clause of this kind is such as to enable the undertaking in a dominant position to realize an abuse of that dominant position.

8. The effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply.

In Case 85/76

HOFFMANN-LA ROCHE & CO. AG, Basle, represented by Messrs. A. Deringer and J. Sedemund, Advocates at the Cologne Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, P.O. Box 39,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES in Brussels, represented by E. Zimmermann, Legal Adviser, with an address for service in Luxembourg at the office of Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision of 9 June 1976 relating to a proceeding under [Article 102 TFEU] (IV/29.020 — Vitamins),

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts and the arguments of the parties put forward in the course of the written procedure may be summarized as follows:

I — Facts and procedure

By decision of 9 June 1976 (Official Journal L 223 of 16 August 1976, p. 27) the Commission, the defendant in these proceedings, found (Article 1), that Hoffmann-La Roche and Company AG in Basle (hereinafter referred to as "Roche"), the applicant, had committed an infringement of Article 86 of the Treaty "by concluding agreements which contain an obligation upon purchasers, or by the grant of fidelity rebates offer them an incentive, to buy all or most of their requirements exclusively, or in preference, from Hoffmann-La Roche".

Under Article 2 of the same decision, the defendant was enjoined to terminate the infringement found while, under Article 3, a fine of 300 000 units of account, being 1 098 000 Deutschmarks, was imposed on Roche.

The application is principally for the annulment of the whole of the decision and, in the alternative, for the annulment of Article 3 thereof.

This decision concerns 26 agreements concluded by Roche with 22 named undertakings engaged in the production and/or sale of vitamins in the Common Market for use either in the pharmaceutical industry (25%) or for food (15%) or as an additive in animal feed (60%).

According to the contested decision, each of the 13 groups of known vitamins forms a separate market. Roche, which is the world's largest manufacturer of bulk vitamins, produces eight of those 13 groups (vitamin A, B_1, B_2, B_3 (pantothenic acid), B_6, C, E, and H (biotin) and is in the market as a reseller for the others (vitamins B_{12}, D, K, M (folic acid) and PP).

All these vitamins are used because of their bionutritive properties. Vitamins C and E are used in addition because of their chemical properties (use in technology), in particular as antioxidants and fermentation agents. They encounter no competition from other products as far as their bionutritive use is concerned though this is not the case with regard to their use in technology.

The contested decision concerns the markets in seven of the eight groups which Roche manufactures, excluding vitamin B_1. In each of these markets the applicant is said to have a dominant position which it has, intentionally or negligently, abused by concluding the agreements in question.

This decision is based on the following factors:

A — The structure of the market in vitamins

(a) An analysis of the structure of the *production and supply* of vitamins shows

that the production of each of the 13 abovementioned groups requires heavy investment and necessitates equipment which is in large measure unique to each group and highly specialized. Because of this fact productive capacity is geared to the estimated growth over 10 years, which has led to surplus capacity throughout the world in spite of the fact that the market in vitamins is expanding vigorously.

(b) Roche is the largest manufacturer not only in the world but also within the Common Market and the manufacturer whose production includes by far the widest range of vitamin groups (except, as regards the last point, Philips-Duphar, whose production of certain vitamin groups is however not significant).

Based on the turnover of the various manufacturers, the shares of the market held by Hoffman-La Roche within the Common Market are the following for the groups of vitamins forming the markets concerned (see Recital 20 to the decision).

— Vitamin A: 47%; the next largest manufacturer accounts for slightly more than half this percentage.

— Vitamin B_2: 86%; the rest of the market is divided among several manufacturers.

— Vitamin B_3 (pantothenic acid): 64%; another producer represents 30%.

— Vitamin B_6: 95%.

— Vitamin C: 68%; the next largest manufacturer has a market share less than one-quarter of that of Roche.

— Vitamin E: 70%; the next largest manufacturer has a market share less than one-third of that of Roche.

— Vitamin H (biotin): 95%.

For vitamins not manufactured but resold by Roche:

— Vitamin B_{12}: 13%.

— Vitamin D: 10%.

— Vitamin K: 10%.

— Vitamin M (folic acid): 47%.

— Vitamin PP: 68%.

In 1974 Roche's turnover in the Common Market was 65% of the total sales of vitamins manufactured by Roche and 60% of the total of those which it sells (production and resale).

It is claimed that Roche has subsidiaries in the vitamin industry in Belgium, the Netherlands, the Federal Republic of Germany, Italy, France, Great Britain and Denmark. The German, French and British subsidiaries are also production centres.

The decision mentions, moreover, Roche's technological lead over its competitors because of its pioneering of the synthesis of various vitamins and the existence of a very extensive and highly specialized sales network.

(c) As regards the structure of the *demand* for vitamins in the Common Market, its chief characteristic is the fact that although the pattern of demand is highly varied (Roche has 5 000 customers), the main area of competition involves the large-scale users and multinational groups which purchase, in large orders, and with a few exceptions, the entire range of vitamins produced.

The 22 undertakings which concluded with Roche the agreements in question bought from it in 1974 quantities accounting for approximately 26% of Roche's sales in the Common Market and 16% of total sales (including all producers and resellers) in the same market.

B — The conduct of the applicant

Since 1964 Roche has concluded agreements, known as "fidelity agreements", to secure exclusive or preferential agreements with customers:

According to those agreements:

— Purchasers obtain from Roche all or most of their vitamin requirements in the form of vitamins manufactured by Roche;

— Roche supplies customers at the most favourable price obtaining on the customer's domestic market;

— Roche pays a rebate each year or every six months calculated on total purchases to those customers who have obtained all or most of their requirements from Roche. This rebate varies between 1% and 5% although there is one customer who receives rebates of from 12.5% to 20%;

— An "English clause" provides that customers are to inform Roche if any "reputable" manufacturer charges a price lower than that charged by Roche. If Roche does not lower its price to that level customers are free to obtain supplies from the other manufacturer without losing the fidelity rebate on their purchases from Roche.

A number of internal documents confirm the main features of the "fidelity system" implemented by Roche and the benefits which it derives therefrom. The system complained of works through agreements concluded either between Roche and the parent companies of the users (multinational contracts) or between Roche subsidiaries and customers in countries in which those subsidiaries are in business (national contracts). 26 contracts, 17 multinational and 9 national, have been concluded with the 22 undertakings concerned.

C — The dominant position of the applicant

In each of the seven markets referred to (vitamins A, B_2, B_6, C, E, biotin (vitamin H) and pantothenic acid (vitamin B_3)) Roche has a dominant position within the meaning of [Article 102] of the Treaty, based on its complete freedom of action which enables it to impede effective competition within the Common Market.

This dominant position results from:

1. The market share held by Roche ranging from 95% for vitamins B_6 and H to 47% (the second producer having only about half this share) for vitamin A.
2. The far wider range of vitamins manufactured by Roche. The requirements of many users extend to several groups of vitamins so that Roche is able to employ a sales and pricing strategy which is far less dependent than that of other manufacturers on the conditions of competition in each market.
3. The fact that Roche is the world's largest producer of all vitamins and that its turnover exceeds that of all other producers.
4. The fact that it has technological advantages not possessed by its competitors.

5. The fact that it has commercial advantages not possessed by its competitors.
6. The absence of potential competition resulting from the fact that entry into the market in vitamins requires large investment programmed over long periods.

D — The existence of an abuse

Roche's conduct constitutes an abuse of a dominant position because by its nature it hampers the freedom of choice and equality of treatment of purchasers and restricts the competition between bulk vitamin manufacturers in the Common Market and is likely to affect trade between Member States:

1. An agreement with purchasers that they will buy all or a very large proportion of their requirements from only one source removes all freedom of choice from purchasers in their selection of sources of supply. Failure by the customer to observe his obligation of exclusivity causes the fidelity rebate to be forfeited in respect of all his purchases from Roche whatever the group of vitamins concerned;
2. Moreover, that exclusive purchasing agreement interferes with competition between vitamin manufacturers;
3. The "English clause" leaves to Roche the decision in each case and depending on the circumstances whether partially to admit a competitor to the market which Roche has reserved for itself. In fact the customer is free to purchase from the competitor only where Roche decides not to match the price offered. Moreover, the clause operates only where a "reputable" competitor in the customer's territory is involved. Thus if the sale in question is of interest by reason either of the quantity or the type of vitamin involved or the fact that the manufacturer is reputable, Roche, with its strength in the market, is put in a position to adjust its price and so preserve exclusivity of supply;
4. The fidelity rebates lead to discrimination prohibited under [Article 102] and to the disadvantage both of those customers of Roche who do not benefit thereby and of those who do not benefit to the same extent;
5. Trade between Member States is affected because the conduct complained of restricts the trading opportunities of users and suppliers of bulk vitamins in different Member States and therefore has a direct influence on the patterns of trade between Member States.

E — The fine

For the purpose of fixing the fine the Commission has taken into account only the period between 1970, by which date there was a systematic policy of fidelity agreements, and the end of 1974, when the first termination of the agreements took place.

Because of the fact that Roche has its registered office outside the Community but has numerous subsidiaries within the Common Market, particularly in the Federal Republic of Germany, the fine has been converted into Deutschmarks.

By application of 18 August 1976, registered at the Court Registry on 27 August 1976, Hoffmann-La Roche & Company AG lodged an application for the annulment of the decision of 9 June 1976.

The Court, after hearing the views of the Advocate General. requested the parties to reply to certain questions and gave

each of them the opportunity of putting forward its observations on those replies.

II — Conclusions of the parties

The applicant claims that the Court should:

— *Principally*

Annul the decision of the defendant of 9 June 1976;

— *In the alternative*

Annul Article 3 of the above-mentioned decision;

— Order the defendant to pay the costs.

The defendant contends that the Court should:

— Dismiss the application as unfounded;

— Order the applicant to pay the costs of the action.

III — Submissions and arguments of the parties

The application is based on the following submissions:

(1) Infringement of the general principle relating to the degree of certainty and foreseeability which a rule imposing a penalty must display before an infringement against that rule can give rise to the imposition of the penalty;

(2) Infringement of procedural rules (fair trial) in that:

(a) the decision to initiate a procedure was taken on the basis of information which came into the possession of the defendant illegally;

(b) the contested decision is based on evidence which was not put forward during the hearing of the parties as laid down by Article 19 of Regulation No 17 of the Council of 6 February 1962 implementing [Articles 101 and 102 TFEU].

(c) the contested decision is based on evidence, in particular as regards the market shares and the restrictive effect of the agreements in question, of which the applicant had no knowledge.

(3) Infringement of Article 18 of the above-mentioned Regulation No 17 according to which, for the purposes of imposing fines and periodic penalty payments, the unit of account must be that adopted in drawing up the budget of the Community, in that Article 3 of the contested decision fixes the fine in Deutschmarks;

(4) Infringement of [Article 102 TFEU] in that, by the contested decision, the Commission incorrectly interpreted, and in any case inaccurately applied, the concepts of dominant position and an abuse of a dominant position which may affect trade between Member States, by finding that Roche was in such a position and by treating the agreements in question as constituting such an abuse;

(5) Infringement of Article 15 (2) of Regulation No 17 in that, assuming that the applicant was in breach of [Article 102] of the Treaty, such breach was not committee either intentionally or negligently.

First Submission: The prohibition on applying penalties as long as the imprecise concepts of "dominant position" and "abuse" have not been given a specific meaning in relation to the type of situation and conduct criticized

Application

According to the applicant, the concepts of dominant position and abuse of such a position may be included amongst the most indeterminate and vague concepts both of Community law and of national legislation. In these circumstances it may be deduced from the fundamental principle *nullum crimen sine lege* that the Commission may only impose the penalties provided for in the case of an infringement of [Article 102] when those general concepts have been given a sufficiently specific meaning by administrative practice or by case-law to have enabled the application of [Article 102] to Roche's situation and to the agreements in question to be foreseen at the date on which they were concluded.

The applicant does not deny that the defendant is entitled to interpret and apply the imprecise concepts contained in [Article 102] in its decisions but does deny its power to impose fines in cases in which, as here, the meaning of those concepts remains uncertain. The principle of the necessary certainty and precision of rules imposing penalties expressed by the legal maxim *nullum crimen sine lege* is moreover recognized and guaranteed both by Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms and by the German constitution. The Bundesverfassungsgericht [Federal Constitutional Court] has moreover specified (14 May 1969, Neue Juristische Wochenschrift 1969, p. 1759) that the requirements of "certainty" and of "foreseeability" are all the greater the more indeterminate the scope of the factors which constitute an infringement and the heavier the penalty is.

Defence

In its defence the Commission recognizes that the protection of fundamental rights must be one of the objectives of Community law. It observes however that the maxim *nullum crimen sine lege* relates essentially to the fact that provisions introducing or increasing penalties should not be retroactive. That principle has been observed in this case. Article 86 of the Treaty, in conjunction with Article 15 (2) of Regulation No 17, on which the fine imposed on the applicant was based, were both in force at the date on which the applicant concluded the agreements complained of.

Secondly, it has not been established that the principles of the necessary "certainty" of the concepts and of the "foreseeability" of the penalties apply as strictly to administrative or disciplinary penalties; Article 15 (6) of Regulation No 17 provides expressly that the fines shall not be of a criminal law nature.

Finally, even accepting that the above-mentioned principles of "certainty" and "foreseeability" may be applied to infringements of administrative law, the terms in question ("dominant position" and "abuse") are not imprecise, having regard on the one hand to the fact that competition law must, to be effective, take into account multiple aspects of economic life and cannot avoid references to general concepts "requiring to a large extent interpretation by the court" and, on the other, to the fact that these concepts are well known to undertakings which, like the applicant, engage in international commerce and are familiar with national competition legislation.

Reply

The applicant replies that the requirement of certainty and foreseeability also applies in German law where provisions laying down fines are

not of a criminal law nature *(Ordnungswidrigkeit)* and even in disciplinary matters. Moreover, it is generally acknowledged that the Community fines in fact constitute penal sanctions. It then observes that it in no way claims that [Article 102] runs counter to the obligation to lay down precisely rules imposing penalties but claims that the protection of fundamental rights requires that the power to impose a fine should be exercised only after that rule has been made specific by adequate administrative practice. For this reason Regulation No 17 makes a distinction between the finding that there has been an infringement of [Article 102], the power to require that such infringement should be brought to an end and the imposition of a fine. In the same way, the competition legislation of several countries, in particular Article 22 of the German *Gesetz gegen Wettbewerbsbeschränkungen* [Law on restrictions on competition], permits a penalty to be imposed only in the case of a (subsequent) infringement of the decision finding that there has been an infringement relating to the abuse of economic power.

Finally, the applicant observes that the principle of the foreseeability of rules imposing a penalty is also acknowledged in other legal systems, in particular in Italy and in Belgium where it is expressed by the rule *in dubio pro reo* which applies not only to the evidence of the acts constituting the infringement but also to the lack of precision of the legal rule.

Rejoinder

In its rejoinder the defendant observes first that although, according to the case-law of the Court of Justice, the fundamental rights guaranteed by the constitutions of the Member States form part of the Community legal order, it does not nevertheless follow that they must correspond in every detail of their wording and content to the national provisions. The principles of "the precision of legal provisions" is, in German and Italian constitutional law, linked to the acknowledged power of the judicial authority to review the constitutionality of the law.

Secondly, the applicant is confusing the precision and the foreseeability of the rule. There is no need for the purposes of applying a law, even a criminal law, for everybody to be able to foresee an offence but only for it to be possible clearly to determine the scope of the factors constituting the infringement by means of judicial interpretation.

These principles, which apply also in Italian law to the criminal law, apply all the more in the field of administrative penalties, in particular in economic administrative law and more especially in the law on cartels which cannot do without abstract descriptions.

According to the Commission, the applicant draws from the principle of the precision of legal provisions conclusions which cannot even be deduced in the Federal Republic of Germany. It contests in particular the comments which the applicant has made on Article 37 (a) of the *Gesetz gegen Wettbewerbsbeschränkungen.*

Second Submission: Infringement of procedural rules

Application

The applicant relies upon three irregularities which it alleges affect the procedure and which should, in its opinion, lead to the annulment of the contested decision.

(a) It observes first that a certain number of documents and in particular those forming Annexes 3, 4, 5, 6 and 7

to the application, in other words four internal documents called "Management Information" and a report of a meeting of the European Bulk Managers on 12 and 13 October 1972 came into the Commission's hands irregularly, in particular because they were handed to the Commission by an employee of Roche who procured them unlawfully and is on that account guilty of an offence punishable by the Swiss criminal law. The irregular procurement of the documents vitiates the procedure and the Commission has, moreover, violated international law by carrying out investigations in a third sovereign State. The applicant, however, puts the complete text of those documents at the disposal of the Court by annexing them to its application and, in these circumstances, leaves it to the Court to decide what consequences are to be drawn from the alleged irregularity.

(b) According to the applicant the procedure is also vitiated by reason of the fact that in the contested decision mention is made of certain documents which were not discussed or even mentioned during the hearing of the parties in accordance with Article 19 of Regulation No 17. Particular reference is made to the five documents put forward in evidence in Recital 12 to the contested decision [1] and the report of a meeting between Unilever and Roche on 11 December 1972 (at the end of Recital 3 to the decision). This is an infringement of the right to be heard and in particular of Article 4 of Regulation No 99/63 of the Commission of 25 July 1963 according to which: "The Commission shall in its decisions deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views".

(c) Finally, the applicant objects that the contested decision is based on information which has not been brought to its knowledge and which it cannot check because the Commission, relying upon its duty to observe the principle of professional secrecy, refuses to notify that information to the applicant in so far as the undertakings from which it was acquired are opposed to its being so notified. This is information acquired on the one hand from certain undertakings which manufacture vitamins and used in the calculation of Roche's market shares and, on the other, information acquired from 16 of Roche's customers and relating to the effect, restrictive in varying degrees, of the agreements in question. Only a small number of those customers agreed that the contents of the investigations to which they were subject should be notified to the applicant and only those investigation reports were notified to the applicant.

Defence

(a) The Commission formally contests the allegation that it induced one of the applicant's employees to send from Switzerland certain internal business documents. It did not conduct and did not moreover have conducted on its behalf any investigation on the territory of Switzerland, which would have violated the sovereignty of that country. It notes moreover that the applicant no

1 — Observation of the Judge-Rapporteur: these documents are the same as those objected to as being irregularly procured, namely the Management Information of December 1970, May (read mid-August) 1971, beginning of August 1971, September 1970 (read 8 September 1972) and the European Bulk Managers Meeting of 1971 (read 12—13 October 1972).

longer puts forward the submission based on the allegedly unlawful procurement of certain information acquired by the Commission.

(b) As regards the fact that during the hearing no reference was made to certain documents mentioned in the decision, the Commission observes that under Article 19 (1) of Regulation No 17 it must notify the applicant of the matters to which it has taken objection; this places it under a duty only to notify the undertakings concerned of the principal points of fact and of law from which it deduces the existence of the infringement but not of all the documents which it possesses.

(c) The Commission also contests the existence of a duty imposed on it requiring, within the context of the administrative procedures which it initiates, to authorize the undertakings concerned to examine the files. In this case it replied to the questions raised by the applicant, in particular with regard to the applicant's market share, that that share had been calculated on the basis of data supplied by other manufacturers. The defendant considers that it was unable to produce the data relating to the marketing shares of other undertakings without having obtained their consent. After the adoption of the contested decision, the Commission agreed in principle to the applicant's inspecting the whole file but made the authorization to inspect the documents containing business secrets of third undertakings subject to the consent of those undertakings; that consent was not given by the competing undertakings and only in some cases by the customers of Roche who were involved in the investigations. The defendant refers in this respect to the judgment of the Court of Justice of 15 July 1970 in Case 45/69, *Boehringer Mannheim GmbH* v *Commission of the European Communities* [1970] 2 ECR 769.

Reply

According to the applicant, the failure to produce the whole file within the context of the administrative procedure violates the right to be heard; this constitutes a violation of a fundamental right. The judgment in the *Boehringer Case* to which the Commission refers established precisely that there is a right to the production of documents during the course of the administrative procedure. This is the expression of a fundamental principle of States to which the rule of law applies that a decision cannot be based on documents with regard to which those concerned have not been able to submit observations. In the absence of such complete knowledge it is impossible for the applicant to know the results of any investigations which have not been expressly referred to in the decision. As regards the investigations mentioned, the applicant insists on the need for it to make itself acquainted with the investigations conducted at the premises of all 16 customers and with the observations made by those customers to the notice of complaints.

Rejoinder

(a) The Commission produces by way of an annex to its rejoinder the decision of the Strafgericht [Criminal Court, Basle] Basel of 1 July 1976 which indicates that the allegations that it induced an employee of the applicant to procure documents in Switzerland are unfounded.

(b) As regards the production of the file, the Commission maintains that after the above-mentioned judgment in the *Boehringer Case* the question whether and to what extent an undertaking involved in a violation of the rules on

competition has a formal right to the production of the file has still not been settled. Whatever the reply, the Commission considers that the right to be heard should not be confused with any right to production of the whole file. In Community law, the right to be heard is ensured by the duty to notify the complaints relating to an infringement of the rules on competition and by the prohibition on including in the decision objections in respect of which the undertakings concerned have not been able to express their views (Article 4 of Regulation No 99/63). In the present case the applicant was acquainted with all the documents which did not contain business secrets of other undertakings and with documents containing such secrets but notification of which had been authorized by the undertakings concerned.

Third Submission: Infringement of Article 18 of Regulation No 17

Application

The applicant considers that the conversion into German Marks of the fine expressed in units of account in Article 3 of the decision infringes Article 18 of Regulation No 17 which refers to the unit of account adopted in drawing up the budget. Financial Regulation No 68/313 of 30 July 1968 (Journal Officiel 1968 L 199, p. 1) fixed the counterpart of the unit of account in each of the currencies of the Member States, since when that parity has not been changed. It follows from the Community character of the unit of account that any debtor must be able to choose in what currency he wishes to discharge his debt. The contrary solution would lead to discrimination against undertakings which have to pay in strong currencies.

Defence

The Commission replies that, although it is true that Article 18 of Regulation No 17 refers to "the unit of account ... adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty" and that the fine is therefore *fixed* in that unit of account, experience has shown that this system left unresolved certain questions relating to the *payment* of the fine. Because of the difficulties which arose in certain cases at the date on which the fine was enforced, the Commission has been in the habit of converting the amount of the undertaking concerned. In so doing the Commission takes into account, where undertakings have their head offices outside the Community, the Member State in which the undertaking referred to has a subsidiary or a large establishment whose assets can cover the amount of the fine. The reference in Article 18 of Regulation No 17 to the unit of account used in drawing up the budget means that, just as the Member States can no longer pay their financial contributions in a currency other than their own according to the Financial Regulation of 25 April 1973, No 73/91/ ECSC, EEC, Euratom (Official Journal L 116, p. 1), the undertakings must pay in national currency the amount resulting from the conversion of the fine into that currency.

Reply

According to the applicant the precise wording and meaning of Article 18 of Regulation No 17 cannot be circumvented by the arguments based on enforcement and those arguments cannot be relied upon where an undertaking in a

third country is not opposed to the payment and possesses subsidiaries in all Member States. In such a case it should be possible for the fine to be paid by any of the subsidiaries at its national parity. The financial regulation to which the Commission referred concerned only the financial contributions of the Member States.

The Commission indicates that it bases its argument not only on Article 18 of Regulation No 17 but also on Article 15 (2) of that regulation and on Article 192 of the EEC Treaty. The decision adopted in application of Article 15 (2) is enforceable and there is a practical need for the purposes of ensuring enforcement to specify the amount of the fines in the national currency of the debtor after the national authority has appended the order for enforcement to the decision. It is true that the fine could be paid in currencies other than the currencies provided for but the Commission ensures in such cases that the debtor pays exactly the equivalent value of the sum payable according to the rate of exchange on the day of payment. Thus the amount stated in the decision in national currency fixes the debt in a binding manner.

Fourth Submission: Infringement of Article 86 of the Treaty in that the contested decision misinterprets or in any case misapplies both the concept of dominant position and that of an abuse of such a position

A — Dominant Position

The applicant criticizes the analysis of the structure of the market on which the Commission has based its conviction that a dominant position exists but above all the fact that for the purpose of the finding that such a position exists and in particular that there is no effective competition the Commission relied exclusively on the market shares and the structures of the market without taking into account actions on the market and the results of those actions, in particular the price trend, even though those actions and those results constitute decisive criteria which must necessarily be taken into consideration.

I Discussion of the analysis by the Commission of the structure of the market

In this respect the applicant criticizes first both the relevance and the existence of the factors adopted by the Commission, namely

(1) The market shares held by Roche and the fact that they are much larger than those of each of its competitors;

(2) The fact that Roche produces a wider range of vitamins than all its competitors;

(3) The fact that Roche is the world's largest producer and that its turnover exceeds that of all other producers;

(4) The number of competitors;

(5) The fact that Roche, which pioneered the synthesis of vitamins, has, in spite of the fact that the patents have expired, a technological lead over its competitors;

(6) The fact that Roche has a first-class sales network specifically organized for vitamins;

(7) The fact that because of the heavy investment required to enter the market in vitamins there is no potential competition;

(8) The fact that Roche's competitors have better access to the supply markets.

As to (1) The market shares held by Roche

Application

The applicant, whilst acknowledging that its market shares are considerable in the case of several sorts of vitamins, formally contests the evaluation thereof made by the Commission. In any case those shares do not show the existence of a dominant position because the market is expanding and the applicant cannot control the market in supplies, production, outlets and, in particular, prices.

For a variety of reasons, originating in particular in the absence of statistics on production and the inadequacy of the available statistics relating to imports and exports of vitamins, the applicant is unable itself to indicate the market shares with sufficient certainty. However, several market shares mentioned in the decision are much exaggerated. Thus, in the case of pantothenic acid, the market share should be reduced from 64 % to 30 %, in the case of Vitamin PP from 68 % to less than 30 % whilst the market shares in the case of vitamins B_2 and B_6 are also overestimated. Moreover, the Commission, in fixing and appraising the market shares, has not correctly delimited the market concerned and has failed to take into account the fact that the market in vitamins is an expanding market. As regards the delimitation of the market, the applicant contests the Commission's statement that vitamins are not interchangeable with other products. In particular, vitamins E and C which are used on a large scale as antioxidants are, in this field, interchangeable with a number of other products and the same applies to biotin in the fermentation industry. The applicant has listed in Annex I (pages 46—47) of its reply to the notice of complaints a large number of possible substitutes in those uses. A delimitation of the market taking that factor into account reduces the market in vitamin C by two-thirds. In the case of the principal products, vitamins A, E and C, the market shares are only approximately 50 % and in some cases well below that. In the case of vitamin B_2 it is necessary to take into account the pressure exerted by the fermentation industry which, on the basis of the price trend, could at any time allocate unused fermentation capacities for the manufacture of vitamin B_2. As regards biotin (3 % of the turnover of Roche vitamins), there was no competition until 1971 because there was no market through lack of demand. However, as soon as demand increased, as a result of the discovery of "new outlets" competitors have appeared and have taken away 10 % of the world market in an extremely short time. It is therefore inaccurate to speak of a "dominant position" with regard to a market which has not yet existed so to speak and in the light of recent great expansion.

As regards the market's characteristic of being an expanding market, that characteristic is common to all vitamins and has important implications with regard to the relative value of the market shares. The

following implications have been ascertained in the case of biotin but are valid for all vitamins. The discovery and marketing of a product goes through a stage of creation of the market first of all, then a stage of experimentation and subsequently enters the expansion stage. A share of the market which during the stages of creation and experimentation may be of the order of 100% will decrease rapidly in the expansion stage whilst remaining high at the outset.

This increased share of the market does not however result from "domination" since that share has not been acquired "to the disadvantage of competitors or by obstacles to competition". The 90% share in the case of biotin shows that competitors have acquired 10% of the market since the beginning of the expansion stage within a very short time. A large market share in an expanding market is not an indication that the innovation may form an obstacle to effective competition. The freedom of action of the innovator in the expansion stage of the market does not result from the power to keep competitors out of the market but exclusively from the market itself.

Defence

The *Commission* explains that so as to have a correct idea of the conditions on the market it collected information from all the manufacturers known to sell vitamins in the Common Market, in accordance with Article 11 of Regulation No 17. The information requested was supplied by all of them; the manufacturers concerned were requested to indicate the value of the quantities sold in 1974. After addition of the amounts indicated the applicant's market shares were determined on the basis of the total so ascertained. The undertakings competing with the applicant expressly indicated that they considered the data supplied as secret and did not agree that they should be passed on to the applicant, so that the defendant was unable to authorize the applicant to make itself acquainted with those data.

As regards the expansion stage of the market, the Commission considers that it is in reality impossible to distinguish the stages of development of the market solely by means of the development of demand and that those stages cannot be separated from one another in accordance with an ideal plan but overlap. Moreover a market stage, as it actually appears, can be influenced by the undertakings which are active on the market. The Commission contests the assertion that all the products which are the subject-matter of the contested decision are still in the expansion stage. This could only be the case with regard to biotin. In the case of this product the Commission considers that the determining factor is not the 10% of the market held by competitors but the fact that the applicant has succeeded in retaining a large market share for a fairly long period.

Reply

The applicant specifies the market shares which it holds on the various markets concerned which indicate that the figures put forward by the Commission are exaggerated:

— In the case of vitamin A the contested decision itself states that the market share is only 47%;

— In the case of vitamin C a precise delimitation of the market in question, taking into account products which can be substituted as

antioxidants for industrial use, results in a finding of a market share of barely 50%;

— For the same reasons of the precise delimitation of the market the market share in the case of vitamin E is 40%;

— On the market in pantothenic acid the applicant has only 30%;

— In the case of biotin the market share should not be taken into consideration because it cannot constitute an indication of domination of an expanding market;

— In the case of vitamin B_2 the share of the world market is barely 50% from 1970 to 1974, except for potential competition from the fermentation industry, in particular from the capacities of antibiotics manufacturers, especially in the United States, whose factories might at any moment be started up again;

— In the case of vitamin B_6, an insignificant product compared to the other vitamins, the applicant's market share is not 95% but 60 to 70%.

The applicant considers, in the light of the case-law of the Court of Justice to which the Commission refers and of the decision of the Commission in the *Continental Can case,* that market shares of the order of 50% are not sufficient by themselves to establish the existence of a dominant position.

In the *Sugar Case* (judgment of 16 December 1975, [1975] ECR 1663 *et seq.)* the Commission and the Court took into consideration the existence of other circumstances even where the market shares were of the order of 85% (at pp. 1977-1978) to 95% (at p. 1993).

Moreover in that case the Commission expressed the following opinion: "Although a share of between 30 and 50% of the market does not allow the conclusion to be drawn that there is *ipso facto* a dominant position, the situation is quite different in the case of a share of the market between 90 and 95% which unquestionably enables the holder 'to act without taking any particular account of its competitors'" ([1975] ECR 1663 at pp. 1854 to 1855).

In the *Commercial Solvents Case* (judgment of the Court of 16 March 1974, Joined Cases 6 and 7/73, [1974] 1 ECR 223) a "world monopoly" was involved.

In the *Continental Can Case* (judgment of the Court of 21 February 1973, Case 6/72, [1973] 1 ECR 215) the Commission referred not only to market shares of between 70 and 90% but also to the possibility "of determining prices and controlling production or distribution of a significant proportion of the products in question" (Journal Officiel 1972 L 7, p. 35).

The applicant emphasizes the agreement amongst learned authors and in case-law that the concept of market share is meaningless unless it is linked to that of the market stage. The Commission adopted this viewpoint in its 1966 study and this led it to emphasize in the decision that the market in vitamins is expanding vigorously. Unfortunately in that decision it failed to include this fact in its appraisal of the market shares. For this reason, in contrast to its statement that it took into consideration in its appraisal of the dominant position "all the circumstances", the defendant is now obliged to deny the significance of the expansion stage whereas the decision in question describes the market as "expanding vigorously" (Decision, Recital 3), which opens up a wider field of activity for all competitors.

Rejoinder

According to the Commission it is for the applicant to contest with figures in support the data supplied by the Commission instead of merely referring to its own estimates of its market shares without indicating on what they are based. In more detail, the Commission observes with regard to vitamins C and E that the applicant has not given precise information enabling it to be determined to what extent it itself supplied customers with vitamins for technological use nor by what other products vitamins may be replaced in that field, who manufactures those products and what the situation is as regards prices. With regard to the other vitamins, the Commission claims that the applicant's statements are based either on potential, *not actual* competition (vitamin B_2) or on the existence of imports which the Commission took into account (pantothenic acid) or on the absence of any anti-competitive effects caused by the large market shares (biotin and vitamin B_6). The Commission considers that the applicant has not supplied the essential facts enabling the accuracy of the market shares which it has mentioned to be verified objectively. According to the Commission, where an undertaking holds large market shares whilst its competitors have appreciably smaller shares and do not offer a range of products which is as large by comparison, this can generally be considered as an indication of a dominant position. It is possible to draw the conclusion that such a position exists from the fact that large market shares are held only if there prove to be special circumstances which in fact restrict to a large extent the freedom of action of the undertaking in question. As regards the case-law quoted by the applicant, the defendant has not contested that the market shares were in excess of 50%. It relied in the decision in question not only on the market shares of the applicant in respect of various groups of vitamins but also on the appreciably smaller market shares of competitors and on a certain number of other important criteria for the purpose of determining the applicant's position on the market. Moreover, it took into account, relying upon the declarations made by the applicant during the course of the administrative procedure, both the applicant's conduct as regards prices and the market situation. Besides, market shares of the order of 25 to 33.3% are, in several Member States (the United Kingdom and the Federal Republic of Germany) considered to be indicative of domination of the market.

As regards the fact that the market in vitamins is expanding, the Commission considers that the applicant's argument is at fault because the applicant wishes to use without differentiation certain theoretical economic models and to give, in addition, an absolute value to the precepts drawn from its theories. The Commission claims, relying upon certain learned authors, that economic laws, whether logical or empirical, do not in any case have an absolute value. The market development which must certainly be taken into account for the purpose of appraising the existence of a dominant position is not of the same significance as the market stage within the meaning of economic theory. The defendant's remarks drawing attention in the defence to "the enormous increase in the applicant's production" came solely

within the framework of the applicant's conduct and not of its dominant position.

As to (2) The range of vitamins offered

Application

As regards the range of vitamins offered by the applicant, in respect of which the decision in question states that "Roche is the only supplier offering the full range of vitamins" and that "the requirements of many users extend to several groups of vitamins" (Decision, last paragraph of Recital 3 and Recital 21), the applicant observes that the requirements of many users extend only to a few vitamins produced not only by the applicant but also by its competitors but that they extend also to a large number of supplementary products (additives) which the applicant cannot offer but with regard to which its chief competitors are in a strong position. This is particularly the case as regards the animal feed industry which constitutes 60% of the total demand.

Thus the structure of the requirements of users is not centred on the extent of the range of vitamins and therefore certainly cannot enable the applicant "to employ a sales and pricing strategy which is far less dependent". The extent of the range of vitamins is not therefore an indication of a dominant position.

Defence

The Commission points out that the applicant does not contest that it has at its disposal as a manufacturer a range of vitamins which is markedly wider than that of its competitors but that this advantage is offset by the fact that those competitors can offer all the additives required by the animal feed sector. The applicant thus refers to a manufacturer of animal feed who requires a small number of vitamins and a large number of other additives and who attempts to obtain his supplies from the same manufacturer. This consumer is however not characteristic of the market in vitamins. The differentiation in the demand for bulk vitamins is more marked. Moreover, in the animal feed sector the most important consumers of vitamins, as the applicant itself has acknowledged, are the pre-mixers which prepare the vitamins and additives intended for the various animal feeding-stuffs and supply them to the manufacturers of animal feed. Besides, large undertakings in the animal feed industry themselves prepare additives and mix them with the feeding-stuffs which they manufacture. These two categories of consumers may, according to the Commission, obtain supplies of vitamins and other additives from various manufacturers which is what they do. The applicant is of interest to them because it can offer them the main vitamins, in particular those of the A, B, C and E groups. The applicant has itself acknowledged that it considers the fact that it produces the widest range of vitamins as an advantage as regards its competitive situation.

Reply

The applicant criticizes the arguments of the defendant relating to the wide range of vitamins offered by it which, it is claimed, should enable it better to set off risks through diversification:

(a) This setting-off of risks is not limited to the marketing of vitamins alone: the wider the production programme of an undertaking the greater its opportunities to set off risks;

(b) The presence on the market of vitamins manufactured by competitors who are markedly more powerful than the applicant offers those competitors much wider opportunities for setting off risks.

As regards the fact that the requirements of consumers belonging to the pharmaceutical industry and food and animal-feed sector are better supplied, this argument would be conclusive only if the consumers solely required vitamins and in addition in quantities which the applicant's competitors cannot offer. However, all the applicant's major competitors are able, like the applicant, to offer the pre-mixers all the basic vitamins for their requirements and, besides, a quantity of additives which the applicant does not possess. The market in vitamins constitutes only a proportion of the whole range of additives: the situation of a person who offers products for sale on the market is therefore characterized not solely by the vitamins which he markets but by the extent of the range of additives offered. The applicant can therefore only state that the extent of the range of vitamins does not permit of an independent sales and pricing strategy. Finally, the applicant has itself indicated that a wide range of products provides indications as to the "competitivity" of the undertaking but not as to market domination.

Rejoinder

In the Commission's opinion the applicant's argument concerning the setting-off of risks is over-simplified: it is by no means certain that a company which is making losses in the vitamins sector can set off risks by profits derived from other fields. As regards the supply of consumers' requirements, the Commission observes that, overlooking the pharmaceutical industry and food sector, the applicant once more centres its arguments on the animal feed sector in which moreover the applicant can offer greater quantities of the four main vitamins.

As to (3) The fact that Roche is the world's largest producer and that its turnover exceeds that of all other producers

Application

The statement that the applicant "*is the world's largest producer* of all vitamins: its turnover exceeds that of all other producers" (Decision, Recital 21, fourth paragraph) is ambiguous. If it is a statement that the applicant has the largest proportion of the production of vitamins, the argument repeats that concerning the market share. If, on the other hand, it is a statement that the applicant is the largest of the undertakings which manufacture vitamins, taking into account all the other products, it is an allegation which is manifestly incorrect.

Several competitors have a total turnover, financial capacity and sales figures markedly higher. Moreover, the smallest diversification in the applicant's

activities (23% of its turnover is accounted for by vitamins, in other words, much more than in the case of its main competitors) results in much greater vulnerability as regards its conduct: it is not the market in a product taken in isolation but all the various markets in products in which an undertaking is active, in other words, the "undertaking's market" which determines the freedom of action of an undertaking. The criterion of the size of an undertaking can only be correctly considered if all the factors playing a part in the structure of the market are actually taken into account and if its size is considered in relation to that of other competitors.

Defence

The statement that the applicant is the world's largest producer of all vitamins must not, according to the Commission, be confused with the argument relating to the market share held by the applicant in the Common Market. The important factor is that the applicant is, in the market in vitamins, both at the Community level and on the world level, the largest producer of vitamins, and in addition it produces more vitamins than all its competitors together. The fact that the turnover, capital, and distribution potential of other companies is several times greater than that of the applicant is unimportant. With a turnover of 5 000 million Swiss Francs per annum, the applicant has financial power enabling it, having regard to the high degree of diversification which it practices in the production of vitamins and to the small proportion of its turnover in that production (23% of the total turnover), the remainder being divided between the very lucrative production of pharmaceutical and chemical products, easily to resolve any difficulties on the market in vitamins.

Reply

According to the applicant, the defendant does not take into account the higher degree of diversification of existing and potential competitors of the applicant which makes them less dependent on the market in vitamins. Moreover, its statement that it is not the turnover or the financial capacity as such which are important is in contradiction with the viewpoints adopted by it in the proposal for a regulation relating to the control of concentrations and in the *Continental Can Case*. Moreover, the applicant's turnover of 5 000 million Swiss Francs per annum proves nothing if it is not compared to the situation of competitors whose financial capacity is in actual fact greater.

Rejoinder

The defendant notes that in the applicant's view the important factor is the dimension expressed in turnover, capital and distribution potential. As for the defendant, it considers that in order to appraise the applicant's position on the market in vitamins the fact that the applicant has large shares of the market in the Common Market and also outside and that it is the leading world manufacturer which produces more than all its other competitors together is determinative. The applicant is thus able to take into account in a flexible manner the different developments of the regional markets both within and outside the Community.

As to (4) The number of competitors

Application

As regards the *number of competitors* (and the range of products which they offer) the applicant criticizes the table published in the decision under Recital 3 which shows the conditions of competition in the market in vitamins in a wholly false light because that competition is determined far less by the number of producers than by that of the persons offering goods for sale (producers and resellers). The table therefore disregards the decisive part played in competition by the large business houses which, in addition to the range of vitamins, offer a large range of additives which the applicant cannot offer. Nor has the defendant taken into account the fact that the applicant has for years been subject to keen competition from Japanese producers and to increasing pressure from certain countries in Eastern Europe.

Defence

The argument that the persons offering goods for sale (producers and resellers) and not just merely producers determine the competition ignores the realities of economic life. Very generally, a producer is always at an advantage in relation to a reseller because he has to take into account only his own costs whereas a reseller must first buy, in other words pay a price which covers both the costs of the producer and profit, and in addition make a profit on the resale. More specifically, the agents (brokers) regularly sell at prices which are quite markedly higher than those of producers and they offer only occasionally at lower prices small quantities of goods or goods whose quality leaves something to be desired.

Reply

According to the applicant the defendant's opinion that for the purposes of appraising a dominant position there is no need to take into account the resellers is incorrect in law and in fact:

— It is contrary to the viewpoint adopted by the Court of Justice in its judgment of 18 February 1971 (Case 40/70, *Sirena S.r.l.* v *Eda S.r.l. and Others* [1971] ECR 69, at p. 83) according to which for the purpose of appraising the impeding of the maintenance of effective competition it is necessary to take into account particularly "the existence and position of any producers *or distributors* who may be marketing similar goods or goods which may be substituted for them".

— Moreover it is incorrect to state that resellers must necessarily sell at higher prices because their costs include those of the producer and, in addition, his profit. In fact exactly the opposite situation occurs: the applicant must cover, in addition to its production costs, its distribution costs of the order of 12 to 14% which may very well be higher than the distribution costs borne by sellers and middlemen. The producers who resell through middlemen do not bear distribution costs of their own. The purchase price of the middlemen thus tends to be reduced by the amount of the distribution costs borne by the producer.

Rejoinder

The defendant specifies that it disputed the validity of putting producers and

resellers on the same footing as regards competition but that it did not contest that the examination as to market domination must take into consideration "the existence and position of any producers or distributors".

The statement that the applicant must itself cover, in addition to its production costs, its distribution costs which are 12 to 14% higher than the costs borne by sellers and middlemen overlooks the fact that a manufacturer who sells through commercial companies bears his own distribution costs to which are added the distribution costs of the commercial undertaking. In addition, because it has decentralized its production and distribution by the creation of subsidiaries, the applicant is closer to its customers than a manufacturer in Japan or in an Eastern country distributing through middlemen.

As to (5) The technological lead

Application

The statement (Decision, Recital 21) that the applicant has a technological and commercial lead over its competitors is in contradiction with the statement that the patents for the manufacture of vitamins have expired (Decision, Recital 8) and that the synthesis of the various vitamins presents no major scientific problem (Decision, Recital 3). As regards recent developments in the industrial uses of vitamin C (antioxidant, fermentation agent for brewers, etc.) (Decision, Recital 8) and of "new compounds for animal feed", this is the result of research in the public sector which led to expansion in the market for both the applicant and its competitors. Finally, the time-sharing service to which the decision refers in Recital 8 is in no way peculiar to the applicant and its use in 1975 concerned only seven customers out of several thousand purchasers (none of which customers was mentioned in the decision). The documents produced by the defendant moreover contest the usefulness of that service.

Defence

The Commission replies that the statement of the applicant's technological advantage is only the expression of an obvious truth and corresponds to the estimates of the applicant itself, as is clear from a series of documents produced before the Court.

The Commission considers it surprising that the applicant, who pioneered the manufacture and application of synthetic vitamins, does not, even after the expiry of the patents, have experience and technical knowledge which gives it a lead over its competitors. The Commission quotes a document of the applicant according to which one of the reasons why multinational undertakings might be interested in concluding supply contracts is know-how.

Reply

The applicant states that instead of providing evidence for the statement that a "technological advantage" exists, the defendant is merely conjecturing. With regard to the document quoted by the defendant the applicant states that the know-how at present linked to all technical products cannot be considered as "a technological lead" constituting an indication of "market domination".

Rejoinder

The Commission does not consider that to have an important technological lead from the point of view of market domination it is necessary to be able, by means of exclusive rights, to prevent third parties from entering the market or to restrict their competition. According to the Commission, the applicant was able to take advantage of the technological knowledge acquired in the manufacture and use of synthetic vitamins so as to strengthen its dominant position.

As to (6) The sales network

Application

Nor does the applicant have a lead over its competitors as regards its sales network (Decision, Recital 8). Some of them (and it is necessary to include amongst them not only pharmaceutical undertakings but also manufacturers of chemical products) have because of their activities in the sector of artificial fertilizers and phytosanitary products, commercial channels in the agricultural sector which they can use in the sale of vitamins.

Defence

According to the defendant, the advantage of Roche's sales network lies in the fact that whilst its competitors are obliged to intersperse a considerable number of independent commercial undertakings in the distribution process the applicant has created through its subsidiaries a worldwide distribution network which is intended to meet the special needs of purchasers of vitamins. This network gives them advice and has a permanent stock of fresh vitamins.

Reply

The advantage resulting from the applicant's sales network is non-existent. Two of the applicant's main competitors sell through their own distribution networks. The fact of possessing a permanent stock of "fresh" vitamins is moreover irrelevant in so far as all products may be stocked for months and in some cases for as long as five years. In fact, the alleged "distribution network" amounts to the applicant's keeping stocks at the premises of various subsidiary companies.

Rejoinder

The defendant states that the applicant does not contest in substance that it possesses a "vast distribution network": the applicant is represented by subsidiaries in all countries. The distribution network of the competitors falls far behind the applicant as regards the manufacture of vitamins and is not therefore of the same importance to them. Even if the vitamins may be stocked for a long time a control is still necessary. That control and the after-sales service are possible only if the applicant has intensively developed its distribution network.

As to (7) Potential competition

Application

The applicant contests the Commission's statement that: "it is unlikely that the possibility of entry by new competitors to the market would at present have any appreciable effect on the position of Roche" (Decision, Recital 21 *in fine*).

The criterion used by the defendant in order to conclude that there is no

potential competition is the need for large and specialized investment and the programming of capacities over long periods from which it follows that "only large pharmaceutical groups" can operate on the market. The latter statement is, according to the applicant, incorrect: almost all the large chemical undertakings are potential competitors. Each of those chemical groups would be capable of going into the manufacture of vitamins immediately if competition on one of the markets fell off or there were a prospect of higher profits. The potential competition exerts a very effective influence at present on the price trend.

As regards the investment required, the applicant recalls that almost all its present or potential competitors by far exceed it in size and financial capacity. Moreover, it is incorrect to claim that any new installation requires such large investment that it could be undertaken only by large business houses. In the case of surplus production capacity (which is the case throughout the world) smaller plants may be more profitable than large installations. This same surplus capacity throughout the world is the origin of great competitive pressure from production plants which are at present at a standstill. The extension of the existing capacities of current competitors might also create real pressure on the conduct of the applicant as regards competition.

It follows from all these factors that disregarding completely potential competition which is always present the decision does not take into account the case-law of the Court of Justice in Case 6/72, *Europemballage Corporation and Continental Can Company Inc.* v *Commission of the European Communities,* judgment of 21 February 1973 [1973] ECR 215, which in actual fact attached great importance to that potential competition.

Defence

Contrary to the applicant's statement, the defendant has in fact examined the question of the existence of potential competition but reached a negative conclusion. It stated in the decision that during the period in question (1964 to 1974) Roche's position on the market in vitamins would not "at present" be appreciably affected if new competitors came on to the market. The arguments put forward by the applicant with regard to possible future developments are therefore irrelevant to the case. In addition, the Commission included in the "large pharmaceutical groups" mentioned in Recital 4 to the decision the large chemical groups to which the applicant refers. The Commission however contests that all the groups could *immediately* launch into the vitamins business in the range manufactured by the applicant.

Reply

According to the applicant, the defendant fails to recognize the very nature of the potential competition. In general, the results of the pressure on the market exerted by potential competitors is that the price level remains low so as not to transform those potential competitors into actual competitors. In this respect the fact that several months or even years elapse between the decision to invest and entry to the market is irrelevant. The very nature of potential competition lies in the fact that it is effective as a threat. The only determining factor is that, by their mere presence, potential competitors have an impact on the market. The defendant moreover fails to recognize the existence

of surplus capacity throughout the world which exerts additional pressure on competition. Finally, the defendant cannot contest that during the above-mentioned period a whole series of undertakings in fact launched themselves for the first time into the market or extended their capacities thereon.

Rejoinder

According to the defendant, the argument put forward by the applicant as regards the effect of potential competition on the level of prices, which, the applicant claims, remains low so as not to attract that competition onto the market, confirms, according to the Commission, the accuracy of its arguments concerning the significance of the reduction in the prices of the applicant's products. The Commission however continues to call in question the probability of the appearance of new competitors on the market, having regard to the large investment required.

As to (8) Access to the supply markets

Application

The decision in question entirely disregarded the access to the market in raw materials. However, the applicant's main competitors and almost all its potential competitors have, as manufacturers of primary chemical products and intermediate products, a large proportion of the raw materials necessary for the production of vitamins, whereas the applicant depends for its supplies almost entirely on third parties and even partially on its existing and potential competitors.

Defence

The Commission replies that the applicant has produced no material evidence for its statement that it depends almost exclusively on other undertakings and even partially on its competitors for its supplies of raw materials.

Reply

The applicant replies that during the course of the administrative procedure it referred in detail to the question of supplies of raw materials. Two of the applicant's competitors are certainly at an advantage as manufacturers of primary products among the large chemical concerns as regards access to products which they manufacture to a large extent themselves. According to the applicant, the criterion of the supply market constitutes one of the basic criteria in the appraisal of market domination.

Rejoinder

The Commission does not contest that the question of access to the supply markets may be relevant for the purposes of appraising the question of market domination but it is only one of several criteria which come into consideration. The determining factor in this respect is whether the applicant is able to obtain supplies on the market. In the present case this is so: as a chemical undertaking the applicant could if necessary have manufactured the semi-finished products itself but until now it has considered it more advantageous to buy the products from other undertakings.

II Discussion of the applicant's conduct on the market and the results thereof

Application

The applicant criticizes the Commission's decision in that it contains no evidence

of an examination of the criteria relating to market performance and market conduct.

Learned writers unanimously consider that a report on the structure of the market which is merely quantitative "is inappropriate for the purposes of determining the degree of freedom of action of undertakings which escapes the control of competition" *(Mestmäcker, Europäisches Wettbewerbsrecht* [European Competition law] p. 370). On the contrary it is necessary to take into account all the special features of the market situation and the market conduct. On the basis of those criteria the applicant was never able to assume that it was not exposed to effective competition and that it therefore had a dominant position in the terms of [Article 102] of the EEC Treaty.

The two criteria (market conduct and results of that conduct) are economically interdependent. In particular, conduct on the market is often described as the "most important criterion". Within the context of the conduct on the market, it is important whether an undertaking must guide itself by market prices or whether it can fix its prices at will within a margin which is not precisely determined. This interpretation was accepted by the defendant itself (Le Problème de la Concentration dans le Marché Commun [The problem of concentration in the Common Market], Brussels 1966, No 22, and the Continental Can Decision, Journal Officiel L 7 of 8 January 1972, p. 25) and by the Court of Justice (judgment of 18 May 1962 in Case 13/60, *"Geitling" Ruhrkohlen-Verkaufsgesellschaft mbH and Others* v *High Authority of the ECSC*, [1962] ECR 83).

An examination of the market results and conduct on the market implies a control on developments for a fairly long period. It is thus necessary in particular to check whether the prices charged by the undertaking have shown an increase during a fairly long period or whether the undertaking has been obliged to guide itself by the market prices and reduce its own under pressure from competition.

However, an examination of the long-term development of prices from the introduction of the vitamins concerned until 1974 indicates that the prices of vitamins A, E, C, B_2 and B_6, which are the most important, have continued to fall considerably. It would be unreasonable for an undertaking which is allegedly not exposed to effective competition and which can fix its prices largely independently of its competitors, suppliers and customers, to reduce its prices to such an extent without being obliged to do so by competition. Moreover, whilst price increases reaching an average of 50% were recorded during the period from 1970 to 1974 and whilst therefore the applicant's costs recorded an increase of equal to or more than 50%, the prices charged by the applicant continued, under pressure from competition, to fall considerably at that time in the case of most vitamins (vitamin A: fall of 25%, vitamin E: fall of more than 18%, panthotenic acid: fall of 50% on average; in the case of vitamins B_2 and B_6 the trend, although less marked, is real, and only the prices of vitamin C show a slight upward trend). It may be concluded from this that the applicant had never had the "power to determine prices". At a period of great increases in prices the applicant would never have voluntarily made such reductions in price if it had not been obliged to do so by extremely effective competition.

The documents relied upon and quoted tendentiously by the Commission as regards the abusive conduct of the applicant give precise information on this subject: the existence of "continuing pressure from Japanese, Danish and German competitors" in the case of vitamin B_6 (circular of December 1970); the imminent entry onto the market in vitamin A and vitamin E of a competitor whose market potential is four times that of the applicant (same circular); the need to fix "highly competitive prices" so as to obtain an annual contract with important customers (circular of August 1971); the existence of "strong competition" in the case of vitamins A and E; the impossibility, as regards vitamin C, of increasing prices without entailing a decrease in market shares and the market loss of the order of 17.5% on the German market in the case of pantothenates (report of 12 and 13 October 1972) are in this respect decisive criteria.

These documents objectively refute the existence of a dominant position and prove *a fortiori* that the applicant could assume more or less subjectively that it was exposed to substantial competition. The applicant produces a number of other internal documents which show that in 1971, 1972 and 1973 the pressure from competition was very keen, in particular on the market in vitamins A, B_1, B_2, B_3, B_6 and E.

Defence

The defendant considers that in order to reply to the question whether the applicant has a dominant position on the market in vitamins it is necessary to rely upon its market shares. Only where those shares, representing almost 50% in the case of the main products (vitamins A, E and C), have been clearly determined is it useful to examine the factors which show that the applicant, in spite of the market shares held, was exposed to effective competition. The market to be taken into consideration is that of each of the groups of vitamins concerned (vitamins A, B_2, B_6, C, E, biotin (H) and pantothenic acid (B_3)). Each of these groups is capable of satisfying established requirements and is hardly interchangeable with other products except in special cases and with regard to particular requirements. The substitution of other products for vitamins is totally impossible. The geographical market to be taken into consideration is the whole of the Common Market.

The defendant puts forward an argument as to form and an argument concerning the substance of the case in reply to the complaint that it did not take into consideration the applicant's conduct on the market and the results of that conduct. As regards form, the defendant is under a duty to give a statement of the reasons upon which its decisions are based and not to refute all the arguments put forward during the course of the administrative procedure. The applicant cannot require that the defendant should adopt in its decision a point of view which it considers incorrect. As regards the substance of the case, the defendant contests that it took into consideration exclusively criteria relating to the structure of the markets. The Commission itself has previously already maintained that market domination "is primarily economic power, in other words the ability on the part of the dominant undertaking to exert an appreciable influence on the activity of the market which is in principle foreseeable" (see: Le Problème de la Concentration dans le Marché Commun,

No 22), a point of view which it then stated in detail in the Continental Can Decision insisting however on the fact that there was in particular freedom of action "where because of their market share or their market share in conjunction in particular with the availability of technical knowledge, raw materials or capital, undertakings are able to determine prices or to control production or distribution with regard to a significant proportion of the product in question".

In the same way, the case-law of the Court of Justice, in particular in the judgments in *Commercial Solvents* (Joined Cases 6 and 7/73 [1974] ECR 223) and the Sugar Cases (Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker-Unie and Others* v *Commission of the European Communities* [1975] ECR 1663, at p. 2000), indicates that the mere fact that the undertakings concerned have very large shares of the market is sufficient to establish that those undertakings held a dominant position. If an undertaking has large shares of the market whilst its competitors hold shares which are markedly smaller and do not offer comparatively as large a range of products this may generally be considered to be an indication of a dominant position of the undertaking with large shares of the market. Only if there are proved to be special circumstances which in fact restrict to a large extent the freedom of action of the undertaking in question is it impossible to conclude from the fact that large shares of the market are held that there is a dominant position.

Analysing next the tables which show that over the years the prices of vitamins A, E, C, B_2 and B_6 have decreased, the Commission draws attention to the considerable increase in the applicant's production during the periods concerned and considers that the graphs prove merely that a great increase in the quantities produced leads to a fall in prices. Comparing the variations in percentages of the quantities produced, on the one hand, and of the prices, on the other, the Commission concludes from this that from 1970 to 1974 the applicant was able to increase its sales of the main vitamins very substantially, that it made concessions as regards prices only in the case of a certain number of them and that as a whole it was able appreciably to improve its receipts.

The documents which the defendant had referred to and quoted in the decision (Recital 12: circular of December 1970, circular of May 1971, correctly August 1971, meeting of the European Bulk Managers on 12 and 13 October 1971, correctly 1972) so as to illustrate the existence of the abuse do not, contrary to the applicant's statements, prove the absence of a dominant position.

The important factor is in fact not whether the applicant was totally free to determine its prices, which is the characteristic of monopolies, but whether its position was such that it could act without really having to concern itself with its competitors, suppliers or customers. However, certain documents produced by the applicant in an annex to the application prove precisely that the applicant was perfectly able to compete with new competitors appearing on the market in vitamins and that it considered itself capable of maintaining its position on the market.

Reply

In its reply the applicant states that, in spite of statements to the contrary, the Commission in practice takes into account for the purposes of determining

the dominant position only the market shares. The facts that the applicant holds large shares of the market and offers a comparatively wider range of goods are claimed to be the "indications" of a dominant position which can only be refuted by special circumstances. The Commission is departing from its own previous declarations and from the case-law of the Court of Justice. Moreover, by reasoning as it does it shifts the burden of proof.

The fact that for the purpose of finding a dominant position the Commission disregarded in the decision in question criteria other than the shares of the market, for example the power to determine prices, constitutes both an infringement of Article 86 by an misinterpretation of its conditions of application and an infringement of Article 190 of the Treaty since the decision in question does not contain a sufficient statement of reasons upon which it is based.

The applicant observes, as regards the case-law referred to by the Commission and its Decision of 2 January 1973, that since the undertakings involved had market shares appreciably higher than the 50% which it has, it is impossible to conclude from this that a share of the market makes it superfluous to take into consideration the results and the conduct on the market and necessary for undertakings to produce evidence of "considerable real restriction of their freedom of action". With regard to the defendant's objection that it is not obliged to express its opinion on all the "objections" or "statements" of the applicant, it fails to recognize that, as regards the criterion of the power to determine prices, according to the case-law of the Court of Justice there are conditions for the application of [Article 102] and it is for the Commission to prove that these have been fulfilled. The applicant considers that the documents produced when the application was lodged indicate the existence of real competition during the period from 1970 to 1974. In this respect the price reductions recorded in the documents supplied by the applicant in the case of the main vitamins in the post-war period and in particular before the period from 1970 to 1974 were not, as the Commission states, the result of the increase of the quantities produced in an expansion stage, the aim of which was to reduce unit prices. In fact, unit prices only go down as long as reserve capacities in an existing production plant which were hitherto not fully employed can be better used and as long as the prices of capital equipment do not increase. In the expansion stage production plant must however necessarily be enlarged and additional plant built so that there can be no reduction in costs. The applicant considers that both theory and economic experience show that an undertaking which is not subject to competition does not lower its prices to the extent to which they were lowered in the present case. The applicant lowered its prices because it was compelled to do so by competition.

As regards, more particularly, the period from 1970 to 1974, the applicant emphasizes that the reductions in price recorded for the applicant's products during this period coincided with an extraordinary increase in prices in all the countries of the Communities. In spite of the 50% increase in costs and faced with doubled demand the applicant was

nevertheless obliged to accept reductions in price of 17% to 29% in the case of four products and, in the case of three other products, was unable to obtain any increase in receipts (this already amounts to a loss of 20% because of inflation).

Several annexes to the application supply additional evidence of the existence of real competition on the markets under consideration. It is significant that the applicant did not succeed in preventing certain new competitors from entering the market. Moreover, the applicant emphasizes that the agreements complained of in the decision in question contain merely a *"parity* clause" providing solely for a possible lowering of prices but that the applicant did not succeed in making its customers subject to the *"increase* clause" in general use at present which provides that when costs and prices increase the delivery prices increase correspondingly.

Rejoinder

The defendant claims that it examined and appraised the conduct of the applicant on the market and the results which it obtained but that this examination produced results different from those at which the applicant arrived. In examining the conduct of the applicant and the results obtained on the market, the defendant did not find that competiton appreciably restricted the applicant's freedom of action. In this respect it is very important that the applicant was able to maintain its large market shares for a relatively long period.

Moreover, the defendant has never denied that it is for it to prove the existence of the criteria of the infringement referred to in [Article 102] The applicant's duty to convince the Court that the defendant has not brought the evidence required from it does not constitute an unconstitutional shift of the burden of proof. The defendant does not contest that in cases in which the Court of Justice has accepted that there was a dominant position the market shares were greater than 50%. In the decision which it took it relied not only on the applicant's shares of the market with regard to the various groups of vitamins but also on the appreciably smaller market shares of competitors and on a certain number of other important criteria for the determination of the applicant's position on the market. In addition, the defendant took into account, relying upon the declarations made by the applicant during the course of the administrative procedure, the applicant's conduct as regards prices and of the situation of the market.

As regards the lowering of prices, the defendant contests the applicant's argument that an undertaking dominating the market has an interest in restricting the quantity sold so as to increase the price.

An undertaking which is not in a monopoly situation but has an important share of the market and whose sales volume is increasing must make sure that it does not encourage other undertakings to compete on the market by prices which are too high. It may therefore have an interest in lowering the prices according to the increase in quantities. As regards the prices for the period from 1970 to 1974, the defendant considers that the applicant has not reacted to the table produced by the defendant juxtaposing the price trend and the development of output from 1970 to 1974 or to the table of the prices charged by the applicant from 1971 to 1974 on the basis of information supplied by the

applicant's subsidiaries in the Common Market.

B — Absence of any abuse

As far as concerns the finding that the applicant has abused its dominant position *the applicant* disputes in the first instance certain facts, especially those relating to the contracts entered into with Unilever and Merck. It also challenges the Commission's interpretation of the English clause. It then refutes the Commission's interpretation and application of [Article 102] as far as the restriction on competition resulting from the "fidelity" clauses of the disputed contracts is concerned. Finally, and more specifically, it denies that by means of the rebates or discounts the contracts at issue in fact applied dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage ([Article 102]

I Arguments concerning certain facts pleaded by the Commission

Application

The applicant's intention is to correct certain facts which in its view the Commission has presented incorrectly. In the first place it stresses the fact that contracts whereby the purchaser buys all its requirements exclusively or preferentially from Roche above all meet the customers' wish to be guaranteed a regular supply of products of a homogeneous quality and at advantageous prices.

In the second place the Commission wrongly regards the rebates on biotin as fidelity rebates. The documents mentioned in Recital 12 to the decision indicated clearly that they are "introductory" rebates usually granted to selected purchasers who agree to promote a product with a view to expanding the market in that product.

The applicant also denies that the contracts entered into with Merck and Unilever form part of the system of "fidelity agreements". Unilever was in the habit of placing regular orders with the applicant on a long-term basis, on behalf of all the continental companies of the Unilever group, for large quantities of vitamins and the contracts do not contain any obligation upon Unilever only to enter into contracts with the applicant.

As far as concerns the agreements entered into with Merck the rebates are justified by the quantities bought especially as they are not "fidelity rebates" but ordinary commercial rebates, since Merck resells most of these vitamins.

There is consequently no justification for including the Unilever and Merck orders in the aggregate amount represented by the quantities covered by all the contracts at issue (Recital 10 to the decision *in fine)* in order to reach in this way the conclusion that the purchases of the 22 customers in question represented 16% of total vitamin sales in the Common Market in 1974. In fact the sales covered by the contract providing for fidelity rebates only represent 4% of the total sales in the Common Market for the period 1970 to 1974.

Defence

The Commission challenges the applicant's assertion that the contracts in question first and foremost meet the customers' wish to be guaranteed supplies of uniform quality and at favourable prices, because, if that had really been the case, all the applicant need have done was to provide in its contracts that it was obliged to supply

them. The applicant cannot seriously deny that the said obligation furthers its own interests which are to tie its customers so as to protect its large share of the market.

The Commission also objects to the assertion that in the biotin sector the rebates are "introductory rebates". Although the contracts entered into with Unilever and Merck do not expressly provide for fidelity rebates these two companies were nevertheless obliged in practice to obtain all their requirements from the applicant. If that had not been the case the inclusion of an English clause in the contracts would have been meaningless.

Reply

If the rebates complained of because they are regarded as "fidelity bonuses" are, by virtue of the English clause, in fact true fidelity rebates, the same applies, in the view of the applicant, *a fortiori* to the rebates on biotin which are only to be granted to customers who are willing to undertake special promotion of biotin in order to develop new fields where it can be used. The applicant then points out that the English clause precluded the customer from being tied "exclusively". It is wrong to talk of "obligations to obtain their supplies exclusively from Roche" when it is not disputed that the customer may accept a more favourable offer from a competitor which the applicant does not itself follow up. Only a small number of the contracts contain obligations to obtain supplies exclusively from Roche whereas in the other cases just because the English clause removed the "attractive effect" of the rebates, customers were not tied by mere promise of rebates.

The fact that, pursuant to the English clause, the applicant must decide whether to adjust its prices to more favourable offers by its competitors also applies to any business transaction where the basic issue is price competition and does not prove that the purchaser is tied in that he must obtain his requirements exclusively from Roche. The defendant cannot dispute the fact that the applicant has never so much as attempted to impose upon a customer any kind of obligation to obtain supplies exclusively from Roche or to threaten him with reprisals because he has obtained supplies from another supplier.

As far as concerns the contracts with Unilever and Merck it is wrong to presume as the Commission does that the English clause is evidence that Unilever has to purchase all its requirements from the applicant because the justification of the clause lies only in the duration of the contract.

The applicant takes the view that in the final analysis the Commission's approach is equivalent to forbidding Unilever to conclude of its own free will and without being under any obligation to do so a contract for the supply of its annual requirements and this would be an unacceptable restriction of the purchaser's freedom of choice. The mere fact that a purchaser obtains most or all of his supplies from the applicant without being under any contractual obligation to do so cannot in any circumstances be an infringement of [Article 102 TFEU]. The fact that the contracts specified a maximum amount which the applicant was to supply and also a minimum amount which Unilever was to purchase makes no difference, for in long-term contracts relating to large quantities of raw materials such stipu-lations are perfectly normal on the market.

The contracts with Merck covered supplies of such large quantities of vitamins B_6 and E that the applicant could not produce them unless the sale of such quantities was guaranteed.

Rejoinder

The rebates agreed in the biotin sector are not introductory because they "are linked to" the condition precedent that the customer buys his requirements exclusively or mainly from the applicant with a view to protecting the share of the market which has been won. ("you should protect your market through fidelity contracts . . .", Management Information Biotin, p. 2).

The Commission points out that it has clearly distinguished in the contested decision between clauses which *directly* bind customers to obtain their supplies from Roche (fidelity contracts) and those in which by means of a price incentive, namely by granting a fidelity bonus, such a binding relationship is *indirectly* established. It is incorrect to say that the English clause "precludes from the outset the obligation to purchase supplies exclusively from Roche", because the exclusivity relates to the procurement of supplies whereas the English clause relates to the fixing of prices.

Indeed in this connexion it is perfectly normal in long-term contracts for the vendor to undertake to take account of competitors' prices. The Commission does not deny that it is of the very essence of competition to endeavour to tie customers to the detriment of competitors and to keep loyal customers as regular customers, but an undertaking in a dominant position is not allowed to use contracts containing obligations on the part of customers to obtain supplies exclusively from that undertaking for this purpose.

The defendant in connexion with the contracts with Unilever and Merck makes the following observations:

(a) The Commission, in answer to Roche's argument that the presence of the English clause in the contracts with Unilever does not permit the conclusion that Unilever was obliged under these contracts to buy all its requirements from Roche, replies that it is fully aware that the so-called English clause makes sense in long-term contracts for the supply of fixed quantities which do not cover all the purchaser's requirements. However, in such cases according to the Commission it is the vendor who undertakes to adjust his prices with the result that the purchaser continues to be obliged to purchase. The legal position under the English clause contained in the contracts at issue is quite different. Since Roche, the vendor, is not obliged to adjust its prices the clause only applies to the performance of the purchaser's obligation to buy most or all of its requirements from Roche.

(b) The Commission takes the view that Merck's unusually large requirements of supplies of vitamins B_6 and E, which, according to the applicant, justified the conclusion of a contract under which it bought its supplies exclusively from Roche, could, according to the Commission, also have been met by other methods, for example by ordering fixed quantities at half-yearly or yearly intervals.

II The arguments concerning the interpretation of the English clause

Application

The applicant points out with reference to the English clause that it is incorrect to say that this clause stipulates that customers are obliged to inform it if any reputable manufacturer charges a price lower than that charged by Roche. The identity of the competitor must on no account be disclosed. Since the anonymity of the competitor is thus

guaranteed, the applicant is in almost the same position as it is whenever it negotiates prices with a purchaser.

The English clause so operates as to remove at the outset the exclusive nature of any obligations to obtain supplies from Roche even assuming that such exclusivity attaches to those obligations in principle. Every customer remains free to try to obtain more favourable prices and/or terms from competitors. This applies just as much to contracts providing for incentive or preferential rebates as to contracts providing for supplies to be obtained exclusively from Roche. The customer who takes advantage of a more favourable offer does not lose the rebate which he is allowed on the other purchases. Thus the present case is entirely different from the so-called "Sugar Case" (judgment of 16 December 1975 in Joined Cases 40-48/73 and Others *Coöperatieve vereniging "Suiker Unie" UA and Others* v *Commission of the European Communities* [1975] 2 ECR 1663, at p. 2001), for in the present case there is no risk of the rebate being lost (see paragraph 504 of the above-mentioned "Sugar" judgment).

Defence

The Commission takes the view that the applicant has minimized the significance of the English clause and the part played by it. Although the clause serves the interests of the customer as far as concerns prices the customer is however only free to purchase from a third party if the applicant consents by not adjusting its prices.

Reply

Contrary to the defendants's apparent belief the English clause, according to its meaning and purpose, plainly operates for the protection of the customer and not of the vendor. The aim of the clause is the protection of the consumer, because it automatically guarantees that the lowest prices are charged. It therefore typifies the power of the demand and not of the supply.

The English clause does not have the "attractive effect" of the loyality rebates, which were at issue in the beforementioned "Sugar Case", because in that case the purchaser lost the rebate in any case as soon as he met even a fraction of his requirements from a competitor. The English clause expressly stipulates that the annual rebate is not discontinued if purchases are made from competitors charging more favourable prices. The applicant produces figures to prove that in fact its purchasers, and for those very reasons, on several occasions obtained well over 50 % of their requirements from the applicant's competitors.

Rejoinder

The Commission replies that the true meaning of the English clause is that it allows the dominant undertaking to react to its competitors' price changes without running the risk of losing its customers to them. Since the decision as to whether a customer may obtain its supplies from a competitor rests with the applicant, the applicant has the power to prevent customers bound by these contracts from obtaining supplies elsewhere and thus to shut out its competitors. The fact that the applicant's customers on several occasions covered more than 50 % of their requirements by purchasing from competitors is not conclusive in answering the question whether the applicant has abused its dominant position by imposing on its customers an unconscionable contractual obligation.

III Arguments concerning the question whether the obligation to obtain supplies exclusively from Roche or to give Roche preferential treatment under the contracts at issue has as its effect the prevention of competition and amounts to an abuse of a dominant position

Application

The applicant explains the scope of the English clause and then concludes that its use cannot amount to an "abuse" within the meaning of [Article 102 TFEU]. The essential balancing of the interests involved (Interessenabwägung) shows that the contracts at issue:

— ensure the availability of supplies to customers and guarantee that a homogeneous quality will be maintained,

— enable the applicant to plan its production,

— guarantee consumers the lowest prices.

On the other hand for Article 86 to apply there must be a connexion between the dominant position and the conduct of the undertaking concerned; the conduct complained of must spring from the undertaking's strength and must only be possible by reason of its dominant position. Indeed tying buyers is quite usual on the market in vitamins and there is no evidence whatsoever that the applicant could conclude the contracts to which objection is taken by reason only of its supposed strong position in the market. On the contrary, as emerges from a statement by Animedica, it was the customers who preferred the suppliers offering the most favourable rebates. Neither has the applicant's conduct blocked access to the market, for since the market in question is a specific market providing outlets for vitamins, the applicant's main competitors, as has already been pointed out, have a much wider range of products.

After consideration of all these factors the conclusion is that the alleged blocking of competitors' access to the market has at no time been of such a kind as to justify the presumption of an abuse within the meaning of [Article 102].

Defence

The Commission justifies its finding that Roche's conduct amounts to an abuse, which it explained in Recital 21 *et seq.* of the disputed decision, by the following considerations:

— the "fidelity" contracts, by compelling customers to obtain their supplies exclusively from the applicant or by achieving the same result through the medium of a price advantage (the fidelity bonus) deprive customers of the opportunity to choose a source of supplies of their own free will, in so far as they are tied to the applicant as customers.

— these contracts also cause competition between vitamin manufacturers to be adversely affected in so far as access to these customers by other vitamin manufacturers is barred by the exclusivity clause agreed between the applicant and its purchasers.

— the English clause represents a loosening of this tie to the extent to which it permits adjustment of prices. Nevertheless it does not leave the customers free to obtain their supplies as they wish from the applicant or its competitors: it is only when the applicant refuses to adjust its price to that of its competitor that the purchaser can obtain his supplies at the latter's price.

When the applicant considered the legality of this clause it wrongly started

from the principle that, when there has to be a ruling as to whether or not there is an abuse of a dominant posititon, it is the interests of those in the market which are determinative. Nor is it correct to insist that the conduct in question must arise out of the dominant position and is only possible by virtue of that position if it is to be caught by the prohibition contained in [Article 102].

On the contrary owing to the fact that undertakings occupying a dominant position have a freedom of action which allows them to act without having to pay much regard to their competitors, they are not allowed to adopt certain practices which may be lawful if adopted by undertakings exposed to competition.

On the other hand an "appreciable" interference with competition is not necessary for the application of [Article 102] as it is in the case of [Article 101]. An undertaking in a dominant posititon is not by definition exposed to any effective competition. As soon as such an under-taking abuses its position the objective of the Treaty to protect competition is jeopardized. Furthermore the purpose of the prohibition contained in [Article 102] is clearly to protect trading parties from undertakings occupying a dominant posititon.

In any case the current contracts account, mainly in the sectors of food and animal feed, for 26 % of the applicant's sales and for 14 % thereof even if the contracts with Unilever and Merck are disregarded.

Reply

Roche refers back to the submissions contained in its application (p. 91 *et seq.)* concerning the advantages and disadvantages of the contracts at issue for the customers and asserts that a balancing of the interests involved is completely justified and that this requirement has been acknowledged in the context of the application of [Article 102 TFEU] both by the Court (judgment of 21 March 1974 in Case 127/73 *Belgische Radio en Televisie and Société belge des auteurs, compositeurs et éditeurs* v *SV SABAN and NV Fonior* [1974] 1 ECR 313 and also by the Commission in its Decision No 72/268 ("GEMA", Journal Officiel L 166 of 24 July 1972). In this case a fair balance of the interests involved has been achieved to the extent to which customers, because their production depends on supplies being delivered on a long-term basis, require and are given contracts which guarantee supplies over a long period while, on the other hand, the applicant which has undertaken these commitments, is also assured of being able to dispose of its production. Moreover by virtue of the English clause the contracts guarantee to any customer supplies at the most favourable price, to each competitor able to compete the opportunity of seeing its more favourable offer accepted and to the consumer an assurance of obtaining automatically the lowest price.

In the view of the applicant the wording of [Article 102] shows that there must be a certain causal connexion between the dominant position on the market and the attitude of the undertaking concerned. The alleged abuse must therefore be connected with some "pressure"; it is not sufficient for it to be connected solely with this market situation.

The defendant has itself admitted in its study in 1966 of "the concentration of undertakings" ["la concentration des entreprises"] that there is an abuse if the undertaking dominating the market "exploits its position in order to obtain advantages, which it would not have succeeded in obtaining if there had been effective competition".

The applicant has never forced a customer to enter into an agreement or to agree to a particular clause. In fact it would have preferred to conclude genuine exclusivity agreements, to

dispense with the English clause and replace it with stable prices or an "increase" clause and to tie its customers on a long-term basis rather than give them the right to give short-term notice of termination.

With regard to the effect of the fidelity contracts the applicant does not agree that the contracts at isssue which only covered 4 % of the vitamins for the seven products in question can eliminate competition or impede integration. This small market share is not such as to limit access to the market of the applicant's competitors. [Article 102] presupposes that the competitors' opportunities to sell have been substantially impeded. This does not occur if access to the market in the case of 96 % of the demand remains completely free and if, in addition, none of the remaining 4 % is protected from competition, and the truth of this is confirmed by the English clause.

It is really surprising that in the defendant's view the criterion of "perceptibility" has no relevance to the application of [Article 102]. In view of the Court's decision and the Advocate General's opinion in Case 23/67 (judgment of 12 December 1967, *S.A. Brasserie de Haecht* v *Wilkin and Wilkin* [1967] ECR 407) and having regard to the fact that [Article 101] and [Article 102] pursue the same objective, it cannot be accepted that a contract tying buyers very loosely to Roche, which does not cover more than 4 % of the demand and which in the case of this limited portion of the demand is conducive, owing to the English clause, to vigorous compe-tition between suppliers, constitutes an appreciable obstacle to intra-Community trade.

Rejoinder

On the question of balancing the interests involved the Commission submits that if the conduct of an undertaking occupying a dominant position on the market adversely affects the system of competition the question whether the interests of the parties are served cannot be material. The judgment of the Court in the *Belgische Radio en Televisie-SABAM* case as well as the *"GEMA"* decision of the Commission were concerned with the specific relations between a company exploiting copyright and its members, a set of facts which cannot be applied to the present case.

In answer to Roche's argument that it brought no pressure to bear upon customers the Commission points out that, for the purpose of considering whether there is an abuse, there is no need to prove an improper act or some factor of a subjective nature or to substantiate immorality, since an abuse must be understood as being a practice the morality of which is immaterial but which is objectively unlawful.

The applicant's submissions on the effect of the fidelity contracts has no bearing on the question whether there is an abuse. They may at best carry weight in the assessment of the gravity of the infringement when the fine is fixed.

The reference to the judgment in the *Brasserie de Haecht* case is also irrelevant. The question whether a certain number of exclusivity agreements which tie customers to manufacturers have as their object or effect the restriction of competition upon the market under consideration clearly cannot be determined in the same way as the question whether exclusivity agreements applied by an undertaking not exposed to any effective competition must be regarded as an abuse within the meaning of [Article 102].

The Commission goes on to point out that the agreements in this case were for the most part entered into with

important customers in the sector of food and animal feed the operations of which are not limited to some Member States but cover all Member States within the Community.

IV Arguments concerning the discriminatory effect of the disputed contracts

Application

The applicant calls attention to the fact that according to recital 26 to the contested decision the conditions for the application of [Article 102] are met, because the rebates, which vary according to the purchasers, have led to discrimination against other customers.

The applicant's view on this point that the additional condition for its application set out in [Article 102], namely that customers are "thereby" placed "at a competitive disadvantage" is missing in the present case. Since the proportion of vitamins in the products manufactured by the customers is very small and is at most 5 % — in general 1 % — the alleged competitive disadvantages due to a difference in the rebates of 1.2 % or even 5 % are almost impossible to calculate. A difference of even 5 % in the rebate would only amount to 0.05 % of the selling price of a food manufacturer and can never be a disadvantage when he fixes his prices.

Defence

In the view of the Commission a "competitive disadvantage" is not to be equated with an "impairment of competitive strengths"; even price discrimination of from 1 to 2 % — and in any case of 5 % — may in principle place customers at a competitive disadvantage.

The Court has overruled this objection, *inter alia*, in its judgment of 16 December 1975 in Joined Cases 40 to 48/73 and Others *(Coöperatieve vereniging "Suiker Unie" UA and Others* v *Commission of the European Communities* [1975] 2 ECR 1663, at p. 2004) in which it found that "Purchasers from SZV, and in particular large industrial consumers, compete with other buyers from the company". Moreover the documents which the applicant has produced prove what importance it and the purchasers have attached to the fidelity bonuses.

Reply

The applicant takes the view that the reference to the case-law of the Court in the "Sugar Case" does not take the matter any further, for in that case the discrimination stemmed from the loss by the purchasers of the whole of the rebates if they were not loyal. In the case in point the operation of the English clause precludes such an effect. In so far as some customers received lower rebates those rebates were in respect of different services, quantities and periods. The defendant's view that every price concession must be exactly adjusted to proved savings in costs is in practice completely unworkable and would lead to a freezing of price competition, which from the standpoint of competition policy is undesirable.

Rejoinder

The Commission refers to its submissions in its defence.

Fifth Submission: Infringement of Article 15 of Regulation No 17 by Article 3 of the contested decision, in that a fine has been imposed, even though it has not been proved — the opposite is the case — that the applicant acted intentionally or negligently

Application

This submission, which relates to the fine, is made in the alternative and recapitulates first of all the arguments which have already been developed in the first submission.

As far as concerns the guilt to which Recital 28 of the decision alludes the applicant takes the view that it can only be regarded as guilty of infringing [Article 102] of the Treaty:

— if the interpretation of the concepts "dominant position" and "abuse" is free of doubt, and

— the undertaking does not make a mistake of fact as to the existence of effective competition.

In any case the applicant has not knowingly committed an illegal act and, because of the uncertain interpretation of the concepts constituting the offence, was so placed that its ignorance of the unlawful nature of its conduct was excusable. To that must be added a mistake of fact which, according to the generally accepted view, rules out the possibility of any guilt.

Defence

The Commission replies that the applicant was fully aware of all the material facts relating to its position on the market in vitamins. As far as concerns knowledge of the illegality the Commission is of the opinion that in the circumstances there has not been any excusable error relating to the prohibited conduct. If the applicant did not know that its conduct was forbidden it could have become aware of this by making a conscientious effort. The applicant must have been aware of the fact that under [Article 102 TFEU] the position which it occupied on the market as far as concerns a large number of vitamins might be regarded as dominant and that the objectives which it sought to attain by means of the exclusivity agreements and of the fidelity contracts could satisfy the conditions constituting an abuse of such a position.

Reply

The applicant replies that as far as concerns the absence of proof of any misconduct on its part the defendant deliberately overlooks the fact that even genuine fidelity rebates (which are not found in this case) are in principle acceptable under competition law (judgment of the Court of 11 June 1968 in Case 22/67 *De Wendel et Cie SA* v *Commission of the European Communities* [1968] ECR 263).

An offence cannot originate in the anticipation of the effects of a fidelity rebate which is in principle acceptable.

The defendant has put forward in the present case some views which it has never put forward before and which are inconsistent both with its own practice and the case-law of the Court of Justice. They are as follows:

— the applicant's market shares of about only 50% are themselves factors establishing that there is a dominant position on the market;

— the fact, which is not disputed, that all the markets in vitamins are expanding is irrelevant;

— the conduct on the market and market performance are not determinative;

— proof of the power to fix prices is unnecessary;

— there may be a finding that the applicant dominates the market in spite of proof that, under the pressure of "strong" and "tough" competition it lowered its prices considerably owing to the action taken by its "aggressive" competitors

and had to accept extensive losses of its market shares;

— the financial strength of its competitors, which is beyond all doubt much greater, is not material;

— in the context of [Article 102] a careful consideration of the interests involved is impossible;

— under [Article 102] the effects of the course of conduct to which exception is taken are not material.

On the other hand the defendant also relies on the judgment of 16 December 1975 in the "Sugar Case" and thus confirms that from 1964 to 1973 a good many objections were not foreseeable. As far as concerns the dominant position as well as the abuse the criteria which were determinative in the "Sugar Case" for the application of [Article 102] and the gravity of the infringement are not present.

Rejoinder

The Commission's answer is that the determinative factor is the question whether the applicant may take advantage of a pardonable error as to the unlawfulness of its conduct. The applicant ought to have ascertained whether the contracts which it arranged were objectionable or not, as far as its operations within the Community were concerned. Since it did not to do this it must be deemed to have accepted that these contracts might be regarded as an abuse within the meaning of [Article 102].

IV — The parties replies to questions put to them by the Court

By a letter dated 21 October 1977 the Court called on the parties to answer, before the opening of the oral procedure, a number of questions either jointly or each as to so much as concerned it. The purpose of these questions was (A) to obtain production of documents and further and better particulars of the data mentioned in the pleadings or the annexes thereto (B) to ascertain whether the parties could agree a number of facts relating to the applicant's market shares and (C) to find out to what extent the customers with whom Roche entered into the disputed contracts in fact obtained their supplies from Roche's competitors.

A — The documents which the parties were requested to produce

The Commission has produced the minutes of the meeting between Unilever and Roche in London on 11 December 1972, which is mentioned in Recital 3 to the contested decision, and also the documents relating to investigations it carried out with certain of Roche's customers. In addition the parties have supplied further and better particulars of certain data and documents which they mentioned in their pleadings, especially with reference to the trend of prices in the various Member States, the quantities supplied (in kilograms/tonnes) and the use of vitamins C and E for technological purposes.

B — The market shares

The Court requested the parties to supply further and better particulars of some of the data which each of them used to assess Roche's market shares within the Common Market, in particular by giving the data covering the years 1970 up to and including 1974 by taking into consideration the quantities coming from non-member countries marketed by resellers who are not

producers, by supplying particulars of the quantities and prices, and above all by endeavouring to provide the Court with the facts which the parties have as far as possible agreed.

In answer to the request the parties have, on the one hand, produced a joint document containing the statistical data upon which they reached agreement and, on the other hand, separate documents in which each party for itself answers those questions a joint answer to which could not be agreed on. In addition each party submitted observations on the separate documents drawn up by the other party.

The main factual information emerging from the further particulars supplied is reproduced in the table (see pages 504 and 505) and give rise to the following observations:

(a) Roche states that it has been able to take note of the factors taken into consideration by the Commission and of the latter's calculation in order to determine the market shares.

(b) Both parties agree that 47% represents Roche's share of the market in vitamin A.

(c) As far as concerns vitamins B_3 (pantothenic acid), C, E and H (biotin) (see table) the parties have jointly agreed figures relating to the market shares, calculated, on the one hand, according to value, and, on the other hand, according to quantity. However, in the Commission's view the value is the most representative, while according to Roche it is the quantity. The latter in this connexion quotes the judgment of 3 July 1976 of the Bundesgerichtshof [Federal Court of Justice] concerning vitamin B_{12} (WuW/E, BGH 1435, 1442 *et seq.*), which established that in order to determine that a dominant position exists on the market regard must be had primarily to the quantity of the shares rather than to their value.

(d) The Commission calculates the market shares for vitamins B_2 and B_6 for the years 1972, 1973 and 1974 on the basis of both value and quantity at 75 to 90%. Roche stresses that since as far as its competitors' sales are concerned it has to rely to a large extent entirely on mere conjecture, it is not in a position to adduce any evidence to the contrary but that adopting its internal method of making such assessments, its share of the market in vitamin B_2 amounts to only 20 to 30% and its share of the market in vitamin B_6 does not exceed 50%.

(e) Roche draws attention to the considerable variations in its market shares from year to year (Answer to Question I. 5f) which goes to show that there is actual competition.

(f) As far as concerns vitamins C and E the parties agree that in addition to their use for bio-nutritive purposes vitamins C and E are used for technological purposes, as antioxidants, colouring matter or as protection against any deterioration of taste, smell and any fading of colours. On the other hand the parties have not reached agreement on the proportion of these vitamins used for these purposes nor are the conclusions to be drawn from their findings.

According to Roche the proportion is 30% in the case of vitamin C and 60% in the case of vitamin E. Since these vitamins, when used for technological purposes, are exposed to competition

Roche's market shares within the Common Market

Markets in vitamins on which there is said to be a dominant position (Recital 20 to the Decision)	Use according to Hoffmann-La Roche (answer to the Court's Question I.4)	Commission's assessment of value (1974) (Recital to the Decision and Annex IV to the Defence)	Hoffmann-L Roche's assessr by quantity (19 (p. 26 of the Reply)
vitamins			
A	Animal feed 81 % Food 7 % Pharmaceuticals 12 %	47 % (the other producers 27, 18, 7, 1 %)	47 %
B_2	Animal feed 74 % Food 4 % Pharmaceuticals 22 %	86 % (next largest manufacturer: 8 %)	50 %
B_3 (pantothenic acid)	Animal feed 81 % Food 2 % Pharmaceuticals 17 %	64 % (another manufacturer: 32 %)	30 % appro
B_6	Animal feed 14 % Food 1 % Pharmaceuticals 85 %	95 % (another manufacturer: almost 30 %)	60 to 70 % o world mark
C	Animal feed 7 % Food 43 % Pharmaceuticals 50 %	68 % (other manufacturers: 15, 7, 5, 3 %)	50 %
E	Animal feed 72 % Food 3 % Pharmaceuticals 25 %	70 % (two other manufacturers: 21,8 %) 40 % approx.	40 % appro
H (Biotin)	Animal feed 57 % Food 6 % Pharmaceuticals 37 %	over 90 % (pp. 68 to 70 of the application)	over 90 % (pp. 68 to 70 of the application)

Corrections following the Court's questions

Figures which the parties have agreed (first statement)			Assessments on which the parties disagree								
Quantity: Roche's calculation Value: Commission's calculation				Commission's calculation by value and quantity (joint statement)				Roche's calculation - of its own market shares (Court's Question I.2a)			
1972 6 countries	1973 9 countries	1974 9 countries		1972 6 countries	1973 9 countries	1974 9 countries		1972 6 countries	1973 9 countries	1974 9 countries	
45	48	47									
The parties proceed on the basis that the market share by value is representative											
			v	87	81·2	80·6					
			q	84·5 191 tonnes	74·8 271 tonnes	80·8 298 tonnes	q	188 tonnes	268 tonnes	297 tonnes	
28·9	34·9	51									
18·9 115 tonnes	23·4 222 tonnes	41·2 256 tonnes									
				H + B_6 = 1 heading in CCT							
			v	87	90	83·9					
			q	84·2 139 tonnes	86 296 tonnes	88·4 404 tonnes	q	262 tonnes	34 tonnes	407 tonnes	
65·7	66·2	64·8						46 to 47 % account being taken of interchangeability: 33 % technological use (Court's Question I.3, I.5)			
64·4 2979 tonnes	63·8 3673 tonnes	63 3988 tonnes									
54	64	58						40 %, account being taken of interchangeability: 60 % technological use (Court's Questions I.3, I.5 a and b)			
50 463 tonnes	60 793 tonnes	54 890 tonnes									
100 →		93									

from other antioxidants, colouring matter and additives, the latter products must be included in the market for each of the vitamins for which they can be substituted. Consequently the market in question for vitamins C and E is much greater than the Commission asserts and Roche's shares of these markets, account being taken of the share attributable to substitutable products, is about 46% in the case of vitamin C and 40% in the case of vitamin E. The applicant is of the opinion that its view is confirmed by the judgment of the Supreme Court of the United States of America in the "Cellophane Case" (E.I. Du Pont de Nemours and Co., 118 F Supp. 41 (D. Del) 1953; aff'd, 351 US 377, 1956 Trade Cases, paragraphs 68, 369 to 71, 597).

The Commission challenges this view. In its opinion the quantities used for technological purposes are considerably less than those put forward by the applicant. Furthermore it considers that the products which can be substituted for vitamins C and E for technological uses are not found on the markets affected by the decision, and in any case do not form part of the markets for vitamins C and E which are intended for bio-nutritive purposes, because there is no "reasonable interchangeability" between these products.

On the other hand vitamins C and E which are used for technological purposes none the less form part of the same markets as the vitamins intended for bio-nutritive purposes, because owing to the fact that these vitamins have two properties, the manufacturers are free, especially on an expanding market, to use these products for the purpose which best suits them.

Finally, even if it is assumed that the vitamins sold by Roche for technological purposes are to be excluded from the markets in question the same must be done in the case of its competitors with the result that the market shares remain unchanged.

(g) The parties have produced as Annex IV to their joint reply tables showing the trend of vitamin prices in the various Member States between 1970 and 1976. Since there are many forms in which vitamins may be sold (for example there are 100 forms in which Vitamin A may be sold) the parties agreed to select the most representative product. These figures disclose a trend, in the case of both falls and rises in prices, which was somewhat — although not fundamentally — different from one Member State to another.

(h) The Commission, in support of its view that Roche occupies a dominant position, has referred to the fact that the applicant produces a wide range of vitamins and is consequently in a position to meet the entire requirements of each of its various customers. Roche has challenged this conclusion by pointing out that most of its customers only obtain supplies of one to three kinds of vitamins. Questioned by the Court on this point (Question I.6) the Commission has compiled a table (Observations of the Commission on Roche's answer to the Court's questions, p. 6), which shows that 13 firms, with 11 of which the disputed contracts were entered into (Animedica, Beecham, Dawe's, Guyomarc'h, Organon, Protector, Provimi, Radar, Ralston, Ramikal, Trouw), buy a large number of different vitamins and, more particularly, that the above-mentioned firms buy all the vitamins referred to in the decision.

The applicant for its part mentions (Answer to Question I.6) an investigation which it carried out on the German market covering 815 customers, of which 589, that is 72.3%, have only bought one, two or at most three vitamins.

(i) The Commission's general conclusion is that the investigations carried out at the request of the Court, except in the case of vitamin B_3 (pantothenic acid), on the whole confirm the determination of the market shares mentioned in the disputed decision. The applicant, on the other hand, takes the view that the differences which have been recorded are significant and sufficiently important to call in question the Commission's assessments that there is a dominant position.

C — The disputed contracts

(a) Even though the parties, as far as concerns the determination of Roche's market shares, have been able to agree on a number of findings, they have not been able to reach agreement on the analysis of the 26 contracts entered into since 1964 with 22 customers, which the Commission regards as fidelity contracts the concluding whereof is an abuse of a dominant position, whereas according to Roche's analysis the rebates in question are primarily quantity or del credere rebates. The Commission has placed on the Court's file nine reports of investigations carried out by its departments with nine of Roche's customers in order to ascertain how the contracts between Roche and its customers were performed. It has also produced for the Court's file an analysis of its reports of investigations, which it has marked with the letters A to G, with those of Roche's customers who have objected to their identity being disclosed.

(b) As far as concerns the questions put to the parties by the Court relating to the effect of the so-called "English clause" (the Commission's answer to the Court's questions p. 13 *et seq.*) the Commission stresses the fact that the disputed contracts provide in general that only offers from "serious competitors" or "reputable manufacturers, brokers or dealers" are taken into consideration for the purpose of releasing customers from their obligation to obtain most or all of their supplies from Roche and also emphasizes that as a rule the offers from the local market are involved. It also stresses the fact that it does not object to the English clause being applied but maintains that this clause does not remove the restrictive effect on competition of the contracts providing for the buyers to obtain their supplies exclusively from Roche subject to a fidelity rebate.

(c) The applicant, replying in turn to the Court's questions on the disputed contracts, submits the following considerations.

As far as concerns the restrictive effect on competition of the contracts complained of the applicant points out that, after it had terminated the disputed contracts, the share of the customers with whom these contracts had been concluded in sales of vitamins did not fall but actually increased, and this shows that the contracts did not restrict competition (Answer to Question II.1 and 3). The applicant also refers to the Commission Decision of 5 December 1969 in the Pirelli-Dunlop case (Journal Officiel 1969 L 323, p. 21) from which it must be concluded that the Commission admits that the inclusion of the English clause prevents contracts under which supplies have to be bought exclusively from the same supplier from restricting competition.

The applicant goes on to say that it has every reason to believe that its competitors have concluded with their customers a good many contracts of the same type as those to which the Commission has objected (Answer to Question II.4). It states in answer to Question II.6 that, although it has terminated the disputed contracts, it has not yet entered into new agreements with the majority of its customers, since its negotiations with the Commission for approval of a standard form contract were not conclused until November 1977. However fresh contracts have been entered into with Merck, Unilever, Animedica and Dawe's and have been annexed to its reply.

The applicant in answer to Question II.7 and II.8 maintains that there is an essential difference between the fidelity rebates and the clauses which are included — in different forms — in the disputed contracts. A fidelity rebate is forfeit entirely once the customer purchases from a third party. Under the contractual relations between Roche and its customers on the other hand, the latter keep the rebates to which they are already entitled, if they obtain their supplies from third parties. The applicant states emphatically that it did not in fact have any means of checking that its customers were applying the English clause correctly and that it always refrained from applying the penalties provided for in the contracts.

V — Oral procedure

At the public hearing on 31 May 1978 the parties presented their oral argument and answered various questions put by the judges and the Advocate General.

The applicant, with the consent of the defendant, produced certain documents in support of its oral submissions and confirmed that it withdrew its submission based on the way in which some documents were obtained by the defendant (Submission 2a).

It also drew attention to the fact that in its letter of 17 April 1978 it also withdrew its submission based on infringement of Article 18 of Regulation No 17 (Submission 3).

The Advocate General delivered his opinion at the hearing on 19 September 1978.

Decision

1 The principal claim in the application lodged on 27 August 1976 by the Swiss company Hoffmann-La Roche & Company AG (hereinafter referred to as "Roche"), whose principal place of business is at Basle, is the annulment of Commission Decision of 9 June 1976 (IV/29.020 — Vitamins) relating to a proceeding under [Article 102 TFEU], which was served upon the applicant on 14 June 1976 and published in the Official Journal of the European Communities L 223 of 16 August 1976, and the alternative claim is the annulment of Article 3 of that decision which imposes upon the applicant a fine of 300 000 units of account, being 1 098 000 Deutschmarks.

2 In that decision the Commission finds that Roche has a dominant position within the Common Market, within the meaning of [Article 102] of the Treaty, on the markets in vitamins A, B_2, B_3(pantothenic acid), B_6, C, E and H (biotin) and that it has abused that position and thereby infringed the said article, by concluding, from 1964 onwards and in particular during the years 1970 to 1974 inclusive, with 22 purchasers of these vitamins agreements which contain an obligation upon purchasers, or by the grant of fidelity rebates offer them an incentive, to buy all or most of their requirements of vitamins exclusively or in preference from Roche (Article 1 of the decision). That decision enjoins Roche to terminate the infringement forthwith (Article 2) and orders it to pay the above-mentioned fine (Article 3).

3 In support of its application the applicant makes the following submissions:

— *First submission:* The contested decision infringes the fundamental principle that rules relating to penalties must be certain and foreseeable.

— *Second submission:* The contested decision, as a result of irregularities in the administrative procedure upon the conclusion whereof it was adopted, has several formal defects.

— *Third submission:* The contested decision infringes Article 86 of the Treaty in that the Commission incorrectly interpreted and in any case inaccurately applied the concepts of a dominant position and of the abuse of a dominant position which may affect trade between Member States by finding that Roche was in such a position and by treating the agreements in question as constituting such an abuse.

— *Fourth submission:* The contested decision, by imposing a fine upon Roche, has infringed Article 15 (2) of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87), the alleged infringements, in so far as they may be found to exist, were not committed either intentionally or negligently.

The applicant has also relied in its application on the infringement of Article 18 of Regulation No 17 of the Council of 6 February 1962 and of Financial

Regulation No 68/313 of 30 July 1968 (Journal Officiel L 199, p. 1) in that the fine had been converted into Deutschmarks, but, during the proceedings, it withdrew this submission so that only the abovementioned four submissions have to be examined.

First submission: Infringement of the principle that rules relating to penalties must be certain and foreseeable

4 According to the applicant the concepts of dominant position and abuse of such a position in [Article 102] are among the most indeterminate and vague concepts both in Community law and in the national law of the Member States and consequently, by applying a fundamental legal principle which should be deduced from the legal maxim *nullum crimen, nulla poena sine lege,* the Commission may not impose the penalties provided for in the case of infringement of that article until those concepts have been given a sufficiently specific meaning either by administrative practice or by case-law to enable undertakings to know where they stand.

5 Nevertheless the applicant does not deny that the Commission is entitled to interpret and give a specific meaning to these concepts in the decisions which it adopts in respect of undertakings but only disputes its power to impose penalties as long as these concepts have remained undefined, which is what has happened in this case.

6 Consequently this submission is only concerned with the fine imposed and it will be necessary to examine it later on at the same time as the other objections to the imposition of this fine.

Second submission: Irregularities in the administrative procedure

7 On this point the applicant in the first place submitted in its application that the procedure initiated by the Commission its own initiative against it pursuant to Articles 3 and 15 of Regulation No 17 of the Council was irregular having regard to the fact that documents for internal use by its departments came unlawfully into the possession of the Commission.

However during the written and oral procedure before the Court it stated that it withdrew this submission and itself produced for the Court's file with other documents the documents the use of which by the Commission it had previously regarded as being unlawful.

In these circumstances this submission may be rejected without any further examination since the Court is of the opinions that it need not examine it of its own motion.

8 The applicant submits in the second place that in the disputed decision documents, particulars whereof were not given during the administrative procedure, and other evidence which the Commission refused to let it inspect because of the duty to respect professional secrecy were taken into account.

Thus the applicant first of all refers to the documents mentioned in Recital 12 to the contested decision, namely four internal circulars issued by Roche, which according to the decision were dated September 1970 (actually 8 September 1972), December 1970, May 1971 (actually mid-August 1971) and August 1971 and also to the minutes of the European Bulk Managers meeting on 12 and 13 October 1971 (actually on 12 and 13 October 1972).

It refers in the second place to the evidence which the Commission obtained from other vitamin manufacturers and with the help of which it calculated the market shares which it claims Roche has, and also to the information requested and obtained from the applicant's customers for the purpose of determining whether or not the contracts, the conclusion whereof is regarded by the Commission as an abuse of a dominant position had as their effect the restriction of competition and of trade between Member States.

9 Observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings.

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

Similarly Article 4 of Regulation No 99/63 of the Commission of 25 July 1963 (Official Journal, English Special Edition 1963, p. 47) on the hearing provided for Article 19 of Regulation No 17 provides that the Commission shall in its decisions deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views.

10 Although the Court in its judgment of 15 July 1970 in Case 45/69 *(Boehringer Mannheim GmbH v Commission of the European Communities* [1970] ECR 769) held that these requirements are satisfied as far as concerns the notification of complaints — the first stage of the administrative procedure — if the notification sets forth clearly, albeit succinctly, the essential facts upon which the Commission relies, this ruling is subject to the proviso that "in the course of the administrative procedure it supplies the details necessary to the defence."

11 Thus it emerges from the provisions quoted above and also from the general principle to which they give effect that in order to respect the principle of the right to be heard the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of [Article 102] of the Treaty.

12 The Commission does not deny that, since it took the view that it was bound to observe professional secrecy, it refused to pass on the data that it had obtained from competitors or customers of Roche which formed the basis, together with other data, of its assessment of the market shares and of the view that the disputed contracts restrict competition.

13 Although Article 20 (2) of Regulation No 17 provides that "Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this regulation and of the kind covered by professional secrecy", this rule must, as the express reference to Article 19 confirms, be reconciled with the right to be heard.

14 The said Article 20 by providing undertakings from whom information has been obtained with a guarantee that their interests which are closely connected with observance of professional secrecy, are not jeopardized, enables the Commission to collect on the widest possible scale the requisite data for the fulfilment of the task conferred upon it by Articles 85 and 86 of the Treaty without the undertakings being able to prevent it from doing so, but it does not nevertheless allow it to use, to the detriment of the undertakings involved in a proceeding referred to in Regulation No 17, facts,

circumstances or documents which it cannot in its view disclose if such a refusal of disclosure adversely affects that undertaking's opportunity to make known effectively its views on the truth or implications of those circumstances, on those documents or again on the conclusions drawn by the Commission from them.

15 However if such irregularities have in fact been put right during the proceedings before the Court they do not necessarily lead to the annulment of the contested decision in so far as remedying them at a later stage has not affected the right to be heard.

16 The documents to which the applicant has referred are, on the one hand, those mentioned in Recital 12 to the contested decision, that is to say the same documents as those in the case of which it had criticized the manner of their coming into the possession of the Commission, although it later produced them for the Court's file so that both parties could and did make their submissions concerning them.

On the other hand as far as concerns the data on the basis of which the Commission has calculated the market shares and its analyses of the effects of the disputed contracts the parties, during the written procedure at the request of the Court produced, following an exchange of information, an agreed document which shows that the Commission in the case of all the vitamins in question has disclosed the bases of its calculation of the market shares according to their value for 1972, 1973 and 1974 with the result that Roche was in a position to estimate its market shares according to the quantities sold on the basis of the sales attributed to certain competitors in the documents produced by the Commission.

17 Thus the parties have been able to agree on an estimate of the market shares according to quantity and value — although they have remained in disagreement as to which of the two criteria is determinative — as far as concerns vitamins A, B_3 and H and also vitamins C and E subject in the case of the latter to an examination of the market to be taken into consideration from the standpoint of the interchangeability for certain uses of these two vitamins with other products, only the market shares of vitamins B_2 and B_6 remaining unagreed.

18 Finally the Commission also produced during the written procedure at the request of the Court the minutes of the meeting between Unilever and Roche mentioned in Recital 3 to the contested decision as well as the reports of the inquiries carried out by its officials with some of Roche's customers, who entered into the disputed contracts, or, in the case of those undertakings which wished to remain anonymous, a note summarizing the said reports.

19 In these circumstances the submission based on the alleged breach of the principle of the right to be heard cannot be upheld.

Third submission: Infringement of Article 86 of the Treaty

20 In the applicant's view the Commission has infringed [Article 102] of the Treaty in the following respects:

I The contested decision wrongly assumes that the applicant has a dominant position, interprets this concept incorrectly and wrongly applies that interpretation to the case in point, especially as far as concerns the assessment and relevance both of the market shares and also of the other factors used to establish the existence of the alleged dominant position.

II The contested decision assumes, in any case incorrectly, that the applicant has abused such a position, since the Commission has made a wrong analysis of the contracts the conclusion whereof is supposed, according to it to constitute an abuse and of the restrictive effects on competition of the said contracts.

III The contested decision wrongly assumes that the applicant's conduct was such as to have an appreciable effect on intra-Community trade.

I — The existence of a dominant position

Section 1: The delimitation of the relevant markets

21 In order to determine whether Roche has the dominant position as alleged, it is necessary to delimit the relevant markets both from the geographical standpoint and from the standpoint of the product.

22 Recitals 3 and 6 to the contested decision show that the geographical market to be considered comprises the whole of the Common Market, that is to say the six Member States up to 31 December 1972 and the nine Member States thereafter.

23 The contested decision refers to bulk vitamins belonging to 13 groups, of which Roche manufactures and markets eight (A, B_1, B_2, B_3 (pantothenic acid), B_6, C, E and H (biotin) and five purchased by Roche from the producers and resold by it, B_{12}, D, PP, K and M).

The Commission found that there was a dominant position in the case of seven of the eight groups of vitamins manufactured by Roche, namely A, B_2, B_3, B_6, C, E and H.

The parties are agreed, on the one hand, that each of these groups has specific metabolizing functions and for this reason is not interchangeable with the others and, on the other hand, that in the case of the possible uses which these three groups have in common, namely for food, animal feed and for pharmaceutical purposes, the vitamins in question do not encounter the competition of other products.

24 The Commission after taking these factors into acount considered (Recital 20 to the contested decision) that each group of vitamins constitutes a separate market and Roche, after having first of all suggested that several groups might together form a single market, accepted this point of view with the reservation that in its opinion the C and E groups of vitamins, as far as each of them is concerned, together with other products form part of a wider market.

Therefore the question whether the Commission has correctly delimited the markets to which the C and E groups of vitamins belong must be examined.

25 It is an established fact that Vitamins C and E apart from their uses in the pharmaceutical industry and in food and animal feed — called bio-nutritive uses — are also sold, *inter alia,* as antioxidants, fermentation agents and additives — uses covered by the word "technological" and, to the extent to which there is any demand for these vitamins for the purpose of the said technological uses, they are exposed to the competition of other products suitable for the same uses.

26 According to Roche the conclusion to be drawn from this is that the C and E groups of vitamins are part of a much larger market comprising these other products and that the Commission has exaggerated Roche's share of the said markets, by failing to include the latter.

27 The Commission on the other hand takes the view that the products which can be substituted for Vitamins C and E for technological uses cannot be included in the same markets as these vitamins because the two possible uses of the latter mean that the degree of interchangeability of the said products with the vitamins in question is not sufficient.

Neither can the vitamins used in the end for bio-nutritive purposes and those used for technological purposes be divided into two separate markets, because, by reason of the two uses to which these products lend themselves, the manufacturers and purchasers are entirely free, especially on an expanding market, to use them for the purpose which they regard as the most profitable.

However assuming that the vitamins sold by Roche for technological purposes had to be excluded from the markets in question the same would have to be done in the case of its competitors with the result that the market shares would remain unchanged.

28 If a product could be used for different purposes and if these different uses are in accordance with economic needs, which are themselves also different, there are good grounds for accepting that this product may, according to the circumstances, belong to separate markets which may present specific features which differ from the standpoint both of the structure and of the conditions of competition.

However this finding does not justify the conclusion that such a product together with all the other products which can replace it as far as concerns the various uses to which it may be put and with which it may compete, forms one single market.

The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned.

There was no such interchangeability, at any rate during the period under consideration, between all the vitamins of each of the groups C and E and all the products which, according to the circumstances, may be substituted for one or other of these groups of vitamins for technological uses which are themselves extremely varied.

29 On the other hand there may be some doubt whether, for the purpose of delimiting the respective markets of the C and E groups of vitamins, it is necessary to include all the vitamins of each of these groups in a market corresponding to that group, or whether, on the contrary, each of these groups must be placed in a separate market, one comprising vitamins for bio-nutritive use and the other vitamins for technological purposes.

30 However in order to calculate the market shares of Roche and of its competitors correctly this question did not have to be answered because, as the Commission has rightly pointed out, if it had been necessary to draw this distinction, it would have had to be drawn for Roche's competitors as well as for Roche itself, and — in the absence of any indication to the contrary by the applicant — in similar proportions with the result that the market shares in percentages would remain unchanged.

Finally Roche, in answer to a question put to it by the Court, has stated that all the vitamins of each group, irrespective of the ultimate intended use of the product, were subject to the same price system so that they could not be split up into specific markets.

It follows from the foregoing that the Commission has correctly delimited the relevant markets in its contested decision.

Section 2: The structure of the relevant markets

31 Although each group of vitamins constitutes a market of its own, these separate markets nevertheless, as far as concerns production and marketing structures, have common features which must be brought out.

32 In the first place the parties agree that the markets of all the groups of vitamins expanded very considerably between 1950 and 1974 — although on a different scale — with production increasing all the time.

33 In particular as far as concerns *production* the parties also agree that, although the synthesis of vitamins, above all after the expiration of the patents, a not inconsiderable number of which was held by Roche, does not raise any especially difficult technical problems, production nevertheless presupposes large capital investment and necessitates special equipment, which is to a very great extent peculiar to each group of vitamins, with the result that the capacity of the factories during the above-mentioned period was geared to the estimated growth in demand over a period of ten years.

In spite of the vigorous growth mentioned above this market structure in the case of most of the groups of vitamins brought in its wake a surplus production capacity throughout the world.

This situation is illustrated in a striking manner by the observation recorded in the minutes of the meeting between Unilever and Roche on 11 December 1972 that Roche's capacity as a whole was alone sufficient to meet world demand and that Roche at that time was only operating at 50% of this capacity.

34 As far as producers operating within the Common Market are concerned this production capacity was concentrated during the period taken into consideration by the Commission in the hands of a limited number of undertakings — nine altogether according to the table in Recital 4 to the contested decision — the number of manufacturers in each group being even smaller namely, four in the case of vitamin A, three in the case of vitamin B_2, three in the case of vitamin B_3, four in the case of vitamin B_6, five in the case of vitamin C, four in the case of vitamin E and two in the case of vitamin H.

Some of these producers were moreover purchasers and resellers of vitamins which they did not produce themselves, while unspecified quantities of vitamins were marketed by large commercial firms which obtained their supplies from sources other than the nine producers mentioned in the decision.

35 As far as concerns the *demand* for bulk vitamins the special feature of the situation with the Common Market is the presence of a relatively large

number of purchasers — about 5 000 who buy from Roche — but a considerable proportion of this demand, which in the case of Roche may be estimated at approximately 25% of its sales within the Common Market, was at the period under consideration concentrated in the hands of 22 large firms, of which seven belonged to the pharmaceutical industry, five to the food industry and 10 to the animal feed industry.

All these customers, irrespective of the sector of the economy to which they belonged, were buyers of a good deal, if not all of the vitamins in question, the only apparent exception in this connexion, at all events as far as concerns its relations with Roche, being Unilever which only purchased vitamins in group A.

Section 3: The relevance of the factors used by the Commission to establish the existence of a dominant position

36 The Commission is of the opinion that Roche has a dominant position on the seven markets (A, B_2, B_3, B_6, C, E, H) and bases this view on the one hand, on the relationship between the applicant's market shares and those of its competitors and, on the other hand, on the existence of a number of factors which, if the market share is not in itself the determinative criterion, nevertheless secure Roche a marked ascendancy on the relevant markets.

The Commission draws the following conclusion from this (Recital 21 to the decision): "Roche enjoys such complete freedom of action on the relevant markets enabling it to impede effective competition within the Common Market that it has a dominant position on such markets".

37 Roche challenges the assessment of its market shares and also the truth and relevance of the other factors used in the contested decision.

It also blames the Commission for having omitted to examine and take into consideration Roche's conduct on the relevant markets and in particular the continual large falls in the prices of vitamins which prove that there was effective competition and that Roche had to yield to its pressure.

38 [Article 102] is an application of the general objective of the activities of the Community laid down by Article 3 (f) of the Treaty namely, the institution of a system ensuring that competition in the Common Market is not distorted.

[Article 102] prohibits any abuse by an undertaking of a dominant position in a substantial part of the Common Market in so far as it may affect trade between Member States.

The dominant position thus referred to relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.

39 Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.

A dominant position must also be distinguished from parallel courses of conduct which are peculiar to oligopolies in that in an oligopoly the courses of conduct interact, while in the case of an undertaking occupying a dominant position the conduct of the undertaking which derives profits from that position is to a great extent determined unilaterally.

The existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares.

40 A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned.

Even though each group of vitamins constitutes a separate market, these different markets, as has emerged from the examination of their structure, nevertheless have a sufficient number of features in common to make it possible for the same criteria to be applied to them as far as concerns the importance of the market shares for the purpose of determining whether there is a dominant position or not.

41 Furthermore although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position.

An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for — without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share — is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position.

42 The contested decision has mentioned besides the market shares a number of other factors which together with Roche's market shares would secure for it in certain circumstances, a dominant position.

These factors which the decision classifies as additional criteria are as follows:

(a) Roche's market shares are not only large but there is also a big disparity between its shares and those of its next largest competitors (Recitals 5 and 21 to the decision);

(b) Roche produces a far wider range of vitamins than its competitors (Recital 21 to the decision);

(c) Roche is the world's largest vitamin manufacturer whose turnover exceeds that of all the other producers and is at the head of a multinational group which in terms of sales is the world's leading pharmaceuticals producer (Recitals 5, 6 and 21 to the decision);

(d) Although Roche's patents for the manufacture of vitamins have expired Roche, since it has played a leading role in this field, still enjoys technological advantages over its competitors of which the highly developed customer information and assistance service which it has is evidence (Recitals 7 and 8 to the decision);

(e) Roche has a very extensive and highly specialized sales network (Recital 21 to the dicision);

(f) There is no potential competition (Recital 21 to the decision).

Furthermore during the proceedings before the Court the Commission adduced as a factor establishing Roche's dominant position the latter's ability, notwithstanding lively competition, to maintain its market shares substantially intact.

43 Before considering whether the factors taken into account by the Commission can in fact be confirmed in Roche's case it is necessary to ascertain, since the applicant challenges their relevance, whether these factors, in the light of the special features of the relevant markets and of the market shares, are of such a kind as to disclose the existence of a dominant position.

44 In this connexion it is necessary to reject the criterion based on retention of market shares, since this may just as well result from effective competitive behaviour as from a position which ensures that Roche can behave independently of competitors, and the Commission, while admitting that there is competition, has not mentioned the factors which may account for the stability of market shares where it has been found to exist.

However if there is a dominant position then retention of the market shares may be a factor disclosing that this position is being maintained, and, on the other hand, the methods adopted to maintain a dominant position may be an abuse within the meaning of [Article 102] of the Treaty.

45 The fact that Roche produces a far wider range of vitamins than its competitors must similarly be rejected as being immaterial.

The Commission regards this as a factor establishing a dominant position and asserts that "since the requirements of many users extend to several groups of vitamins, Roche is able to employ a sales and pricing strategy which is far less dependent than that of the other manufacturers on the conditions of competition in each market".

46 However the Commission has itself found that each group of vitamins constitutes a specific market and is not, or at least not to any significant extent, interchangeable with any other group or with any other products (Recital 20 to the decision) so that the vitamins belonging to the various groups are as between themselves products just as different as the vitamins compared with other products of the pharmaceutical and food sector.

Moreover it is not disputed that Roche's competitors, in particular those in the chemical industry, market besides the vitamins which they manufacture themselves, other products which purchasers of vitamins also want, so that the fact that Roche is in a position to offer several groups of vitamins does not in itself give it any advantage over its competitors, who can offer, in addition a less or much less wide range of vitamins, other products which are also required by the purchasers of these vitamins.

47 Similar considerations lead also to the rejection as a relevant factor of the circumstance that Roche is the world's largest vitamin manufacturer, that its turnover exceeds that of all the other manufacturers and that it is at the head of the largest pharmaceuticals group in the world.

In the view of the Commission these three considerations together are a factor showing that there is a dominant position, because "it follows that the applicant occupies a preponderant position not only within the Common Market but also on the world market; it therefore enjoys very considerable freedom of action, since its position enables it to adapt itself easily to the developments of the different regional markets. An undertaking operating throughout the markets of the world and having a market share which leaves all its competitors far behind it does not have to concern itself unduly about any competitors within the Common Market".

Such reasoning based on the benefits reaped from economics of scale and on the possibility of adopting a strategy which varies according to the different regional markets is not conclusive, seeing that it is accepted that each group

of vitamins constitutes a group of separate products which require their own particular plant and form a separate market, in that the volume of the overall production of products which are different as between themselves does not give Roche a competitive advantage over its competitors, especially over those in the chemical industry, who manufacture on a world scale other products as well as vitamins and have in principle the same opportunities to set off one market against the other as are offered by a large overall production of products which differ from each other as much as the various groups of vitamins do.

48 On the other hand the relationship between the market shares of the undertaking concerned and of its competitors, especially those of the next largest, the technological lead of an undertaking over its competitors, the existence of a highly developed sales network and the absence of potential competition are relevant factors, the first because it enables the competitive strength of the undertaking in question to be assessed, the second and third because they represent in themselves technical and commercial advantages and the fourth because it is the consequence of the existence of obstacles preventing new competitors from having access to the market.

As far as the existence or non-existence of potential competition is concerned it must however be observed that, although it is true — and this applies to all the groups of vitamins in question — that because of the amount of capital investment required the capacity of the factories is determined according to the anticipated growth over a long period so that access to the market by new producers is not easy, account must also be taken of the fact that the existence of considerable unused manufacturing capacity creates potential competition between established manufacturers.

Nevertheless Roche is in this respect in a privileged position because, as it admits itself, its own manufacturing capacity was, during the period covered by the contested decision, in itself sufficient to meet world demand without this surplus manufacturing capacity placing it in a difficult economic or financial situation.

49 It is in the light of the preceding considerations that Roche's shares of each of the relevant markets, complemented by those factors which in conjunction with the market shares make it possible to show that there may be a dominant position, must be evaluated.

Finally it will also be necessary to consider whether Roche's submissions relating to the implication of its conduct on the market, mainly as far as concerns prices, are of such a kind as to alter the findings to which the examination of the market shares and the other factors taken into account might lead.

Section 4: Application of the relevant criteria to the different groups of vitamins

(a) The vitamin A group

50 The parties both concede that Roche's market share within the Common Market may be put at 47 % both as to value and quantity.

According to the data produced by the Commission, which Roche does not dispute, the shares of the other producers in 1974 may be put at 27 %, 18 %, 7 %, and 1 %.

51 Since the relevant market thus has the particular features of a narrow oligopolistic market in which the degree of competition by its very nature has already been weakened, Roche's share, which is equal to the aggregate of the shares of its two next largest competitors, proves that it is entirely free to decide what attitude to adopt when confronted by competition.

Roche's technical lead over its competitors due to the fact that it is the proprietor of several patents relating to vitamin A, even after the expiration of these patents, is a further indication that it occupies a dominant position.

As has been indicated above the same applies to the absence of potential competition from new manufacturers, whereas the competition derived from the surplus manufacturing capacity of existing undertakings rather favours Roche as is apparent from an extract from Management Information of the middle of August 1971 which reads "Although BASF will continue to intensify its activities, we expect to achieve a further steady increase of our turnover. However, the present overcapacity of production is such that a fixing of prices cannot be expected for the next few years. Such a development would, of course, be accelerated if one of our smaller competitors ceased production".

52 Therefore the Commission was right to find that the applicant occupies a dominant position on the market in vitamin A.

The fact that Roche had to obtain its supplies of raw materials for the manufacture of vitamins of group A from an undertaking of the chemical industry which also manufactured vitamin A and which was consequently its competitor is not of such a kind as to alter the Commission's conclusions, since Roche has never claimed that it was in any difficulties at all either as regards the frequency of the deliveries of its supplies or as regards prices.

(b) The vitamin B group

53 The Commission in its contested decision had evaluated Roche's market share at 86 %.

In the document which was jointly prepared during the written procedure it disclosed the bases of its calculations of Roche's market shares both in value and in quantity, and it appears from the tables which it produced that all the imports of vitamins into the Common Market for which there are statistics have been taken into consideration.

On the basis of these data it arrives at the following figures:

Vitamin B_2 Roche's market share	1972 (6 Member States)	1973 (9 Member States)	1974 (9 Member States)
value	87.0%	81.2%	80.6%
quantity	84.5%	74.8%	80.8%

54 Roche simply asserts in substance "that since, as far as concerns competition, it has to rely on mere estimates it is unable to adduce any evidence to the contrary", but it estimates its share of the world market as being considerably less and its share of the Common Market at not more than 50 %.

In order to justify the difference between the latter estimate and the Commission's it refers to the fact that "if the fermentation production

capacity, especially in the USA, of 200 to 300 tonnes per annum, which was reduced to a minimum at the beginning of 1970 but which may at any moment be reactivated, is added to these figures its share is only about 50 %", thus pleading — without giving any other particulars — either the existence of potential competition or a reduction of its own manufacturing capacity in the USA.

55 If the first assumption proved to be correct it would be such as to raise the presumption that after 1970 some of Roche's competitors were eliminated from the market.

Even if it is assumed — the position is not clear — that the reference is to the closing down of Roche's manufacturing capacity, this fact cannot be relied on for the purpose of challenging the Commission's calculations as long as it has not been established that competitors did not also close down their manufacturing capacity, and that, in any case, the inevitable outcome of this was a reduction of Roche's market shares within the Common Market rather than a rationalization of production.

Furthermore although the existence of surplus manufacturing capacity may in certain circumstances be a consistent element of potential competition likely to have an effect on the question whether there is a dominant position — although it has already been confirmed above that this factor did not apply to Roche during the period under consideration — it cannot affect the evaluation of the market shares which have in fact been acquired.

56 In these circumstances the Commission's calculations as corrected, which moreover are sufficiently dependable to be capable of acceptance, cannot be called in question on the strength of the above-mentioned objections and the market shares which they disclose are so large that they are in themselves evidence of a dominant position.

(c) The vitamin B_3 (pantothenic acid) group

57 The Commission has admitted that the figures used in the contested decision had to be corrected and the two parties agree the following evaluations of the market shares:

Vitamin B_3 Roche's market share	1972 (6 Member States)	1973 (9 Member States)	1974 (9 Member States)
value	28.9%	34.9%	51.0%
quantity	18.9%	23.4%	41.2%

58 Market shares of this size either in value or in quantity, complemented by the statement in the document jointly prepared by the parties that the figures for 1971 were 6 % lower still than those for 1972 do not in themselves constitute a factor sufficient to establish the existence of a dominant position for most of the period considered by the Commission.

On the contrary it has become apparent that the rectification which the latter had to carry out was due to its omission to take account of the imports of a Japanese competitor which in 1973 accounted for 30 % of the market.

On the other hand the Commission, in the case of this particular market, has not indicated what the additional factors would be, which, together with the market share as corrected, nevertheless would be of such a kind as to admit of the existence of a dominant position.

These findings lead to the conclusion that, as far as concerns vitamin B_3, there is insufficient evidence of the existence of a dominant position held by Roche for the period under consideration.

(d) The vitamin B_6 group

59 The Commission had evaluated Roche's market share at 95 % whereas Roche, which has not supplied any particulars relating to the Common Market, admits that it has a market share of about 60 to 70 % of the world market.

After the parties had compared their figures (Annexes 1 (e) and 2 (g) to the document relating to matters agreed by the parties) they were unable to agree a joint evaluation and the Commission produced the following figures after having corrected its own evaluation:

Vitamins B_6 Roche's market share	1972 (6 Member States)	1973 (9 Member States)	1974 (9 Member States)
value (B_6 + H)	87.0%	90.0%	83.9%
quantity	84.2%	86.0%	88.4%

60 It must be noted that, although the market shares cover the two groups B_6 and H, at least in terms of value, because the vitamins of groups B_6 and H fall within the same customs heading, Roche has nevertheless not contended that this fact is not of such a kind as to alter the resulting orders of magnitude.

Roche maintains, without going into a more detailed explanation, that this estimate must be reduced by at least 20 %, but even if this view were to be accepted without qualification, Roche's market shares are nevertheless so large that they prove the existence of a dominant position.

This is all the more true because at the relevant time the market share of none of Roche's four next largest competitors reached 10 % and the shares of some of them were probably less than 5 %.

(e) The vitamin C group

61 The Commission in the contested decision had estimated Roche's market share at 68 %, whereas Roche during the proceedings put forward the figure of 50%.

The parties, after having compared their views, agreed on the following estimates of the market shares on the assumption that only the market in vitamins is taken into consideration:

Vitamin C Roche's market share	1972 (6 Member States)	1973 (9 Member States)	1974 (9 Member States)
value	65.7%	66.2%	64.8%
quantity	64.4%	63.8%	63.0%

62 Roche takes the view that this estimate should be corrected by allowing for the fact that the market in question should also include products competing with the technological uses of Vitamin C and it asserts that in those circumstances its market share would not exceed 47%.

63 Since the considerations set out above relating to the delimitation of the relevant market for vitamins intended both for bionutritive and technological

uses have led to the argument developed by Roche being rejected, the market shares which the parties have agreed of the vitamin C market as such must be accepted. They are evidence of the existence of a dominant position.

As far as concerns this market too — on which moreover there was a shortage in 1971 — the gap between Roche's shares (64.8%) and those of its next largest competitors (14.8% and 6.3%) was such as to confirm the conclusion which the Commission reached.

(f) The vitamin E group

64 The Commission in its contested decision had evaluated Roche's share of the vitamin E market at 70%, whereas Roche during the proceedings put forward the figure of 40%.

The parties, after having compared their views, jointly agreed to evaluate the market shares, on the assumption that only the vitamin E market has to be taken into consideration, as follows:

Vitamin E Roche's market share	1972 (6 Member States)	1973 (9 Member States)	1974 (9 Member States)
value	54%	64%	58%
quantity	50%	60%	54%

Moreover Roche estimates that its share for 1970 and 1971 is 7% lower still than that for 1972.

65 Roche takes the view, for the same reasons which it put forward in relation to vitamin C, that the relevant market should also include products competing with the technological uses of vitamin E and it asserts that in those circumstances its market share for 1974 would not exceed 40%.

66 Since Roche's argument as far as concerns the delimitation of the relevant market has been rejected for the reasons mentioned above it is necessary to take into consideration the market shares which the parties have agreed.

The size of these shares, which is in itself significant, is made the more so by the fact that the shares of Roche's competitors must be estimated, after the before-mentioned rectification, for 1974, according to value, at 16%, 6% and 1% in the case of the other producers and at 19% for one or more importers who were in general firms operating from non-Member States.

Such a position as the one which has been established conforms even more typically than the one established in the case of vitamin A to the pattern of a narrow oligopolistic market in which Roche's share is much larger than the combined shares of the two next largest competitors.

Therefore the Commission was right to find that there was a dominant position on this market.

(g) The vitamin H group

67 The applicant has admitted that it had a 100% share of this market and that during the period under consideration its share amounted to 93% with the result that it in fact has a monopoly.

(h) Summary

68 It follows from the foregoing that, as far as concerns the groups of vitamins A, B_2, B_6, C, E and H, all the constituent elements of a dominant position were present whereas the existence of such a position in the case of vitamin B_3 has not been established.

Section 5: The applicant's conduct on the market

69 It is however necessary to consider whether the preceding conclusions are belied by the applicant's behaviour on the relevant markets, which in its view shows that there was not only lively competition but also that such competition brought pressure to bear on it.

On this point it places special reliance on the fact that the prices of the various groups of vitamins continually fell and also that in certain Member States its market shares decreased.

It also refers to the information contained in various internal documents and especially in "Management Information" and "Marketing News" which it circulated regularly and which contain an analysis of the market situation of each group of vitamins and also to the information relating to the European Bulk Managers meeting organized by Roche in Basle in October 1972.

70 The Court has already held *inter alia* in its judgement of 14 February 1978 in Case 27/76 *United Brands Company and United Brands Continentaal B.V.* v *Commission of the European Communities* [1978] ECR 207 that even the existence of lively competition on a particular market does not rule out the possibility that is a dominant position on this market since the predominant feature of such a position is the ability of the undertaking concerned to act without having to take account of this competition in its market strategy and without for that reason suffering any detrimental effects from such behaviour.

71 However, the fact that an undertaking is compelled by the pressure of its competitors' price reductions to lower its own prices is in general incompatible with that independent conduct which is the hallmark of a dominant position.

The applicant has produced in the annexes to its application a number of graphs with two different curves, the one for measuring falls in prices and the other for measuring increases in production of Roche's different groups of vitamins on the world market during a period which covers, as the case may be, the years from 1940 to 1954 up to the end of 1974.

72 It must however be noted that these graphs relate to the world market and that Roche, which has several times stressed the disparities between the price fluctuations from one Member State to another, cannot therefore maintain that the variations on the world market are necessarily representative of price trends in the Community.

Even if it is assumed that the recorded world price trends may be regarded as reflecting the general trend of prices within the Common Market, an examination of the graphs however makes it clear that, to a very great extent, the prices of different groups of vitamins fell considerably so long as production only increased slowly, but that these falls were greatly reduced and even gradually superseded by a very high degree of stability as from the time

when there was a big increase in the production of each specific group of vitamins, namely: from 1964 in the case of vitamin A, from 1956 in the case of vitamin B_2; from 1966 in the case of vitamin B_6; from 1958 in the case of vitamin C; from 1950 in the case of vitamin B_3; from 1965 in the case of vitamin E, while in the case of vitamin H (biotin), the price curve, which had been stable up to 1970, as from that time falls slightly while at the same time production expands.

These data show that there is a correlation between prices on the one hand, and the volume of production and costs on the other, rather than between prices and the pressure of competition.

73 Roche, in answer to questions put by the Court, produced a number of tables (Annex 4 (a-i) of the document relating to matters agreed by the parties) setting out those variations in the prices of vitamins considered by Roche to be the most representative in each group between 1970 and 1976 for each Member State as well as the average prices based on national prices throughout the Community.

74 These tables in fact show that the price rises and falls varied considerably.

However, the price variations of the same product during the same period differ markedly in the various Member States and this discloses a partitioning of the markets and would be likely to raise the presumption of a corresponding price strategy.

It is noteworthy that in the case of vitamin H (biotin), in respect of which Roche admits that its market share was 100% in 1970 and 93% in 1974, Annex 4 to the document relating to matters agreed by the parties shows that there were also considerable price reductions, which, expressed in Swiss francs and taking average figures, record falls throughout the whole of the Common Market from 40.54 Swiss francs in 1970 to 30.72 Swiss francs in 1973 and to 29.85 Swiss francs in 1974. Such falls in prices cannot in the case of an undertaking having a market share of between 93% and 100% be attributed to the pressure of competition but are determined rather by a price policy intentionally and freely adopted and are not in any case inconsistent with the existence of a dominant position.

75 This finding is substantially confirmed by the internal documents mentioned above.

As far as concerns in particular vitamin H (biotin), Management Information of 8 September 1972 discloses that, although a competitor — the Sumitomi undertaking — first began to manufacture biotin at the end of 1971, it preferred to sell part of its production to Roche and the rest in the United States and that Roche, anticipating the appearance of another producer during 1973, decided to strike first and drop its "inflexible price policy at once".

It is in fact in the year 1973 that a significant fall in the price of vitamin H has been recorded.

76 These factors show that Roche is certainly not subjected to any competitive pressure but by means of its position is able to adopt a price policy designed to forestall such pressure.

Furthermore the same number of Management Information recommends among other precautions to be taken the use of fidelity contracts.

77 As far as concerns vitamin C, of which Roche's market share between 1972 and 1974 may be estimated at about 65%, Marketing News of 6 December 1971 states that, in view of the shortage of this product, the representatives and subsidiaries of Roche, having regard to the long-term market strategy, are advised "to give preference to the food industry, both in respect of supplies and price advantages" as opposed to the pharmaceutical industry which will have to obtain part of its supplies from the brokers.

78 Although the figures and documents produced show that price variations, which were sometimes considerable, may be recorded on the markets for all the different vitamins, these variations appear in certain cases to bear no relation to the existence of competition, while in other cases it is usually Roche which at least plays the part of the price leader.

Furthermore the documents produced taken as a whole disclose the existence of a first-rate commercial and marketing organization, through which it is possible not only to carry out a systematic survey of the markets but also to detect the slightest intention on the part of any possible competitor to enter the market for one or other of the products, and which is capable not only of reacting instantaneously but also of forestalling such endeavours by taking appropriate steps.

All these considerations show that the price variations alleged and in fact confirmed do not prove that there was any competitive pressure which was likely to jeopardize the marked degree of independence enjoyed by Roche as far as concerns its market strategy and that such variations are not of such a kind as to invalidate the findings that there is a dominant position based, in the case of each group of vitamins, on the combination of the market shares and the other factors used.

79 Consequently the Commission was right to find in the contested decision that there was such a position as far as concerns the markets in vitamins A, B_2, B_6, C, E and H.

On the other hand it was wrong to find that there was such a position on the vitamin B_3 market.

II — The existence of an abuse of a dominant position

Section 1: Preliminary observations

80 According to the contested decision the applicant has abused its dominant position by concluding with 22 large purchasers of vitamins contracts of sale — about 30 (some of them moreover were renewals with or without amendments of a previous contract) — under which these purchasers undertook to obtain all or most of their requirements of vitamins or certain vitamins expressly mentioned therein exclusively from Roche or which gave them an incentive to do so by including a promise of a discount which the Commission classifies as a fidelity rebate.

According to the Commission (Recitals 22 to 24 of the contested decision) the exclusivity agreements and the fidelity rebates complained of are an abuse within the meaning of [Article 102] of the Treaty, on the one hand, because they distort competition between producers by depriving customers of the undertaking in a dominant position of the opportunity to choose their sources of supply and, on the other hand, because their effect was to apply dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage, in that Roche offers two purchasers two different prices for an identical quantity of the same product

depending on whether these two buyers agree or not to forego obtaining their supplies from Roche's competitors.

81 The contracts at issue are for the sale of vitamins which belong to one or more of the groups in respect of which a dominant position has been found to exist to purchasers owning within the Common Market undertakings for which part or all of these vitamins are intended.

These contracts may be catalogued as follows and will be referred to later by the name of the purchaser:

1. Afico/Nestlé: *one* contract for one year commencing on 1 January 1968 renewable by tacit agreement.
2. American Cyanamid: *one* contract for one year commencing on 1 January 1971 renewable by tacit agreement.
3. Animedica. *two* contracts, one a multi-national contract of 12 January 1973, the other for supplies to the Federal Republic of Germany of 9 May 1972, each of them for one year renewable by tacit agreement.
4. Beecham: *three* successive agreements dated 1 April 1972, 1 April 1973 and 31 December 1973 covering the periods 1 April 1972 to 31 March 1973; 1 April 1973 to 31 December 1973 respectively and the year 1974.
5. Capsugel/Parke Davis: *one* contract of 22 March 1967 which took effect as from 15 March 1967.
6. Dawe's: *one* contract which took effect from 1 August 1971 without any stipulation as to its duration.
7. Guyomarc'h: *one* contract which took effect as from 1 May 1972 for a period of one year and renewable by tacit agreement.
8. Isaac Spencer: *two* contracts, the first covering the period from 1 July 1973 to 31 December 1973, the second covering the year 1974.
9. Merck: *three* contracts, the first dated 3 March 1972, relating to vitamin A, for a period of five years, renewable by tacit agreement for further periods of two years; the second of 3 March 1972, relating to vitamin E and containing a clause concerning its duration almost identical to that in the preceding contract; the third, dated 5 July 1971, relating to vitamin B_6 for a period up to 31 December 1966, then renewable by tacit agreement for successive periods of two years.

10. Nitrovit/Imperial Foods: *two* contracts, one of 22 December 1972, the other of 11 January 1974, each for a period of one year.

11. Organon: *one* contract of 15 April 1970, amended on 10 October 1974, for periods of one year renewable by tacit agreement.

12. Pauls and Whites: *three* contracts dated 2 March 1972, 16 July 1973 and 22 January 1974 for the periods 1 April 1972 to 31 March 1973, 1 April 1973 to 31 December 1973 and for 1974 respectively.

13. Protector: *one* contract which took effect as from 1 July 1968 for the year 1968, which was in fact renewed each year and in any case until the end of 1972.

14. Provima: *one* contract of 30 September 1972, amended on 27 November 1974, with no stipulation as to duration.

15. Radar: *one* contract of 23 February 1971, for the year 1971 which refers to a similar agreement entered into previously for 1970.

16. Ralston Purina: *one* contract of 19 January 1970, for the year 1970, renewed at least until the end of 1974.

17. Ramikal: *one* contract of 22 August 1972, which took effect as from 1 January 1972 for an indefinite period and replaced a contract going back to 1964.

18. Sandoz: *one* contract which took effect in 1965 for a calendar year renewable by tacit agreement from year to year.

19. Trouw: *one* contract of 1 July 1971, which took effect as from 1 January 1971 and was amended on 27 November 1972.

20. Unilever: *three* contracts of 9 January 1974, the first two relating to supplies of vitamins to the United Kingdom, vitamin A, type B in the case of the first contract, other types of vitamin A in the case of the second contract, while the third covers supplies of vitamin A on the continent, in the case of all three contracts for the years 1974 and 1975.

21. Upjohn: *one* contract which took effect on 1 November 1967 without any stipulation as to duration.

22. Wyeth: *one* contract which commenced on 1 January 1964 without any stipulation as to duration.

Section 2: Analysis of the contracts at issue

82 Although these contracts were drawn up at different times and in terms which are not always identical, they may be divided into three categories as far as concerns the scope of the undertaking by the purchaser to obtain its supplies.

83 Some of them contained a specific undertaking by the purchaser to obtain exclusively from Roche either:

(a) All or almost all of its requirements of bulk vitamins manufactured by Roche: Afico/Nestlé, Dawe's, Organon, Provimi (except for 10% thereof for the purpose of comparison), Ralston, Purina, Upjohn (all vitamins except four special vitamin A products intended for animal feed in respect of which Roche has granted Upjohn a licence under its trademark Injacom);

(b) on all its requirements of certain vitamins therein expressly mentioned: Merck (vitamin A, Vitamin B_6 over and above the 200 tonnes manufactured by Merck itself, and Vitamin E);

(c) on a percentage stipulated in the contract of its total requirements (American Cyanamid, Animedica Allemagne and Animedica International: .80%) or of its requirements of certain specified vitamins (Guyomarc'h: 75% of its requirements of vitamins A, B, C, E);

(d) on "the major part" ("la majeure partie", "überwiegender Teil") of its requirements of vitamins or of certain vitamins (Beecham, Isaac Spencer, Nitrovit, Pauls and Whites, Ramikal, Trouw).

84 In some of the contracts the purchaser undertook to "give preference to Roche" (Wyeth) or expressed its "intention" to obtain its supplies exclusively from Roche (Capsugel/Parke Davis) or agreed to recommend its subsidiaries to do the same (Sandoz), either in respect of all their vitamin requirements or of certain vitamins therein specified (Capsugel/Parke Davis: A, B_1, B_2, B_6, C, E, H) or again in relation to a fixed percentage of their total requirements (Protector: 80%).

85 Finally the contracts concluded with Merck and Unilever respectively had special features which makes it desirable to examine separately the undertakings which they contained.

86 The duration of most of the contracts was for an indefinite period, either according to the terms thereof or because of the operation of a clause providing for renewal by tacit agreement, and they were clearly designed to establish trading relations for several years.

Most of the contracts were entered into as far back as 1970 and were in force during the whole or part of the period 1970 to 1974.

87 All the above-mentioned contracts with the exception of those entered into with Unilever provided for the grant, under various names, of discounts or rebates calculated on the total purchases of vitamins, whatever group the latter belong to, during a given period usually of a year or six months.

It was a special feature of the contracts with Beecham, Isaac Spencer, Nitrovit, Pauls and Whites, Sandoz and Wyeth that the percentage of the rebates provided for was not fixed but increased — in general from 1% to 3% — according to the amounts purchased every year.

Except in the case of Animedica International, Guyomarc'h, Merck B_6, Protector and Upjohn, the contracts contained a clause, called the English clause, under the terms of which the customers could — by adopting various methods which will be examined later on — bring to Roche's notice by way of comparison more favourable offers from competitors with the result that, if Roche did not adjust its prices, the customer affected was released, as far as that purchase was concerned, from its obligation to obtain supplies exclusively from Roche, or, if no such specific obligation had been stipulated, could purchase from the said competitors without thereby losing in either case, as far as concerns past or future purchases, the benefit of the above-mentioned rebate.

88 It is in the light of these special features that it is necessary to consider whether the disputed contracts were an abuse by Roche of its dominant position.

Section 3: The determination, in the light of Article 86 of the Treaty, of the legal nature of the undertakings to obtain supplies exclusively from Roche and of the system of rebates

89 An undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise

on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of [Article 102] of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate.

The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position.

90 Obligations of this kind to obtain supplies exclusively from a particular undertaking, whether or not they are in consideration of rebates or of the granting of fidelity rebates intended to give the purchaser an incentive to obtain his supplies exclusively from the undertaking in a dominant position, are incompatible with the objective of undistorted competition within the Common Market, because — unless there are exceptional circumstances which may make an agreement between undertakings in the context of [Article 101] and in particular of paragraph (3) of that article, permissible — they are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.

The fidelity rebate, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers.

Furthermore the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply.

Finally these practices by an undertaking in a dominant position and especially on an expanding market tend to consolidate this position by means of a form of competition which is not based on the transactions effected and is therefore distorted.

91 For the purpose of rejecting the finding that there has been an abuse of a dominant position the interpretation suggested by the applicant that an abuse implies that the use of the economic power bestowed by a dominant position is the means whereby the abuse has been brought about cannot be accepted.

The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

Section 4: The nature of the rebates at issue

92 The applicant nevertheless submits that the agreed rebates are quantity and not fidelity rebates or that they correspond to an economic transaction with the customer justifying consideration of this kind.

93 In considering this submission it is necessary to distinghuish between those contracts which provide for rebates at a fixed rate and those in which rebates at progressive rates are provided for.

(a) Contracts which provide for rebates at a fixed rate

94 First the applicant's argument cannot be accepted in the case of those contracts which provide for a rebate at a fixed rate.

95 In fact — and without prejudice to the observation that where exclusivity has been formally accepted the granting or not of a rebate is in the final analysis irrelevant — none of the said contracts includes any undertaking relating to fixed or only estimated quantities or linked to the volume of purchases but they all refer to "requirements" or a proportion of the said requirements.

Moreover in most of them the parties have themselves described the clause as a fidelity rebate clause (American Cyanamid, Organon, Provimi, Ralston Purina, Trouw) or used terms which strongly underline the link between the exclusivity and the rebates allowed.

96 The Dawe's contract stipulates that the rebate is granted "in return" for the exclusivity which has been accepted; the Ramikal contract provides for a confidential annual bonus (vertraulicher Jahresbonus), "which is a genuine bonus for your purchases from Roche" (eine echte Vergütung auf ihre Bezüge von Roche) and is independent of the quantity rebates to which Ramikal remains entitled.

It is true that in four of the contracts, namely the Afico/Nestlé, Capsugel/Parke Davis, Provimi (as from 1974) and Upjohn contracts, the reason why the rebate is allowed on all purchases, according to the terms of the said contracts, is that these customers guarantee to Roche payment of the bills resulting from orders placed directly by subsidiaries of those customers.

It is nevertheless difficult to accept that rebates calculated in all respects on the same basis as those which in the other contracts are acknowledged to be fidelity rebates, can be consideration for an undertaking by international companies such as Nestlé, Parke Davis and Upjohn designed to reassure Roche that their subsidiaries are solvent.

Nor is it possible to accept Roche's argument that, at least in the case of certain vitamins such as biotin (vitamin H), the rebate was an introductory rebate, since the contracts neither distinguish between the different rebates according to their function fixed in a general and uniform way for all or a large proportion of each customer's requirements nor allow any such distinction to be drawn.

(b) Contracts which provide for rebates at progressive rates

97 A number of the contracts at issue, namely Beecham (1972, 1973, 1974), Isaac Spencer (1973, 1974), Nitrovit (1973, 1974), Pauls and Whites (1972, 1973, 1974) contain, on the one hand, an undertaking relating to "the major part" of the purchaser's requirements and, on the other hand, a rebate clause providing for a discount, the percentage whereof increases — in general from 1% to 2%, and then to 3% — depending on whether during the period of one year a greater or lesser percentage of the purchaser's estimated

requirements has been met, each of the contracts containing a value estimate (in pounds sterling) of the total requirements and, in addition, in the case of two of the contracts (Pauls and Whites 1972, Beecham 1972) a quantitative estimate of each of the types of vitamins referred to in the contract.

By way of example reference may be made to the Beecham contract (1 April 1972 to 31 March 1973) whereby, since the annual requirements were estimated at a maximum of £300 000, the rebate provided for was 1% if the turnover reached 60%, namely £180 000, 1.5% if it reached 70%, namely £210 000, and 2% if it reached 80%, namely £240 000.

There are similar formulae in the other contracts, the estimate of requirements differing from contract to contract and from year to year, obviously to allow for the customer's capacity of absorption.

98 Although the contracts at issue contain elements which appear at first sight to be of a quantitative nature as far as concerns their connexion with the granting of a rebate on aggregate purchases, an examination of them however shows that they are in fact a specially worked out form of fidelity rebate.

99 In the first place it is noticeable that this particular form of rebate is incorporated in those very contracts in which the undertaking by the purchaser to obtain supplies was drawn up in the form which placed him under the least constraint, namely that the purchaser was to obtain "most of his requirements", so that the purchaser concerned was left with considerable freedom of action.

The indeterminate nature of the undertaking thus worded is to a great extent offset by an estimate of annual requirements and by the granting of a rebate increasing in accordance with the percentage of the requirements which are met and this progressive rate is clearly a powerful incentive to obtain the maximum percentage of the said requirements from Roche.

100 This method of calculating the rebates differs from the granting of quantitative rebates, linked solely to the volume of purchases from the producers concerned in that the rebates at issue are not dependent on quantities fixed objectively and applicable to all possible purchasers but on estimates made, from case to case, for each customer according to the latter's presumed capacity of absorption, the objective which it is sought to attain being not the maximum quantity but the maximum requirements.

101 Consequently the Commission was also right to regard the said contracts containing fidelity rebates as an abuse of a dominant position.

Section 5: The English clause

102 All the contracts in question except five (the Animedica International, Guyomarc'h, Merck B_6, Protector and Upjohn contracts) contain a clause, called the English clause, under which the customer, if he obtains from competitors offers at prices which are more favourable than those under the contracts at issue may ask Roche to adjust its prices to the said offers; if Roche does not comply with this request, the customer, in derogation from his undertaking to obtain his requirements exclusively from Roche, is entitled to get his supplies from the said competitor without for that reason losing the benefit of the fidelity rebates provided for in the contracts in respect of the other purchases already effected or still to be effected by him from Roche.

103 In the applicant's view this clause destroys the restrictive effect on competition both of the exclusivity agreements and of the fidelity rebates.

In particular in the case of those contracts which do not contain an express undertaking by the purchaser to obtain his requirements exclusively from Roche the English clause eliminates "the attractive effect" of the rebates at issue since the customer does not have to choose between acceptance of Roche's less attractive offers or losing the benefit of the fidelity rebates on all purchases which he has already effected from Roche.

104 There is no doubt whatever that this clause makes it possible to remedy some of the unfair consequences which undertakings by purchasers to obtain their requirements exclusively from Roche or the provision for fidelity rebates on all purchases accepted for relatively long periods, might have in so far as those purchasers are concerned.

Nevertheless it is necessary to point out that the purchaser's opportunities for exploiting competition for his own benefit are more restricted than appears at first sight.

105 Apart from the fact that the English clause is not in the Guyomarc'h, Merck B_6, Animedica International, Protector and Upjohn contracts it is subject to

conditions which limit its scope and in fact leave Roche with a wide discretion as to the possibility of the customer's invoking it.

A number of contracts stipulate not only that the offer must come from important competitors but also from large competitors operating on the same scale as Roche or again provide that the offers must not only be comparable as to the quality of the product but also as to their continuity and such a condition, by eliminating a more favourable but occasional method of obtaining supplies, strengthens the exclusivity.

Other contracts stipulate that the offer must come from producers to the exclusion of brokers or commercial agents and such a condition in fact eliminates non-European competitors who operate on the market through commercial firms as was found when the parties at the request of the Court separately undertook an investigation of the market shares.

In some contracts the English clause is linked directly with Roche's pledge to guarantee the best prices "on the local market" and it only operates within these limits, and this not only restricts its scope but brings about a partitioning of the markets which is incompatible with the Common Market.

106 Furthermore the English clause does not remove the discrimination resulting from the fidelity rebates between purchasers in similar circumstances depending on whether or not they reserve their freedom to choose their suppliers.

107 It is particularly necessary to stress that, even in the most favourable circumstances, the English clause does not in fact remedy to a great extent the distortion of competition caused by the clauses obliging purchasers to obtain their requirements exclusively from Roche and by the fidelity rebates on a market where an undertaking in a dominant position is operating and where for this reason the structure of competition has already been weakened.

In fact the English clause under which Roche's customers are obliged to inform it of more favourable offers made by competitors together with the particulars above mentioned — so that it will be easy for Roche to identify the competitor — owing to its very nature, places at the disposal of the applicant information about market conditions and also about the alter-

natives open to, and the actions of, its competitors which is of great value for the carrying out of its market strategy.

The fact that an untertaking in a dominant position requires its customers or obtains their agreement under contract to notify it of its competitor's offers, whilst the said customers may have an obvious commercial interest in not disclosing them, is of such a kind as to aggravate the exploitation of the dominant position in an abusive way.

Finallly by virtue of the machinery of the English clause it is for Roche itself to decide whether, by adjusting its prices or not, it will permit competition.

108 It is able in this way, owing to the information which its own customers supply, to vary its market strategy in so far as it affects them and its competitors.

It follows from all these factors that the Commission's view that the English clauses incorporated in the contracts at issue were not of such a kind as to take them out of the category of abuse of a dominant position has been arrived at by means of a proper construction and application of [Article 102] of the Treaty.

Section 6: Application of the criteria adopted in the contracts at issue (other than Unilever and Merck)

109 The contracts which contain an express obligation by purchasers to obtain from Roche all (Afico, Dawe's, Organon, Provimi, Ralston, Purina, Upjohn) or a very large percentage (Animedica Allemagne, Animedica International, American Cyanamid, Guyomarc'h) of their requirements of vitamins or of their requirements of certain groups of vitamins designated in the contracts, satisfy the conditions amounting to conduct restricting competition as set out above and represent an abuse of a dominant position.

The same applies to contracts whereby the purchaser undertakes to reserve to Roche the supplying of the "major part" ("majeure partie", "überwiegender Teil") of its requirements (Beecham, Pauls and Whites, Nitrovit, Isaac Spencer, Ramikal and Trouw) especially as the less restrictive nature of

the wording used is offset, as has been shown above, by the granting of rebates which are specially designed to have such a corrective effect.

110 The same findings have to be recorded in respect of the contracts which, although it may be doubtful whether they contain a firm undertaking by the producers to obtain supplies exclusively from Roche, offer, by means of the granting of the rebates analysed above, a strong incentive to purchasers to let Roche alone supply the whole or part of their requirements of vitamins or of certain groups of vitamins.

The Commission was justified in pointing out (Recitals 11 and 24 to contested decision) that this incentive is made more attractive by the fact that the rebate is granted on all purchases of the different groups of vitamins so that if the purchaser wanted to approach — in circumstances other than those to which the English clause, the scope of which has been examined above, applies — a competing producer for a particular vitamin he will however be prevented from doing so because he would thereby lose the benefit of the rebate on all the other vitamins which he continues to buy from Roche.

111 Having regard to the fact, which both the applicant and the Commission admit, that the various groups of vitamins are products which are not interchangeable and represent separate markets, this system of rebates on overall purchases is furthermore an abuse within the meaning of subparagraph (d) of the second paragraph of [Article 102] of the Treaty in that it aims at "making the conclusion of contracts subject to acceptance by the other parties of sup-plementary obligations which, by their nature or according to commercial usage, have no connexion with the subject of such contracts".

Finally it must be borne in mind that, even if, as Roche submits, the purchaser's non-compliance with his undertaking to obtain his requirements exclusively from Roche did not make him liable to be sued for breach of contract but only caused him to lose the benefit of the promised rebates, such contracts nevertheless contain a sufficient incentive to reserve to Roche the sole right to supply the purchaser for them to be, for this reason alone, an abuse of a dominant position.

Section 7: Application of the criteria adopted in the Merck and Unilever contracts

(a) The Merck contracts

112 Roche has entered into three contracts with Merck, the first dated 5 July 1971 for supplying Merck with vitamin B_6, the second dated 3 March 1972 for supplying it with vitamin A and the third of the same date for supplying it with vitamin E.

113 The recitals to the first contract, relating to a product in respect of which the applicant's market share is approximately 80 %, state that "Roche is shortly going to double the manufacturing capacity of its plant which at the present time is about 500 tonnes per annum and therefore has an interest in meeting part of Merck's requirements" and that "Merck is willing to cover these requirements from Roche upon the following terms and conditions in so far as they exceed its present manufacturing capacity of about 200 tonnes per annum".

Under clauses 6 and 7 of this contract the delivery price payable by Merck is the average selling price of the same product to third parties less a rebate of 20 %, it being understood that Roche "will in any case apply to Merck the most favourable prices and/or conditions".

Under clause 12 thereof Merck is forbidden to resell the said vitamins to Roche's competitors without Roche's consent.

Under clause 14 Roche agrees to obtain all its supplies of "phosphoric ester of pyrodoxine 5" from Merck and Merck agrees to supply the latter therewith upon the same conditions as those stipulated for supplying Merck with vitamin B_6.

Clause 13 of the contract provides that the contract shall be for a period of five years and thereafter renewable by tacit agreement for periods of two years.

The contract does not contain an English clause.

114 The other two contracts dated 3 March 1972 for supplying Merck with vitamins A and E are in general in the same form as the contract analysed above.

The difference between these two contracts is that in the one relating to vitamin E the recitals restate that "Roche is shortly to increase substantially

its production capacity for vitamin E" and " would therefore like to be a regular supplier of Merck", whereas the contract relating to vitamin A does not contain such a recital.

The two contracts dated 3 March 1972 — unlike the one dated 5 July 1971 — do not provide for the parties supplying each other exclusively on a reciprocal basis but contain a clause to the effect that Merck is released from its obligation to purchase its requirements exclusively from Roche if it receives a more favourable offer and Roche does not adjust its prices.

Finally, these two contracts forbid Merck to resell the said vitamins which are the subject-matter thereof to Roche's competitors without Roche's consent.

115 The special factors set out above indicate that the purpose of Merck's undertaking to obtain its requirements exclusively from Roche was, as far as concerns vitamins B_6 and E, to secure Roche in advance a stable market for the increased production which was planned and to remove at the very least a not inconsiderable part of this additional production from the risks of competition.

Such an obligation to obtain supplies exclusively for such a period of time from an undertaking in a dominant position, for the latter's benefit, is an abuse by that undertaking of its dominant position within the meaning of [Article 102] of the Treaty.

Although the same purpose has not been expressed as far as vitamin A is concerned and although the possibility cannot be ruled out that this contract — as several precise, technical definitions incorporated in the text lead one to suppose — meets Merck's wish to secure regular and continuous supplies of a product of which it only manufactures small quantities itself, this fact does not remove the prohibition on an undertaking in a dominant position from tying its purchasers by obligations to obtain their supplies exclusively from it, especially for periods as long as those provided for in the said contract.

The obligation to obtain supplies exclusively from Roche together with the granting of very large rebates, according to the circumstances, of 12.5 % to 20 % (vitamin A), 15 % to 20 % (vitamin E) and 20 % (vitamin B_6), and the ban on resale to producers of vitamins proves the intention to restrict competition.

116 It is necessary to point out that in circumstances such as those in this case, and especially with reference to the contract of 5 July 1971, in which the parties undertake to supply each other exclusively on a reciprocal basis, the question might be asked whether the conduct in question does not fall within [Article 101] of the Treaty and possibly within paragraph (3) thereof.

However, the fact that agreements of this kind might fall within [Article 101] and in particular within paragraph (3) thereof does not preclude the application of [Article 102] since this latter article is expressly aimed in fact at situations which clearly originate in contractual relations so that in such cases the Commission is entitled, taking into account the nature of the reciprocal undertakings entered into and to the competitive position of the various contracting parties on the market or markets in which they operate to proceed on the basis of [Article 101] or [Article 102].

(b) The Unilever contracts

117 Roche entered into three contracts with Unilever on 9 January 1974.

118 The first, executed by Food Industries Ltd., acting as Unilever's agent, with Roche's UK subsidiary, contains first of all an estimate of the purchaser's requirements of synthetic vitamin A, type b, assessed at 130-134 thousand milliard (m.m.) international units for 1974.

The contract also provides that it shall continue during 1975 and that the purchaser shall give an estimate of its requirements during December 1974 at the latest.

The second, executed by the same parties, covers deliveries of vitamin A, other than type b, and as far as concerns the rest of the agreement contains the same terms and conditions as the first.

The third contract is concluded directly between Roche, Basle, and Unilever Inkoop Mij, Rotterdam, and provides that Roche has "agreed to supply the requirements of your group (Continent only) for the following products: vitamin A for margarine about 30 m.m. in 1974, between 27 and 33 m.m. in 1975; beta-carotene (all forms) about 6 000 kg in 1974, between 5 400 kg and 6 600 kg in 1975".

119 The three contracts state the prices which have been agreed, subject moreover in the case of the contracts with Food Industries Ltd. to a clause dealing with exchange rates.

These three contracts do not provide for any rebates but in its two contracts with Food Industries Ltd. Roche gives an assurance that it will charge Unilever any more-favourable price which it charges third parties, whereas the contract for the Continent only provides that if Unilever receives more-favourable offers from competitors Roche will adjust its prices or permit the purchaser to buy the quantity concerned from competitors.

120 The terms of the contracts make it absolutely clear that their purpose is the supply by Roche of all Unilever's requirements of the vitamin in question for a period covering the years 1974 and 1975.

Since the contracts in question contain a formal undertaking to obtain supplies exclusively from Roche the question whether or not they also contain a provision granting a rebate is not determinative when deciding whether they are caught by [Article 102] of the Treaty.

The fact that Roche's contracting partner is itself a powerful undertaking and that the contract is clearly not the outcome of pressure brought to bear by Roche on its partner does not preclude the existence of an abuse of a dominant position, such an abuse consisting in this case of the additional interference, due to the obligation to obtain supplies exclusively from Roche, with the structure of competition in a market in which in consequence of the presence there of an undertaking occupying a dominant position the degree of competition has already been weakened.

Such agreements could only possibly be admissible in the context of, and subject to the conditions laid down in, [Article 101] (3) of the Treaty but none of the contracting parties has thought it necessary to avail itself of this possibility.

121 The examination of the contracts at issue concluded both with Merck and Unilever does not disclose any special features which would prevent them from falling within the concept of an abuse which in principle includes any obligation to obtain supplies exclusively from an undertaking in a dominant position which benefits that undertaking.

III — The effect on competition and trade between Member States

122 The applicant denies that the difference between the prices which by means of the fidelity rebates it allows its various customers to pay and which vary according to whether those customers agree to obtain all their requirements exclusively from it or not, is of such a kind as to place them at a competitive disadvantage within the meaning of subparagraph (c) of the second paragraph of [Article 102] of the Treaty, since this difference cannot have an appreciable effect on the competition *inter se* of Roche's purchasers.

Furthermore in its reply it seems to be maintaining that the conduct for which it is censured is not of such a kind as to hinder trade between Member States.

123 As far as the first point is concerned the terms of the contracts at issue as well as the considerations set out in Management Information and in the minutes of the meeting between Unilever and Roche in London on 11 December 1972 show clearly the importance which Roche itself attaches to the rebates which it grants.

In these circumstances it cannot be accepted that these rebates are not of importance to the customers.

Moreover since the course of conduct under consideration is that of an undertaking occupying a dominant position on a market where for this reason the structure of competition has already been weakened, within the field of application of [Article 102] any further weakening of the structure of competition may constitute an abuse of a dominant position.

124 As far as concerns the question whether trade between Member States has been affected it is in the first place an established fact that the market for each of the vitamins considered comprises the whole of Community territory which covered, to begin with, six and then nine Member States.

125 The prohibitions contained in Articles 85 and 86 must be interpreted and applied in the light of Article 3 (f) of the Treaty which provides that the activities of the Community shall include the "institution of a system ensuring that competition in the Common Market is not distorted" and Article 2 of the Treaty which gives the Community the task of promoting "throughout the Community a harmonious development of economic activities".

By prohibiting the abuse of a dominant position within the market in so far as it may affect trade between Member States, [Article 102] therefore covers not only abuse which may directly prejudice consumers but also abuse which indirectly prejudices them by impairing the effective competitive structure as envisaged by Article 3 (f) of the Treaty.

126 Furthermore the actual wording of a number of the English clauses implied that the partitioning of the markets would be maintained making it possible in particular to charge different prices from one Member State to another, and this finding is confirmed by the fact, to which attention has already been drawn above, that the price variations for a particular vitamin at a particular time differed markedly from one Member State to another.

127 The foregoing shows that the course of conduct at issue was capable of both affecting competition and affecting trade between Member States.

Fourth submission: The fine

(a) The imprecision of the rules containing penalties

128 The applicant submits that because of the general nature and imprecision of the concepts "dominant position" and "abuse" of such a position, which are set out in [Article 102] of the Treaty, the Commission could only have imposed fines upon it for infringing this article after these concepts had been given a specific meaning either by administrative practice or by case-law so that those persons liable to be fined know where they stand.

129 By virtue of Article 87[reapealed] of the Treaty the Council had to adopt the necessary regulations or directives especially with a view to ensuring "compliance with the prohibitions laid down in [Article 101] and in [Article 102] by making provision for fines and periodic penalty payments".

In pursuance of this provision it adopted Regulation No 17 of 6 February 1962 Article 15 (2) whereof provides that the Commission may by decision impose on undertakings or associations of undertakings fines up to a

maximum fixed by that article if they either intentionally or negligently infringe Article 85 (1) or [Article 102] of the Treaty.

On the other hand under Article 2 of the same regulation: "Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85 (1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice".

130 Thus from 1962 onwards undertakings knew, on the one hand, that if they ignored the prohibitions of [Article 102] they would render themselves liable to fines and, on the other hand, that by means of a specially arranged procedure they were in a position to obtain clarification of the application of the said prohibitions to their particular case.

Moreover the nature of these prohibitions and the conditions which must be fulfilled for them to apply, in spite of [Article 102] being inevitably couched in general terms, are not imprecise and impossible to foresee as Roche claims.

131 The way in which [Article 102] had been applied before provided Roche during the period 1970 to 1974, which the Commission considered for the purpose of fixing the fine, with a degree of anticipation which was amply sufficient to enable Roche to take account of this to its advantage when deciding how to act in relation both to its dominant position and to the practices for which it is blamed.

132 When Article 86 refers to the existence of a dominant position and forbids any abuse of it, that article has to be considered in the light of a comprehensive system of provisions — such as Article 3 (f), Article 37 (1), the second subparagraph of Article 40 (3), Article 85 and Article 90 of the Treaty — all of which are designed to establish on a market having the particular features of a single market competition which is effective and not distorted.

Moreover where Article 86 uses the expressions "dominant position" and "abuse" it refers to concepts which are not new, but which have in essence been given a specific meaning as a result of the practice of the authorities

responsible in most of the Member States for examining and curbing conduct which restricts competition.

133 As far as concerns in particular the concept of a dominant position a prudent commercial operator is in no doubt that, although possession of large market shares is not necessarily and in every case the only factor establishing the existence of a dominant position, it has however in this connexion a considerable significance which must of necessity be taken into consideration in relation to his possible conduct on the market.

Such an evaluation of the scope of [Article 102] did not mean that in Roche's case, at all events on most of the markets at issue, there was any factor which it was impossible to foresee or which gave rise to unreasonable doubt.

134

As far as concerns the compatibility of fidelity rebates with the prohibitions of [Article 102] the application of this article to a system of obtaining supplies exclusively from the applicant and of rebates of the kind it has worked out was not impossible to foresee and this is shown not only by the experience which every undertaking of the size of the applicant operating throughout the Common Market ought to have of the practice of the authorities responsible in the Member States for applying competition law but also by the precise wording of subparagraph (b) of the second paragraph of [Article 102] directed against limiting markets, of subparagraph (d) of the second paragraph of [Article 102] which prohibits making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which have no connexion with the subject of such contracts and, in particular, of subparagraph (c) of the second paragraph of [Article 102] which is directed against applying dissimilar conditions to equivalent transactions.

There is even less reason to accept Roche's claim that it was impossible to foresee the result of its actions because at the very least the possibility, if not the probability, of this application of the law had to be taken into consideration by a vigilant commercial operator and because Article 2 of Regulation No 17 allowed a precautionary measure to be taken for a ruling on the application of [Article 102] to doubtful cases. The applicant did not however consider that it should avail itself of this opportunity in order to obtain that legal certainty of which it claims it has been deprived.

135

Finally, the applicant quotes the Commission's decision of 5 December 1969 (Journal Officiel L 323, p. 21) relating to a proceeding under [Article 101 TFEU] (IV-24, 470-1, *Pirelli/Dunlop*).

In its view that decision indicates that agreements under which the parties supply each other on a reciprocal basis are admissible as soon as they include an English clause.

136 The decision which the applicant has quoted was concerned with an agreement entered into by two undertakings, which did not occupy a dominant position on the market, relating to the manufacture on reciprocal account of tyres and which was intended to make it easier for each of the two parties to penetrate the market of the other.

Furthermore the clause providing for adjustment of prices in the Dunlop/Pirelli agreement was not subject to the many restrictions and conditions which are found in the contracts at issue and which markedly restrict the scope of that clause.

An undertaking in a dominant position cannot reasonably believe that a negative clearance issued in such circumstances would serve as a precedent for justifying its own behaviour in the context of [Article 102]

137 It follows from the foregoing considerations that the submission based on the imprecise nature of the concepts in [Article 102] must be rejected.

(b) The application of Article 15 (2) of Regulation No 17

138 The applicant also submits that it would appear from the contents as a whole of the file and from its own conduct that it could not be regarded as having acted either intentionally or negligently if it was of the opinion, on the one hand, that it did not occupy a dominant position on the markets in question and, on the other hand, that the contracts at issue were compatible with [Article 102] of the Treaty.

139 The suggestions and instructions contained in Management Information and the other internal documents relating to the importance and the anticipated effects of entering into contracts, which provide for the purchaser obtaining his requirements exclusively from Roche and for a system of fidelity rebates, in relation to the retention by Roche of its market shares prove that the applicant intentionally pursued a commercial policy designed to bar the access to the market of new competitors.

The increase from 1970 onwards of contracts under which the purchaser obtains his supplies exclusively from Roche or is induced to so confirms this intention.

On the other hand the size of the applicant's market shares, in any event in the case of most of the groups of vitamins, implies that its conviction it did not occupy a dominant position could only be the outcome of an inadequate study of the structures of the markets on which it operates or of a refusal to take these structures into consideration.

The conditions for the application of Article 15 of Regulation No 17 were therefore fulfilled.

(c) The amount of the fine

140 However, the preparatory inquiries in this case have disclosed that the Commission has made some mistakes in its evaluation of the applicant's dominant position on the market for vitamins in group B_3.

Furthermore as far as concerns the market shares which are evidence of a dominant position the Commission only supplied particulars for the years 1972, 1973, 1974 and to a certain extent for 1971, so that the duration of the infringement to which regard is to be had in fixing the amount of the fine must be reduced to a period which is only a little over three years and so less than the five years which the Commission took into consideration.

Finally it is an established fact that as far back as the stage of the administrative procedure Roche stated that it was ready to amend the contracts at issue and in fact amended them in conjunction with the Commission's departments.

141 In view of the foregoing it is appropriate to reduce the amount of the fine and it appears justifiable to fix it at 200 000 units of account, being DM 732 000, the remainder of the application being dismissed.

Costs

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

Under paragraph (3) of that article, when each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the parties bear their own costs in whole or in part.

Each party has failed on some heads and must therefore bear its own costs.

On those grounds

THE COURT

hereby

1. **Reduces the amount of the fine imposed on Hoffmann-La Roche AG, fixed under Article 3 (1) of Commission Decision of 9 June 1976 (IV/29.020) at 300 000 units of account, being DM 1 098 000 to 200 000 units of account, being DM 732 000;**

2. **Dismisses the remainder of the application;**

3. **Orders each party to bear its own costs.**

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 13 February 1979.

A. Van Houtte
Registrar

H. Kutscher
President

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Facts and Issues