In the Joined Cases 6 and 7/73

ISTITUTO CHEMIOTERAPICO ITALIANO SpA, represented by Mr J. J. A. Ellis, advocate at the Hoge Raad, the Netherlands,

and

COMMERCIAL SOLVENTS CORPORATION, represented by Mr B. H. ter Kuile, advocate at the Hoge Raad, the Netherlands, with an address for service in Luxembourg in the chambers of Mr Jacques Loesch, 2 rue Goethe,

applicants,

**v**

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Advisers B. van der Esch and A. Marchini-Camia, acting as agents, with an address for service in Luxembourg in the chambers of its Legal Adviser, Mr Emile Reuter, 4 boulevard Royal,

defendant,

in Application for annulment of Decision No 72/457/EEC of the Commission of 14 December 1972 (OJ L 299, p. 51 of 31. 12. 1972), taken pursuant to Article 86 of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, A. M. Donner (Rapporteur) and M. Sørensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher, C. Ó Dálaigh and A. J. Mackenzie Stuart, Judges,

Advocate-General: J. P. Warner,
Registrar: A. Van Houtte,

gives the following

# JUDGMENT

## Issues of fact and of law

I — Statement of the facts

The facts and procedure may be summarized as follows:

*Commercial Solvents Corporation* (CSC) is a company incorporated under the law of the State of Maryland, having its principal office in the City and State of New York, United States of America. The company manufactures and sells among other things products based on nitroparaffines, *inter alia* 1. nitropropane ('nitropropane') and a derivative thereof 2. amino-1-butanol ('aminobutanol'). Both are intermediary products for the manufacture of ethambutol and ethambutol-based specialities, used as an anti-tuberculosis drug.

In 1962 CSC acquired a 51 % of the voting stock in *Istituto Chemioterapico Italiano SpA* (Istituto), a company incorporated under Italian law — having its principal office in Milan. At present CSC has a 50 per cent representation in the 'Consiglio di amministrazione' — Board of Directors — (5 out of 10) and in the 'Comitato Esecutivo' — Executive Committee — (3 out of 6). The President of CSC is also Chairman of the Board of Directors, has an additional casting vote.

Until 1970 Istituto acted as a reseller of aminobutanol produced by CSC in the United States of America. A customer of Istituto for aminobutanol was *Laboratorio Chemico Farmaceutico Giorgio Zoja SpA* (Zoja), to whom Istituto began selling the product in 1966. Zoja used the product in the manufacture of ethambutol-based specialities. In 1968 Istituto started development of its own ethambutol-based specialities. It obtained governmental registration for the manufacture thereof in November 1969, and started production in 1970.

Early in 1970 CSC decided that in principle it would no longer supply nitropropane and aminobutanol to the EEC, but would instead supply dextro-aminobutanol, an up-graded intermediate product, which Istituto would convert to bulk ethambutol for sale in the EEC and elsewhere, and for the manufacture of its own specialities. CSC informed its resellers, including Istituto, that thereafter nitropropane and aminobutanol would be available only in such quantities as had already been committed for resale.

In the spring of 1970 Zoja cancelled its order for 20 000 kg of aminobutanol prescribed by the then current agreement between Istituto and Zoja. This step was induced by the circumstance that a number of independent distributors were supplying large amounts of aminobutanol at lower prices than those provided by the aforesaid agreement.

Since early 1970 CSC has been supplying dextro-aminobutanol to Istituto, which processes it into bulk ethambutol. Most of this product is sold by Istituto to other producers of specialities, and the balance is used for the production of Istituto's own speciality.

At the end of 1970 Istituto informed CSC that Zoja had placed a new order for aminobutanol and asked whether this intermediary product could again be supplied for resale to Zoja. CSC replied that none was available.

After further attempts to obtain supplies of aminobutanol on the world market had failed as the search for the product inevitably led to one possible source of supply, namely CSC, Zoja, by letter dated 8 April 1972, applied to the Commission for the institution of proceedings against CSC and Istituto,

under Article 3 of Regulation 17 for infringement of Article 86 of the Treaty.

By letter dated 25 April 1972 the Commission served the Notice of Objections on CSC and Istituto. The enterprises concerned were given two weeks in which to reply to the objections. On 15 May 1972 CSC and Istituto submitted their oral comments.

At its meeting of 14 December 1972 the Commission adopted a decision jointly and severally requiring the applicants in the present proceedings:

(a) under penalty of a fine of 1 000 units of account per day of delay, beginning 31 days after receipt of the Decision, to supply 60 000 kg of nitropropane or 30 000 of aminobutanol to Zoja, as its most urgent needs, at a price not exceeding the maximum price charged for those two products;

(b) under penalty of a second fine of 1 000 units of account per day, to submit to the Commission within two months after receipt of the Decision, proposals for the subsequent supply of Zoja.

(c) to pay a fine of 200 000 units of account.

The Decision was sent on 29 December 1972 and was received on 4 January 1973 by Istituto and on 8 January 1973 by CSC.

## II — Procedure

By applications dated 16 February 1973, registered at the Court of Justice on 17 February 1973, Istituto and CSC applied for the annulment of this Decision. By application of 6 March 1973, registered at the Court of Justice on 9 March 1973, Zoja applied for leave to intervene in support of the Commission. By Order of 11 April 1973 the Court granted the application.

By application of 22 May 1973, registered on 24 May 1973, Zoja applied for leave to discontinue its intervention and the Court, by Order of 20 June 1973, ordered the intervention to be removed from the register.

After hearing the Advocate-General, the Court, by Order of 8 May 1973, decided to join Cases 6 and 7/73.

Applicants and defendant, at the request of the Court, answered a number of questions in statements lodged at the Registry of the Court on 30 October and 5 November 1973.

The parties presented oral argument at the hearing on 20 November 1973; the Advocate-General delivered his opinion at the hearing on 22 January 1974.

## III — Submissions of the parties

*Istituto* (applicant in Case 6/73) submits that the Court should:

(a) declare null and void the Decision of the Commission of 14 December 1972, under Article 173 EEC;

(b) order the Commission should pay the costs;

*CSC* (applicant in Case 7/73) submits that the Court should:

(a) declare null and void the Decision of the Commission of 14 December 1972, in so far as that Decision is addressed to CSC, and order such other measures as the Court may deem appropriate;

(b) order the Commission to pay the costs;

the *Commission* (defendant) submits in both cases that the Court should:

(a) dismiss the applications as unfounded,

(b) order the applicants to pay the costs.

## IV — Pleas and arguments of the parties

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

*1. The Commission's competence and the Commission's opinion that CSC and Istituto constitute one economic unit*

In its Decision of 14 December 1972 the *Commission* states:

1. that CSC holds 51 per cent of Istituto's share capital;

2. that according to Italian company law (Article 2359 of the Civil Code) holding the majority of the voting stock implies having the control of the company;

3. that five out of the ten members of Istituto's Board of Directors are high-ranking executives of CSC, and that the President and Director of CSC is also the Chairman of Istituto's Board of Directors;

4. that three out of six members of Istituto's Executive Committee are nominees of CSC;

5. that in CSC's annual report for 1972, Istituto is listed as a subsidiary of CSC and as CSC's research base in Europe;

6. that Istituto, besides its operations as a manufacturer of chemical and pharmaceutical products, operates or has operated as an exclusive distributor of several products of CSC;

7. that CSC imposed on CSC's distributors in certain countries a resale prohibition of its products for the manufacture of ethambutol and an export prohibition;

8. that CSC must have controlled Istituto's unsuccessful merger negotiations in 1968 and 1969 with Zoja;

9. that there exists a relation between the prohibition under point 7. and the unsuccessful issue of the merger negotiations under point 8. (Decision I C and II A).

The Commission draws the conclusion from these points that CSC controls Istituto and exercises its control in fact at least with respect to Istituto's relations with Zoja. Therefore there is no ground for distinguishing between the will and acts of CSC and those of Istituto. Regarding their relations with Zoja the Commission considers them as constituting one economic entity.

*CSC* and *Istituto* both submit that the facts alleged by the Commission, even if they were correct, are inconclusive. According to the Court's ruling in cases 48/69, 52/69 and 53/69 (Rec. 1972, p. 619, 787 and 845), in order for a parent and a subsidiary to be deemed a single economic unit, so that the acts of the subsidiary may be attributed to the parent company, there must be (a) power of the parent company to direct the subsidiary and (b) the actual exercise of the parent's control to such an extent that the subsidiary does not determine its behaviour on the market in an autonomous manner.

The facts alleged by the Commission do not constitute any evidence in favour of such a type of control. Under Istituto's Articles of Association the two 'Consiglieri-Delegati', Dr C. Vittadini and Eng. G. V. Vittadini still have full power to direct the company, except in relation to investments. Neither in the Board of Directors nor in the executive Committee does CSC have majority representation. Only in matters of investment can CSC exercise a blocking vote. According to a certificate of Arthur Young & Company, Milan, submitted as evidence by the applicants, more than 75 % of Istituto's turnover is derived from the sale of products neither produced by CSC nor based on raw materials supplied by CSC.

The Commission has failed to point out a single instance where Istituto's

behaviour on the market resulted from instructions given to it by CSC. Neither the fact that in its annual reports to stockholders CSC calls Istituto its subsidiary (for United States accounting and securities law reasons), nor the fact that Istituto conducts some research also for the benefit of CSC, affect the determination of the question whether or not Istituto autonomously decides its own market behaviour. The Commission's reference to Article 2359, para. 2, of the Italian Civil Code is not relevant in this context, as this article prohibits cross shareholdings between a parent and a 'controlled' subsidiary company for the protection of the parent's creditors. It follows that the term 'controlled' in Article 2359, para. 2, has nothing to do with the question of control of market behaviour which is, according to the judgments of the Court cited above, the factor which determines 'economic unity'.

*CSC* deduces from the foregoing argument that no economic unity between Istituto and CSC exists and that its only connexion with the Common Market in this case is that it once sold nitropropane and aminobutanol into the EEC and later made the policy decision to discontinue such sales. Therefore it could not have acted with respect to the present matters within the EEC either by itself or through Istituto.

*Istituto,* also concludes that there exists no dependence on CSC with respect to its market behaviour. Even on the hypotheses — expressly rejected by both applicants — that Istituto is a dependent subsidiary of CSC and that its behaviour on the market is to be imputed to the latter, the Commission's own theory has not been consistent because if the Commission is right in alleging that CSC dictated Istituto's conduct, then the latter cannot be considered as liable for the former's decisions. In that case the Decision in issue is wrongly addressed.

The *Commission,* in its defence, puts the relevant question as follows:

Does the fact that CSC owns 51 per cent of the Istituto voting stock (as is admitted by CSC) taken together with the other applicable facts mentioned in the Decision (likewise not contested by CSC) mean that Istituto is under the control of CSC, *at least as regards the behaviour in question?*

As Istituto is a company incorporated under Italian law, it is essential to consider the rights and powers which Italian *company law* accords those who hold the majority of the voting stock of a company limited by shares ('società per azioni' — 'Spa'). Istituto's documents of incorporation do not derogate from the relevant provisions of Italian company law. It follows from these provisions that the ownership of the majority of the voting stock brings with it the right to manage a company (Article 2368 of the Italian Civil Code), both in a positive way by nominating the managers — 'amministratori' — (Articles 2364 and 2383) and negatively, by preventing their replacement as well as by having them held liable for breach of duty (Article 2393).

In support of its opinion the Commission refers to Italian academic writing on this subject (Pasteris, il 'Controllo' nelle società collegate e le partecipazioni reciproche, Milan, 1957, Chapters IX and X), to the relevant provisions in the company law of Member States (in Germany, Article 16 (1) of the *Aktiengesetz* of 1965, in France, Loi No 66-537, Article 354 and in the United Kingdom, Companies Act, 1948, sect. 154) and to the Proposal for a Council Regulation embodying a Statute for a European Company, Article 6 and 223.

The Commission considers that under competition law it is possible to go even further into the complex of legal and factual in order to discover the economic reality of control than is possible under company law. Here Article 23 of the German Gesetz gegen Wettbewerbsbeschränkungen is a good example.

The fact that one company holds a majority of the voting stock of another is by itself sufficient proof under Community competition law, that it controls the latter. The presence on the Board of Directors and in the Executive Committee of nominees of CSC, indicates that the power of control has *in fact* been exercised in the present case as was set out in the Decision. In this respect it is significant that the President of CSC who is also Chairman of Istituto's Board of Directors, has the casting vote. Therefore CSC also has a majority in the executive organ of Istituto.

The Commission refers once again to its Decision in stating that it considers CSC and Istituto as 'one economic unit' for the purposes of applying Article 86 with regard to their relationships with Zoja. As regards this relationship CSC's control of Istituto is evident: first, the decision to transform Istituto from a distributor of ethambutol to a producer of this product is a type of decision implying investments — for which CSC has a blocking vote — ; secondly, it results from the certificate of Arthur Young & Company referred to by CSC that ethambutol produced by Istituto is a part of the 'products manufactured in Italy under the permission of CSC'.

Even if it were admitted that Istituto enjoyed a position independent of CSC, this would in no way affect the jurisdiction of the Commission, for the conduct of CSC in question produces effects in the territory of the Common Market which are direct and immediate, reasonably foreseeable and substantial. According to the ruling of the Court in the *Béguelin Case,* 22/71, (Rec. 1971, p. 949), the fact that an undertaking is situated in a third country does not constitute an obstacle to the application of the Community's competition rules where the behaviour produces effects within the Common Market.

The Commission refers also to the Advocate-General's opinion in the Dyestuffs Cases, 48/69 a.o. (Rec. 1972, p. 619).

*CSC* and *Istituto* reject the argument of the Commission. In particular they allege that the defendant has altered its position in stating that CSC and Istituto form an 'economic unit' solely with regard to their relationship with Zoja. This constitutes an impermissible alteration of the subject of the litigation.

According to the Court's judgments in the *Dyestuffs Cases* the only applicable criterion is the complete dependence of Istituto on CSC in determining its behaviour on the market. The same criterion was applied by the Commission itself in its Decision No IV/22-548 *Christiani & Nielsen* (OJ L 165, 15.7.1969, p. 12).

The applicants reject once again the argument of the Commission that CSC's holding of 51 % of the voting stock allows it to control the management of Istituto. This opinion is inconsistent with the Commission's Statement in its Proposal to the Council of Ministers concerning a fifth Directive on the harmonization of Company Law (COM (72) 887 of 27 September 1972) with respect to the powers of the general meeting. The importance attached to Italian civil law by the Commission is hardly comprehensible, as the provisions cited have nothing to do with questions regarding control of market behaviour. The references made to German, French and English law are equally inconclusive for the questions here relevant. It is not permissible to refer to the Draft Statute for a European Company, as it does not reflect the existing law in EEC Member States and its final adoption as Community law is still doubtful.

As to the alleged domination of CSC in Istituto's management, the applicants repeat their position that neither in the Board of Directors nor in the Executive Committee does CSC have a majority. The fact that the Chairman of the Board of Directors — currently a CSC executive — has a casting vote is virtually of no consequence, for up to now the president's casting vote has never been used.

It is stressed by CSC and Istituto that CSC cannot direct the latter's investments, as CSC, through its representation in the Board of Directors and the Executive Committee, has only the power to veto investments, not to command them. CSC has never used this veto power. The only part CSC played in the behaviour of Istituto regarding the production of bulk ethambutol and specialities derived from it (mycobutol) was that it did not veto the investments needed. The Commission's allegation that CSC 'caused' Istituto to produce ethambutol is wrong: it was Istituto's decision. The reference of the Commission to the certificate of Arthur Young & Company, according to which ethambutol is produced 'under the permission of CSC' is inconclusive. This clause means no more than that the two enterprises agreed that CSC would supply Istituto with an intermediate product for the manufacture of ethambutol. At the request of the applicants Arthur Young & Company issued a new statement which leaves no room for misinterpretation.

CSC and Istituto emphasize that there exists no relationship at all between Istituto's decision to start the manufacture of ethambutol and CSC's refusal to supply Zoja with aminobutanol: Zoja unilaterally terminated the relations with Istituto and when, six months later, Istituto applied to CSC for a supply of aminobutanol for resale, CSC refused for technical and commercial reasons.

CSC gives an extensive account of the effects doctrine in relation to public international law, in answer to the Commission's observation on the effects of CSC's conduct within the Common Market. Its main conclusions are:

1. as, in contrast to Sections 1 and 2 of the Sherman Act, Articles 3 (f), 85 and 86 of the EEC Treaty do not cover trade with third countries, decisions of United States Courts cannot be used as precedents for the interpretation of Article 86 EEC;
2. it follows both from relevant legislation of the Member States and from their attitude towards the extra-territorial application of US. Antitrust Law that the Commission is mistaken in its statement that the effects doctrine has been accepted in the law of the Member States;
3. the Commission's reference to the Béguelin Case is irrelevant in the present context for that Case dealt only with private law questions concerning the scope of application of Article 85 (2).

The *Commission* in its rejoinder rejects the allegation of an alteration of the subject of the litigation. It refers once again to the Decision, which indicates unmistakably that the Commission considered CSC and Istituto as one economic unit especially 'as regards their relations with Zoja'. In the present case the two criteria developed by the Court in the *Dye-Stuffs Cases* had been entirely satisfied:

1. CSC has, by holding the majority of Istituto's capital, power of control over ISTITUTO;
2. certain factors confirm that the power of control has in fact been exercised in the present case.

In its *Christiani & Nielsen Decision* the Commission considered that it was impossible for a wholly owned subsidiary to act autonomously. It does not follow that the Commission must consider any subsidiary in which the parent company holds less than 100 per cent of the capital as being autonomous. The applicants' assertions regarding relevant Italian Civil Law (Article 2359 and 2362) are inconclusive because they do not refute the Commission's position that in every case where Italian legislation attaches legal consequences to the control of one company by another, control is assumed to exist when one company holds the majority of the voting stock of another company. The Commission reaffirms on the relevance

of the quoted provisions of the company law of other Member States and of the proposal for a Statute for a European Company. With respect to the applicant's assertions on the management of the CSC-Istituto Group the Commission does not consider important the fact that the Chairman has never used his casting vote; the mere position of having such a vote matters in determining the power relations within the group. The Commission considers that the distinction between veto power and the power to command investments is scholastic and irrelevant.

The defendant rejects expressly the contentions that during the present proceedings it has changed the reasons on which it bases the existence of the CSC-Istituto Group. Neither in maintaining that CSC and Istituto constitute one economic unity, at least in their relations with Zoja, nor in stating that the Chairman of the Board of Management has a casting vote, has the Commission changed its original view as reflected in the Decision. As to the 'effects doctrine', the Commission remarks that the arguments of the applicants have already been put forward in the Dye-stuffs Cases. The Commission, declines to resume once again the elaborate dispute on this doctrine, maintaining that the *Béguelin Case* is relevant in this context.

2. *As to the relevant market*

In its Decision the *Commission* stated

(a) that the CSC-Istituto Group holds a dominant position in the world market of the raw materials for the production of ethambutol — i.e. nitropropane and aminobutanol,

(b) that at present it is not possible, under competitive conditions, to produce ethambutol from other intermediary products than nitropropane and aminobutanol,

(c) that it follows from the foregoing data that the CSC-Istituto Groups holds a dominant position within the Common Market as regards the indispensable raw materials for the production of ethambutol (Section II B of the Decision).

Between *applicants* and the *defendant* there is a large measure of disagreement as to the definition of the relevant market. *CSC* and *Istituto* on the one hand assert the relevant market to be that of anti-tuberculosis drugs, the Commission on the other hand alleges, referring to its Decision, that the relevant market is that of raw materials for the production of ethambutol, i.e. that of nitropropane and aminobutanol.

In the *applicants'* view the definition of the relevant market must start with determining the relevant market for the end-products, i.e. ethambutol and specialities derived from it. Only in so far as ethambutol constitutes a separate market could there exist a separate market for its component.

The *defendant* submits in its statement of defence that Zoja was affected by CSC's refusal to provide it with aminobutanol or nitropropane, the raw materials it needed to produce ethambutol in a competitive manner. It was not enough that Zoja was able to obtain ethambutol in bulk, even from Istituto. Since the competitive position of Zoja on the market entirely depends on the technology and know-how it has acquired in processing nitropropane and/or aminobutanol into ethambutol, cutting off its supply of these raw materials might eliminate it from the market. In this respect Zoja as a buyer is entirely tied to the supplier of those materials. At this stage the relationship between CSC and Istituto on the one hand and Zoja on the other hand has to be judged in the light of Article 86.

*CSC* and *Istituto* reject this explanation, asserting that it implies a change of the position developed by the Commission in the Notice of Objections and in the Decision.

The *Commission* admits that in the Notice of Objections the group is found

to enjoy a dominant position in a wider field than that retained in the Decision (since it extends to ethambutol), but it emphasizes that from the outset its view has been that CSC was in a dominant position first of all on the market in the raw material necessary for the manufacture of ethambutol, the market on which the abusive termination of supplies has been established. The Decision itself leaves no shadow of doubt on the point of the relevant market. (Section II B). In so far as the ethambutol market is mentioned (Section II C) this is done 'in order to establish the effects of the behaviour in question'.

*CSC* and *Istituto* submit that the Commission's allegation according to which their 'group' had a monopoly on the world market in raw materials for the manufacture of ethambutol, is unfounded. They invoke successively

1. a statement of Professor S. Pietra, head of the Institute of Organic Chemistry of the University of Pavia;
2. a letter of International Business & Research Inc., Coral Gables, Florida, USA, stating that a different manufacturing process for aminobutanol, not based on nitropropane, has been developed;
3. an offer made by Fallek Petrochemical (Europe) CV, Amsterdam, the Netherlands, for thiophenol which, according to Fallek, is used in Eastern Europe as an intermediary in the production of ethambutol;
4. the information that aminobutanol is being manufactured by a different process (starting from butanone rather than nitropropane) on an industrial scale in Italy by Polifarm SpA Bergamo;
5. the information that Chimica Bulciago SRL Como, Italy may be producing aminobutanol by a process not based on nitropropane;
6. two reports by Professor Corbellini, Director of the Institute of Organic and Analytic Chemistry of the University of Milan, and Professor Macchioni, Director of the Institute of Organic Chemistry of the University of Cagliari;
7. (in the reply) the information that the enterprise 'Société Chimique de la Grande Paroisse', Paris, France also manufactures nitropropane and aminobutanol;
8. (in the reply) an affidavit by Dr Jerome L. Martin showing that there is at least one known practical method of producing nitropropane rather than purchase it from CSC, based on raw materials easily available at economic prices, and that there are at least three known practical processes for producing aminobutanol without the use of nitropropane.

The *Commission* states that in the present case the buyer (Zoja) depends on the availability of nitropropane and/or aminobutanol on the market. Only in re-processing these raw materials into the end-product (ethambutol) is Zoja able to employ its technology and know-how. Consequently cutting off the supply of nitropropane and/or aminobutanol would inevitably result in Zoja's disappearing from the market. Therefore the existence of other processes for manufacturing, from other raw materials, the same end-product is in this context irrevelant. Also the possibilities of obtaining ethambutol in bulk on the market are not important. Speculations concerning the availability of such processes, of such other raw materials and/or other end-products do not alter the fact that the industrially tied buyer cannot switch to other suppliers of other raw materials, without changing the economic and industrial basis of his undertaking. The whole question can be summed up as follows: are there, besides the CSC-Istituto Group, other suppliers of nitropropane and aminobutanol who are offering these materials in sufficient quantities under reasonable conditions? It is in this light that the alternatives put

forward by the applicants have to be judged.

The Commission reviews critically the other alleged sources of aminobutanol and ethambutol:

Ad 1.:

Professor Pietra's statement mentions only a number of alternative methods of manufacturing aminobutanol under laboratory conditions, which is quite a different thing from producing it on an industrial scale and in competitive conditions;

Ad 2.:

the letter from International Business & Research Inc. only states that a process for the manufacture of aminobutanol not based on nitropropane is '*under development*';

Ad 3.:

as to the offer made by Fallek CV the Commission remarks that it contains only vague indications, saying nothing about the nature of the method of obtaining ethambutol from thiophenol, nor about its industrial and commercial practicability. This impression was confirmed by the subsequent exchange of letters between Zoja and Fallek.

Ad 4.:

Regarding Polifarm the Commission observes that manufacturing aminobutanol from butanone is too expensive in comparison with the method of processing aminobutanol from nitropropane. The amounts of aminobutanol produced by Polifarm on the base of butanone are limited and reserved for its own manufacture of ethambutol.

Ad 5.:

Bulciago is a small firm producing small amounts of aminobutanol on the base of butanone for its own use. Both Polifarm and Bulciago supplied Zoja with ethambutol in bulk at prices varying from 41 500 Lira to 67 000 Lira per kg. These prices are not competitive since, as ICI stated in a memorandum of 13 November 1972, the price of ethambutol in bulk was 38 000 Lira. This gives an indication that the method of processing aminobutanol from butanone is not competitive.

Ad 6.:

The report of Professor Corbellini is not pertinent, because — although it mentions the possibility of producing aminobutanol from butanone — it does not consider the problem of the costs of production involved in such a method. As to the report of Professor Macchioni the Commission observes that it is incomplete and inconclusive, as it refers only to the last phase of the process of synthesis based on butanone and does not give an account of the industrial and commercial possibilities of this method.

Ad 7.:

The Société Chimique de la Grande Paroisse has built only a pilot plant for the production of nitropropane. This plant, still working at a reduced rhythm, allows, at the moment, the marketing of samples of a few kg.

Ad 8.:

Dr Martin examines the method for producing aminobutanol from alpha-aminobutyric acid. This method, which was suggested by Professor Corbellini, had already been, at the request of Zoja, examined by Professor Cardani, who considered it not commercially feasible on account of the very high price of the raw material (approximately 30 000 Lira per kg). Although Dr Martin admits that alpha-aminobutyric acid is at present only available in laboratory quantities, he asserts that this raw material could be manufactured on an industrial scale at a cost of about one dollar per pound. Next he examines how aminobutanol could be

produced from this raw material. He gives three possible methods with which laboratory experiments have been carried out and which are published in literature dating from 1940 and 1943.

After having indicated that there might be ways of producing aminobutanol other than the nitropropane method, Dr Martin describes another process of obtaining nitropropane than that used by CSC. He acknowledges that the economic practicability of this method has not been established. The Commission holds Dr Martin's investigation to be purely theoretical. Although the writings cited are very old, they have never been applied industrially. Furthermore, with either process Zoja would be obliged to commence its production process at an earlier stage. Such vertical expansion could be expensive and hazardous, as it is entirely based on methods which so far have only been tested under laboratory conditions. Here the Commission asks why it took CSC twenty years to perfect its method of producing nitropropane on an industrial scale, if the method described by Dr Martin, available since 1872, could have been applied without any difficulty.

The Commission summarizes its review of the different alternatives by stating that none of them offers Zoja real commercial possibilities to overcome the cutting off of the supply of aminobutanol and/or nitropropane by the CSC-Istituto Group. Consequently the Commission's assumption that the CSC-Istituto Group has a dominant position, if not a monopoly, is entirely justified.

In its defence the Commission mentions incidentally dextro-aminobutanol as a raw material for the production of ethambutol. This is an upgraded intermediary supplied by CSC to Istituto since 1970.

The *applicants* declare this impermissible by way of procedure, and assert that dextro-aminobutanol is a more upgraded intermediary product for the manufacture of ethambutol and does not constitute a relevant market by itself.

The *Commission,* referring to the Decision, agrees on the last point with the applicants. Dextro-aminobutanol could not constitute a market by itself: it forms part of the market of raw materials for the production of ethambutol, which is dominated by the CSC-Istituto Group.

*3. As to the abuse of the dominant position*

In its Decision the Commission states:

1. CSC's refusal to supply a raw material to one of its main users must lead to the elimination of one of the principal producers of ethambutol in the Common Market;
2. this behaviour seriously affects the maintenance of conditions of effective competition within the Common Market, as there are only five producers of ethambutol within the Community, three of them being important (American Cyanamid Company by the intermediary of its subsidiary Cyanamid Italia; Zoja; and since 1970 the CSC-Istituto Group);
3. therefore CSC's behaviour constitutes an abuse of a dominant position;
4. for the purpose of establishing the effects of the conduct in issue one is entitled to consider the ethambutol market as a separate market: ethambutol is one of the modern therapeutical components most frequently used in the treatment of tuberculosis; ethambutol is a complement to rather than a competitor of other anti-tubercular drugs; the maintenance of a high level of sales of ethambutol on a non-expanding market (in spite of the appearance of a new antibiotic which may be used in the treatment of

tuberculosis, rifampicine, confirms that the possibilities of replacing this product are negligible;

5. the offer for sale of a quantity of ethambutol in bulk made by Istituto to Zoja on 15 May 1972 does not put an end to the infringement of Article 86, for this move cannot undo the fact that Zoja was disappearing from the market as a *manufacturer* of ethambutol (Sections I B and D, II C).

(a) *CSC and Istituto* submit that it was Zoja which in the spring of 1970 unilaterally cancelled its current supply contract with Istituto. When CSC terminated its sales in the EEC of aminobutanol, it reserved the quantities committed by Istituto for resale to Zoja until CSC was informed in April 1970 that those quantities were no longer desired by the latter. The applicants deny that the discontinuation of the supplies to Zoja entails its elimination from the market. This could only be true if there were no alternative ways to manufacture ethambutol. It is shown both by the applicants' submissions and by the fact that all previous consumers of CSC's nitropropane or aminobutanol continued their manufacturing activities with other intermediate products, that such alternatives do exist. Taking into account the large stocks of aminobutanol Zoja had at its disposal at the moment CSC cut off the supply, this enterprise would have been in a position to continue the processing of aminobutanol for a considerable time, thus having the opportunity to change its methods of manufacturing ethambutol. The Commission is wrong in considering it irrelevant that Zoja was still able to obtain ethambutol in bulk for the manufacture of its own ethambutol-based specialities. The argument put forward in favour of this contention fails, because it is nowhere indicated if and to what extent Zoja's technology, equipment and chemical know-how have been affected by the discontinuation of the supply of aminobutanol. As far as patents are involved it is to be noted that pharmaceutical products are not patentable in Italy, where Zoja manufactures its ethambutolbased specialities. The Decision does not give the slightest information of the reason why Zoja's patents in other Member States would become worthless. The applicants emphasize that Zoja is no more and no less dependent for its supply, whether it buys aminobutanol or ethambutol in bulk from CSC or Istituto. The Decision fails to make clear why it is an abuse to offer the latter intermediary product instead of the former.

In its essence the Commission's position resolves itself into the obligation for CSC to maintain Zoja as a competitive firm, manufacturing and seeling ethambutol and ethambutol based specialities and to ensure that Zoja needs not change its manufacturing operations.

The *Commission* replies that Zoja's decision to cancel the supplies of aminobutanol provided for in the contract with Istituto was approved by the latter. It invokes the transcript of the telephone conversation between executives of both enterprises. Therefore Istituto's contention that Zoja unilaterally cancelled the existing agreement cannot be accepted. The question, however, whether Zoja's decision was approved by Istituto or not does not affect the definition of abuse, for there is no relation between the alleged breach of contract by Zoja and the discontinuation of supplies by CSC and Istituto: even if the alleged breach of contract had not occurred, this would in no way have prevented the action of CSC-Istituto. The Commission refers to its previous observations to refute the argument that there were alternative sources of aminobutanol or nitropropane on the market. The discontinuance of the supply of aminobutanol had the effect that Zoja was forced to discontinue its manufacturing process and to become a mere packer and distributor of ethambutol. In fact it has been excluded from some of the stages

previously undertaken by it. Manufacturing aminobutanol from raw materials other than nitropropane or ethambutol from another intermediary product than aminobutanol or dextro-aminobutanol would have entailed with it an important and expensive adaptation of Zoja's system of manufacture.

The Commission condemned only the fact that, without valid justification, the Group discontinued supplies of the raw materials for the manufacture of ethambutol to one of the main users of that raw material and as a result created a situation in which one of the main ethambutol manufacturers might be eliminated from the market so that the maintenance of effective competition might be seriously affected. Among the different causes which may affect Zoja's survival and viability, only this cause was imputed to CSC-Istituto by the decision. So the applicants' contention that the definition of abuse adopted by the Commission would oblige the CSC-Istituto Group to guarantee Zoja's survival in any case is clearly erroneous.

In fact the discontinuation of the supply of aminobutanol has had the consequence that Zoja, after exhausting its existing stocks of aminobutanol, disappeared from the market as a *manufacturer* of ethambutol. The fact that the company as such has, so far, survived does not alter this.

(b) With respect to the ethambutol market, which is considered by them as the only possible relevant market, CSC and Istituto submit that contrary to what is stipulated in the Decision, ethambutol does not constitute a separate market. This drug is not the newest antituberculosis agent and it does not have the largest share of the anti-tuberculosis drug market. In fact ethambutol is only one of a number of anti-tuberculosis drugs which are competing on the same market, i.e. that of anti-tuberculosis drugs; its market share is decreasing, both as a simple drug and combined with other products. The leading anti-tuberculosis drug is not ethambutol but rifampicine, as is corroborated by statistical data collected by International Marketing Service. The data also show that ethambutol is more and more being replaced by rifampicine both as a separate drug and as an ingredient in complex drugs.

As for the delimitation of the relevant market, the concept of interchangeability settles the matter; the Commission has to prove that ethambutol as an anti-tuberculosis drug cannot be replaced, within reasonable limits, by other drugs. In fact all the suitable drugs for the treatment of tuberculosis are to a certain degree interchangeable.

Thus the market of anti-tuberculosis drugs has to be looked upon as the relevant one. In support of their view the applicants refer to the following literature:

1. An article by Dr. Virchow, Medical Director of a tuberculosis clinic in Davos;
2. 'Drugs of Choice 1972-1973' by Dr Modell, St. Louis, 1972;
3. Physicians Desk Reference to Pharmaceutical Specialities and Biologicals 1972, 26th edition;
4. The Journal of the American Medical Association, April 17, 1972, 'Evaluation of a new Antituberculosis Agent'.

The *Commission* disputes the analysis made by the applicants. First, it emphasizes once again that in the Decision the ethambutol market has only been mentioned for the purpose of establishing the effects of the abusive conduct. In general, it would be hazardous to speak of interchangeability when dealing with modern drugs whose effects and specific contra-indications require the physician to make a choice dictated in each individual case by the particular clinical characteristics of his patient. In particular, in the case of ethambutol the available literature (including that referred to by the applicants) indicates that the treatment

of tuberculosis often requires a combination of drugs, depending on the peculiarities of the different cases. Since most of the usual combinations of drugs mentioned in the literature contain ethambutol, the Commission thinks itself justified in qualifying it as the most frequently used anti-tuberculosis drug. This clearly does not mean that, expressed in relative quantities, ethambutol has the largest market share, but rather indicates that it is very important as a component of the anti-tuberculosis regimens.

Like the relative quantities of drugs used, the relative value of the sales, too, has a limited significance. This has to be borne in mind when interpreting the statistical data advanced by the applicants.

It follows from the previous reasoning that the various drugs for the treatment of tuberculosis are used as components of the particular regimens that are prescribed in the individual cases. So one has to assume that these drugs are complementary to each other and not interchangeable. The Commission is thus entitled to consider the ethambutol market as a separate one.

The applicants' arguments regarding rifampicine are defective in two respects. First, nowhere has it been proved that the increase in sales of this medicine is taking place at the expense of ethambutol. On the contrary the literature consulted indicates repeatedly that both drugs are frequently used as complements. Secondly, the statistics put forward by the CSC-Istituto Group only reveal that the increase in sales of rifampicine is larger than the growth of sales of ethambutol. Further it is important to know that rifampicine is also used for many purposes other than the treatment of tuberculosis. This fact limits the force of the argument even further.

*4. As to the effect on trade between Member States*

In its decision the Commission points out:

1. there exist important outlets for ethambutol within the Common Market;
2. Zoja exports ethambutol to France and since 1971 to Germany;
3. it can be reasonably expected that Zoja's sales to the other Member States will increase;
4. it follows that the elimination of Zoja would affect both the actual and the potential intracommunity trade in ethambutol;
5. the existence of patents held by Cyanamid in the other Member States did not turn out to be an insurmountable obstacle to Zoja's sales to those States.

CSC and *Istituto* submit that the market for anti-tuberculosis drugs within the EEC is a very small one, because tuberculosis has become a very rare disease. Zoja's sales within the Common Market are only a small portion of its production; most of it is exported to the world market. Moreover trade from Italy with the other Member States is blocked by patents in those States held by American Cyanamid Company. These patents have never been questioned in the Netherlands and Belgium. When they were challenged in the Federal Republic of Germany, their validity was upheld by the competent national tribunal. In France, patent litigation is pending; the Decision mentions the ruling against American Cyanamid Company by the Court of Appeal of Paris, but omits to state that this judgment is now under review by the Court of Cassation.

CSC has offered to supply Zoja with its requirements of aminobutanol to the extent necessary to enable it to participate in intra-community trade.

The *Commission* asserts that the very fact that Zoja has made exports to other member countries shows that effective intracommunity trade exists. Where the product in question is a medicine, which has been on the market only a few years,

the amounts sold are not very large in terms of value. It is, however, not correct to argue, from the limited sales in terms of value which have been effectuated within the EEC, that trade between Member States is not being affected. Where ethambutol is used to combal a serious, but rare illness, the amounts of exports offer, as such, an insufficient criterion.

The applicants' representation of the facts with respect to the patents of American Cyanamid Company is not correct. At present Zoja, pursuant to a decision of the Court of Appeal of Paris, may legitimately export to France. The German decision mentioned by the applicants is not unfavourable to Zoja's position. The Düsseldorf Landgericht has confirmed in its judgment of 1 February 1973 that the product manufactured and sold by Zoja is not the same as that which results from the process patented by American Cyanamid Company.
Further, the Commission mentions that legal proceedings are pending in Great Britain, Korea and Japan.

The Commission does not consider relevant the fact that CSC is prepared to supply Zoja to the extent necessary for the latter's sales within the Common Market, as the offer of such a supply, made in May 1972, is subsequent to the abusive behaviour, which consisted in a total cessation of supplies. Consequently this offer does not provide a remedy for the infringement committed. The Decision by which the Commission has imposed sanctions in respect of that infringement would still be valid even if supplying Zoja for its sales in the Common Market would cause the cessation of the abuse.

The Commission concludes that, in the presence both of an existing intra-community trade in which Zoja is playing a role of protagonist, and of potential trade in the development of which Zoja is the most promising undertaking, there can be no doubt that its disappearance as a competitor would seriously prejudice this trade.

The *applicants* reply that the Commission's allegations with respect to the patent litigation between Zoja and American Cyanamid Company are not correct. A nullity proceeding instituted by Zoja before the German Patent Office against Cyanamid's patent was rejected in December 1971. The interlocutory decision of the Landgericht Düsseldorf, referred to by the Commission, was no more than an order to both parties to produce evidence in support of their respective theses. It gives no indication as to what the final outcome of this litigation — an infringement action, brought by Cyanamid against Zoja and Zoja's German distributor — will be. Regarding the patent situation in Great Britain, Korea and Japan, mentioned by the Commission, the applicants state, first, that the Decision in issue was given at a time when the United Kingdom was not a Member State of the EEC, secondly, that the patent situation in Korea and Japan has nothing to do with intra-community trade. These references must therefore be regarded as irrelevant. The Commission is not entitled to make conjectures about the potential development of intra-community trade in ethambutol. It has to be taken into account that pharmaceutical products are subject to constant evolution and renovation, so that such estimates can only cover a reasonably foreseeable future. As the validity of Cyanamid's patents in the EEC extends to at least 1977 (Great Britain), no prejudicial effect on intra-community trade can be assumed in the foreseeable future.

The *Commission,* in its rejoinder, maintains that, contrary to the applicants' opinion, Cyanamid's patents cannot block Zoja's export to Germany. In fact the application for attachment filed by Cyanamid in the Landgericht of Munich once ethambutol produced by Zoja was introduced on the German market was refused on 4 May 1971. Consequently Zoja can export to

Germany. The importance of the interlocutory decision of the Landgericht of Düsseldorf is that it refused to grant Cyanamid the advantage as regards burden of proof under Section 47 (3) of the German Patent law, because the American Cyanamid product and the Zoja product do not have the same characteristics.

More generally, the applicants' conclusion that ethambutol manufactured by Zoja cannot be exported to the countries of the Common Market is not correct, because Cyanamid patents have not so far been able to block the import of Zoja's product.

The Commission only referred to the patent situation in Korea and Japan in order to give an indication of the value of Zoja's patents and hence of its competitive strength.

*5. As to the remedies*

The *applicants* submit that the Commission lacks the competence to issue specific orders for delivery of products and for submitting to the Commission proposals for further supply, both sanctioned by a daily penalty for non-compliance. Competence to do this is not provided for in Regulation No 17, nor in any other regulation. It may be possible that Article 87 EEC authorizes the Council of Ministers to vest such powers in the Commission, but no measure to this effect has yet been taken.

Moreover, the Commission's order to supply 60 000 kg of nitropropane or 30 000 kg of aminobutanol to Zoja constitutes a misuse of its powers. The Commission's competences under Article 86 are limited to competition within the Common Market, only in so far as trade between the Member States is concerned. Its injunction to deliver 60 000 kg of nitropropane or 30 000 kg of aminobutanol to cover Zoja's most urgent needs is disproportionate. Although the applicants do not have detailed data concerning Zoja's sales of ethambutol in the Common Market at their disposal, they consider that the quantities required by the Commission greatly exceed the annual quantities needed by Zoja for its intra-community trade. CSC refers here again to its proposal to Zoja to supply it with the amounts of aminobutanol required for the production of ethambutol to be sold within the Common Market.

The Commission has misused its powers, therefore, by issuing injunctions which can quantitatively only be related to Zoja's requirements for the world market. This invalidates the Decision with regard to the injunction for an immediate supply in Article 2 and the daily fine in Article 4 (1), and also, unless the Commission relates the supply obligation to Zoja's needs for the Common Market only, with regard to the injuction for a longer term supply in Article 2 and the daily penalty in Article 4 (2).

The *Commission* refers, in its defence, to the wording of Article 3 (1) of Regulation No 17, and in particular to the following clause: it may by decision require... to bring infringement (of Articles 85 and 86) to an end. This Article, instead of summing up a list of remedies which the Commission may impose, establishes the goal to be attained by the Decisions, i.e. the end of the infringement. It follows that the extent of powers vested in the Commission can only be determined in relation to the goal laid down in Article 3. Since in the present case the behaviour which resulted in an infringement of Article 86 was that of ceasing to supply the raw material, thus risking the elimination of one of the principal manufacturers of the derived product, the necessary remedy could only be the ordering of such supplies as to guarantee the economic survival of the manufacturer in question. Hence the Commission acted within the competences laid down by Article 3.

With respect to the question of the proportionality of the injunctions the

Commission states that the issue consists in guaranteeing Zoja's survival as a competitive manufacturer of ethambutol. This competitive position must be evaluated not only in the light of the situations on the market at the moment the Decision was issued, but rather from the point of view that Zoja is the only potential competitor of American Cyanamid Company. Consequently the Commission, in issuing the injunctions, had to take into account the potential role of Zoja within the Common Market.

With respect to the quantity which the applicants were ordered to supply, the Commission observes that it was not possible to calculate exactly the quantities Zoja urgently needed to survive. Therefore the average of the last annual supply which Zoja received from Istituto and the annual order for 1971 applied to a period between three and four months was adopted as a criterion for Zoja's urgent needs:

$$\frac{(80\,000 \text{ kg} + 120\,000 \text{ kg}) \times 7/24}{2} =$$

29 166 kg aminobutanol.

Having by this 'life-line' insured the survival of Zoja, the Commission did not intend to impose the supply of predetermined quantities in the future, but limited itself to relying on the presentation of proposals. If the applicants were able to show that the extent of the 'life-line' was excessive, nothing would prevent the error in evaluation from being taken into account, when establishing future supplies. But the defendant stresses that the criterion cannot be based on a simple distinction between the actual sales of Zoja within the Common Market and those to third countries, because this would ignore the necessity of Zoja's survival as a viable producer. An important decrease in Zoja's turnover could not occur without seriously affecting its competitiveness. That is why it would be incorrect to consider the production aimed at third countries not to be relevant to the present case.

CSC and *Istituto* answer that Regulation No 17 contains an exhaustive list of the measures which the Council, pursuant to Article 87, has authorized the Commission to take. The Commission cannot extend this list by stating that any measure it considers indispensable is implied in the authorization to give cease-and-desist orders. If the Commission considered it necessary to have larger powers, it could always propose an enabling regulation to the Council.

The applicants repeat that any regulatory powers of the Commission in the field of competition are strictly limited to measures to protect competition in intra-community trade. Therefore the injunctions are unacceptable, because they oblige the applicants to supply. Zoja with quantities of intermediary products that are related to Zoja's sales in the previous years, sales which have only been effectuated for a small part in the Common Market (about 10 %). In fact the Commission has obliged CSC to supply Zoja with raw material of which, after being processed, about 90 % will be sold in third countries. This, clearly, constitutes a misuse of powers.

CSC rejects the Commission's argument that the amount of immediate deliveries ordered by the Commission constituted a 'life-line' for Zoja. The Decision does not mention Zoja's general economic position, its financial and stock-position and the possibility for Zoja to continue manufacturing specialities on the basis of bulk-ethambutol or other intermediary products.

The *Commission,* in its rejoinder, maintains its previous argument.

*6. As to the procedure and the reasoning*

CSC and Istituto submit that the Commission has infringed the rules of procedure in basing its decision on insufficiently investigated facts, namely with respect to the alleged economic unity between CSC and Istituto, the assumption that CSC is the only

producer of aminobutanol and nitropropane, the delimitation of the relevant market, the dominant position of CSC-Istituto on the market, the position of Zoja, and the trade between Member States in ethambutol and ethambutol-based specialities. Further the Decision infringes Article 19 of Regulation 17 and Articles 2 and 4 of Regulation 99/63, because it is based on a number of alleged facts which were never communicated to CSC and Istituto in the Notice of Objections. Finally the Commission infringed the rules of procedure in imposing on CSC and Istituto disproportionate injunctions. The applicants state that the Commission has disregarded the standards of impartiality needed to ensure fair proceedings by neglecting to investigate matters suggested by CSC and Istituto.

It follows that the Commission's reasoning is based on a presentation of facts which is erroneous and incomplete to such an extent that the reasoning cannot constitute a sufficient basis for the Decision, which therefore, pursuant to Article 190 EEC, is null and void.

The *Commission* answers that the first allegation of CSC and Istituto has been covered by its previous remarks on the different complaints elaborated by the applicants. The Commission admits that there are two points on which the Decision differs from the Notice of Objections:

(a) by comparison with the Notice of Objections the Decision adds certain facts, such as the presence of representatives of CSC in the executive organs of Istituto or the fact that CSC itself stated that Istituto is its subsidiary;

(b) with respect to the non-replaceability of ethambutol in the Notice of Objections the emphasis is laid on the special characteristics of ethambutol, whereas in the Decision reference is made to the complementary nature of this product and other antitubercular medecines.

Both alterations are correct because they are based on accurate facts, known to the applicants. Consequently the reasoning of the Decision is substantial and sufficient. The Commission considers it superfluous to contest the allegations made by CSC regarding violation of Article 190 EEC.

## V — Questions put to the parties by the Court

### *1. Questions put to the applicants*

(a) The Court understands that in 1970 CSC decided to discontinue deliveries to the EEC of nitropropane and aminobutanol, and to supply instead dextro-aminobutanol, (an up-graded intermediate product), which Istituto could process into ethambutol in bulk for sale within the EEC and elsewhere.

Before taking this decision, did CSC supply nitropropane or aminobutanol to customers outside the EEC?

If so, was the decision taken solely with regard to the EEC, or did it apply to a wider area? If so, what was this area?

What were the reasons (technical, economic and commercial) behind the decision?

*CSC* answers that it has for many years supplied nitropropane and aminobutanol to customers in the United States and elsewhere throughout the world.

Nitropropane is produced in CSC's basic nitroparaffins plant, which produces four basic products in generally fixed proportions: nitropropane, nitroproite, nitromethane and nitroethane. CSC's production of nitropropane is limited to the capacity of its present plant. The expansion of its production capacity entirely depends on the possibility of finding an outlet for all four basic products, and not solely on its market for nitropropane and its derivatives. Because the relative demand for the four products shows an asymmetrical picture

CSC does not intend to enlarge its production capacity because of a shortage of nitropropane alone.

It has long been CSC's general policy to upgrade its product line so that it sells more and more of the endproduct in order to come into closer connexion with the final user and, if possible, to enlarge its profit margins. That is why CSC decided to cut back its sales of nitropropane as such, in order to have more raw materials available for sales of derivatives of that product. It also restricted its sales of nitropropane derivatives for pharmaceutical end use, so as not to become too dependent on one product market. Finally it started upgrading its product in the market of antituberculosis drugs and emphasizing sales of dextro-aminobutanol rather than aminobutanol.

Istituto submits that, on the basis of its own research, it decided to go over to the production and sale of ethambutol in powder form and of its own speciality based on ethambutol, mycobutol.

(b) It transpires, both from Istituto's application and from the decision at issue, that Istituto bought certain quantities of nitropropane on the Italian market and sold them subject to a prohibition on resale.

What were the reasons for this prohibition?

If the underlying reason was to prevent the export of nitropropane to third countries, what was the object in view?

Is the Commission's statement, that the condition imposed on buyers consisted of a prohibition on resale for *pharmaceutical purposes,* correct?

Istituto points out that the prohibition at issue was merely a non-recurring measure and regarding a single small quantity of nitropropane. The purpose of this prohibition was to prevent the export of nitropropane to third countries. At the time the measure was taken Istituto was engaged in efforts to penetrate into the markets of a number of third countries with the sale of ethambutol in powder form and it did not wish to see its action disturbed by exports to the same markets of a less developed intermediate product in Istituto's own possession.

The Commission was wrong in stating that the conditions laid down for purchasers included a prohibition on resale for pharmaceutical use. In fact the prohibition was not imposed to prevent resale for pharmaceutical purposes within the EEC.

(c) In May 1972 CSC offered to supply Zoja with sufficient quantities of aminobutanol to cover its production of ethambutol for the Common Market. In its Reply, CSC notes that for the world market Zoja could obtain ethambutol in bulk from Istituto.

Does this mean that, as regards the world market, there is close cooperation between the applicants?

*CSC* answers that its statement on the availibility of ethambutol in bulk was only a statement of fact, and did not imply any cooperation between the applicants as regards the world market.

*Istituto* submits that it exports ethambutol in powder form on the international market, without any form of collaboration with CSC.

(d) Does CSC supply ACC with raw materials for the manufacture of ethambutol? If so, what are these raw materials?

If the answer to the question is negative, how and where does ACC obtain raw materials for ethambutol?

*CSC* answers that it does not supply ACC within the EEC with any raw materials for the manufacture of ethambutol. On the United States market, ACC is supplied with relatively small quantities of aminobutanol, and outside the United States CSC delivers large quantities of dextro-aminobutanol to ACC. It is emphasized by CSC that the nature and extent of its sales outside the EEC are not relevant to these proceedings.

2. *Questions put to the defendant*

(a) Is a refusal to sell to be considered in all cases as the abuse of a dominant position in respect of those industries which use the products, the supply of which has been discontinued?

If not, under what conditions does such a refusal constitute an abuse?

The *Commission*, after giving a general account of the pertinent legislation of the Member States, maintains that under Community law a refusal by an undertaking in a dominant position to sell is likely to constitute an abuse of such a position. However, the possibility should not be excluded of such a refusal being legitimate in certain circumstances. Only by examining each individual case would it be possible to establish whether a refusal to sell by an undertaking in a dominant position is justified. In any event in cases in which:

— the dominant position is a monopoly;

— the refusal to sell applies to one of the principal users, previously a customer;

— the refusal to sell gravely affects maintenance of conditions of effective competition in the Common Market, and

— no objective justification is apparent,

the unlawful nature of the refusal to sell is particularly clear.

(b) It has been stated repeatedly that only supplies of nitropropane and aminobutanol could allow Zoja to produce ethambutol using its own technology and technical knowledge (know-how). Is it possible to state precisely in what these technical advantages consist?

Do they allow Zoja to produce ethambutol by methods which by and large would not infringe its competitors' patents?

The *Commission* states that one has to consider separately the statement that only supplies of nitropropane and aminobutanol could allow Zoja to produce ethambutol, and the statement that a change in production methods would cause Zoja to lose the advantages that it derives from its own technology and technical knowledge.

The first statement is the only one which is important with regard to the present case. It is based on the fact that on the one hand ethambutol can nowadays be produced economically and on an industrial scale only from one or other of such raw materials, and on the other hand these raw materials are not available on the market except from the CSC-Istituto Group. Without nitropropane or aminobutanol, therefore, Zoja would find it materially impossible to continue manufacturing ethambutol.

The aim of the second statement was to point out that the switch from supplying nitropropane or aminobutanol to supplying bulk ethambutol would have caused Zoja's elimination as a *manufacturer* of ethambutol, contrary to the applicants' allegations. The fact that without nitropropane or aminobutanol Zoja is no longer in a position to make use of its own technology would only have been important if ethambutol could have been produced from raw materials other than nitropropane or aminobutanol. Since, however, there are no other raw materials for the production of ethambutol, and therefore the discontinuance of supplies of nitropropane and aminobutanol prevents Zoja from manufacturing ethambutol in any case, the waste of Zoja's own technology entailed by the discontinuance of supplies can only be used as an additional argument.

Next, the Commission gives an account of the specifications of Zoja's most important patents.

As regards the second part of question (b), the Commission refers to its rejoinder and concludes that it has

sufficiently demonstrated that the patents held by other companies (and in particular ACC) would not have prevented Zoja from continuing and increasing the volume of its own exports within the Common Market.

In support of its view the Commission submits a decision of 2 October 1973 adopted by the Landesgericht of Düsseldorf dismissing the claim of infringement brought by ACC against Zoja.

## Grounds of judgment

1 It is established that after conferring with Commercial Solvents Corporation, a company incorporated under the law of the State of Maryland, having its principal office in the City and State of New York (hereinafter called 'CSC'), Istituto Chemioterapico Italiano of Milan (hereinafter called 'Istituto') stated that it was unable to supply aminobutanol to Laboratorio Chimico Farmaceutico Giorgio Zoja (hereinafter called 'Zoja'), to whom during the years 1966-1970 it had supplied large quantities as a raw material for the manufacture of ethambutol.

2 Following Zoja's application to the Commission for a finding that there had been an infringement of Articles 85 and 86 of the EEC Treaty, the latter by letter dated 25 April 1972 initiated under Article 3 of Regulation No 17/62 the procedure for alleged infringement of Article 86 of the Treaty against CSC and Istituto by serving on them Notice of Objections under Article 19 of Regulation No 17/62 and Article 3 of Regulation No 19/63.

3 By Decision dated 14 December 1972 (OJ L 299 1972, p. 51 et seq.) the Commission found that CSC and Istituto had infringed Article 86 by stopping supplies to Zoja of raw material for the manufacture of ethambutol from November 1970.

4 It therefore adopted the measures which it considered necessary to put an end to the infringement and imposed a fine of 200 000 units of account jointly and severally on the applicants.

5 By applications filed at the Registry on 17 February 1973 Istituto and CSC applied for the annulment of this Decision. Since for the purpose of the proceedings the two cases were joined by order of 8 May 1973, it is appropriate to give a single judgment in the language of Case 7/73.

## I — The application of Article 86

6 It is established that in 1962 CSC acquired 51 % of the voting stock in Istituto. CSC has 50 % representation on the executive committee and on the board of directors of Istituto. The chairman of the board of directors, who has a casting vote in the event of votes being equal, is also a representative of CSC. The executive officers (consiglieri delegati) responsible for the administration of Istituto were the same persons before and after 1962, although after 1962 they have had to obtain the approval of the executive committee for investments above a certain level.

7 CSC manufactures and sells among other things products based on nitroparaffins, *inter alia* 1. nitropropane ('nitropropane') and a derivative thereof 2. amino-1-butanol ('aminobutanol'), an intermediate product for the manufacture of ethambutol. Until 1970 Istituto acted as a re-seller of nitropropane and aminobutanol produced by CSC in the United States. At the beginning of 1970 CSC decided that it would no longer supply the Common Market with these products and informed Istituto that thereafter these products would be available only in such quantities as had already been committed for resale. Since then CSC has changed its policy and supplied Istituto exclusively with dextro-aminobutanol for processing into bulk ethambutol for sale in the EEC and elsewhere and for its own needs, since Istituto had meanwhile developed its own specialities based on ethambutol.

8 It is necessary therefore to examine in turn the questions

(a) whether there is a dominant position within the meaning of Article 86,

(b) which market must be considered to determine the dominant position,

(c) whether there has been any abuse of such a position,

(d) whether such abuse may affect trade between Member States and

(e) whether the applicants have in fact acted as an economic unit.

The complaints of infringement of the rules of procedure and insufficient grounds for the Decision will be examined in this context.

*(a) Dominant position*

9 The applicants dispute the findings in the Decision in question according to which the CSC-Istituto group 'has a dominant position in the Common Market for the raw material necessary for the manufacture of ethambutol', on the basis that it has 'a world monopoly in the production and sale of nitropropane and aminobutanol'.

10 For this purpose they rely on documents which, they claim, establish that aminobutanol is produced by at least one other Italian company from butanone, that a third Italian company manufactures ethambutol from other raw material, that a French company produced nitropropane independently and that another undertaking has brought thiophenol on to the market, a product which is said to be used in Eastern Europe to produce ethambutol.

11 Finally CSC produced a statement by an expert according to which there is at least one practical method of producing nitropropane other than the method used by CSC and at least three other processes for producing aminobutanol without using nitropropane.

12 During the course of the administrative proceedings the applicants adduced some of these particulars in support of a request that before taking a decision the Commission should obtain an expert's report to verify the alleged monopoly of CSC as regards the production of raw material for the manufacture of ethambutol. The Commission rejected this request, since it considered that the particulars relied on, even if they were established, would not effect the substance of its Notice of Objections. In the present proceedings the applicants renewed their request for an expert's report on the point at issue.

13 The Commission replied, without being seriously challenged, that the production of nitropropane by the French company is at present only in an experimental stage and that the researches of this company have been developed only subsequently to the events in dispute. The information as to the possibility of manufacturing ethambutol by using thiophenol is too vague and uncertain to be seriously considered. The statement of the expert produced by CSC takes account only of wellknown processes which have not proved

themselves capable of adaptation to use on an industrial scale and at prices enabling them to be marketed. The production by the two Italian companies mentioned is on a modest scale and intended for their own needs, so that the processes used do not lend themselves to substantial and competitive marketing.

14 The Commission has produced an expert's opinion from Zoja according to which the production of aminobutanol based on butanone on a substantial industrial scale would be possible only at considerable expense and at some risk, which is disputed by the applicants who rely on two experts, according to whom such production would not present any difficulties or cause excessive costs.

15 This dispute is of no great practical importance since it relates mainly to processes of an experimental nature, which have not been tested on an industrial scale and which have resulted in only a modest production. The question is not whether Zoja, by adapting its installations and its manufacturing processes, would have been able to continue its production of ethambutol based on other raw materials, but whether CSC had a dominant position in the market in raw material for the manufacture of ethambutol. It is only the presence on the market of a raw material which could be substituted without difficulty for nitropropane or aminobutanol for the manufacture of ethambutol which could invalidate the argument that CSC has a dominant position within the meaning of Article 86. On the other hand reference to possible alternative processes of an experimental nature or which are practised on a small scale is not sufficient to refute the grounds of the Decision in dispute.

16 It is not disputed that the large manufacturers of ethambutol on the world market, that is to say CSC itself, Istituto, American Cyanamid and Zoja use raw material manufactured by CSC. Compared with the manufacture and sale of ethambutol by these undertakings, those of the few other manufacturers are of minor importance. The Commission was therefore entitled to conclude 'that in the present conditions of economic competition it is not possible to have recourse on an industrial scale to methods of manufacture of ethambutol based on the use of different raw materials'.

17 It was justified therefore in refusing the request for an expert's report.

18 For the same reasons the request made during the course of the present proceedings must be rejected, since the fact that CSC had a dominant position on the world market in the production and sale of the raw material in question has been sufficiently established in law.

*(b) The market to be considered*

19 The applicants rely on the sixth recital of Section II-C of the Decision in dispute for the conclusion that the Commission considers the relevant market for determining the dominant position to be that of ethambutol. Such a market, they say, does not exist since ethambutol is only a part of a larger market in anti-tuberculosis drugs, where it is in competition with other drugs which are to a large extent interchangeable. Since a market in ethambutol does not exist, it is impossible to establish a separate market in the raw material for the manufacture of this product.

20 The Commission replies that it has taken into account the dominant position in the Common Market in the raw material necessary for the production of ethambutol.

21 Both in Section II-B and in the part of Section II-C of the Decision which precedes the finding that the conduct of the applicants 'therefore constitutes an abuse of a dominant position within the meaning of Article 86' (II-C, fourth recital), the Decision deals only with the market in raw materials for the manufacture of ethambutol. In taking the view that 'the conduct in question limits the market in raw material as well as the production of ethambutol and thus constitutes one of the abuses expressly prohibited by the said Article' the Decision in dispute considers the market in ethambutol only for the purpose of determining the effects of the conduct referred to. Although such an examination may enable the effects of the alleged infringement to be better appreciated, it is nevertheless irrelevant as regards the determination of the relevant market to be considered for the purpose of a finding that a dominant position exists.

22 Contrary to the arguments of the applicants it is in fact possible to distinguish the market in raw material necessary for the manufacture of a product from the market on which the product is sold. An abuse of a dominant position on

the market in raw materials may thus have effects restricting competition in the market on which the derivatives of the raw material are sold and these effects must be taken into account in considering the effects of an infringement, even if the market for the derivative does not constitute a self-contained market. The arguments of the applicants in this respect and in consequence their request that an expert's report on this subject be ordered are irrelevant and must be rejected.

*(c) Abuse of the dominant position*

23 The applicants state that they ought not to be held responsible for stopping supplies of aminobutanol to Zoja for this was due to the fact that in the spring of 1970 Zoja itself informed Istituto that it was cancelling the purchase of large quantities of aminobutanol which had been provided for in a contract then in force between Istituto and Zoja. When at the end of 1970 Zoja again contacted Istituto to obtain this product, the latter was obliged to reply, after consulting CSC, that in the meantime CSC had changed its commercial policy and that the product was no longer available. The change of policy by CSC was, they claim, inspired by a legitimate consideration of the advantage that would accrue to it of expanding its production to include the manufacture of finished products and not limiting itself to that of raw material or intermediate products. In pursuance of this policy it decided to improve its product and no longer to supply aminobutanol save in respect of commitments already entered into by its distributors.

24 It appears from the documents and from the hearing that the suppliers of raw material are limited, as regards the EEC, to Istituto, which, as stated in the claim by CSC, started in 1968 to develop its own specialities based on ethambutol, and in November 1969 obtained the approval of the Italian government necessary for the manufacture and in 1970 started manufacturing its own specialities. When Zoja sought to obtain further supplies of aminobutanol, it received a negative reply. CSC had decided to limit, if not completely to cease, the supply of nitropropane and aminobutanol to certain parties in order to facilitate its own access to the market for the derivatives.

25 However, an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start

manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question, would amount to eliminating one of the principal manufacturers of ethambutol in the Common Market. Since such conduct is contrary to the objectives expressed in Article 3 (f) of the Treaty and set out in greater detail in Articles 85 and 86, it follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86. In this context it does not matter that the undertaking ceased to supply in the spring of 1970 because of the cancellation of the purchases by Zoja, because it appears from the applicants' own statement that, when the supplies provided for in the contract had been completed, the sale of aminobutanol would have stopped in any case.

26 It is also unnecessary to examine, as the applicants have asked, whether Zoja had an urgent need for aminobutanol in 1970 and 1971 or whether this company still had large quantities of this product which would enable it to reorganize its production in good time, since that question is not relevant to the consideration of the conduct of the applicants.

27 Finally CSC states that its production of nitropropane and aminobutanol ought to be considered in the context of nitration of paraffin, of which nitropropane is only one of the derivatives, and that similarly aminobutanol is only one of the derivatives of nitropropane. Therefore the possibilities of producing the two products in question are not unlimited but depend in part on the possible sales outlets of the other derivatives.

28 However the applicants do not seriously dispute the statement in the Decision in question to the effect that 'in view of the production capacity of the CSC plant it can be confirmed that CSC can satisfy Zoja's needs, since Zoja represents a very small percentage (approximately 5-6 %) of CSC's global production of nitropropane'. It must be concluded that the Commission was jusified in considering that such statements could not be taken into account.

29 These submissions must therefore be rejected.

*(d) The effects on trade between Member States*

30 The applicants argue that in this case it is principally the world market which is affected, since Zoja sells 90 % of its production outside the Common Market and in particular in the developing countries and that constitutes a much more important market for anti-tuberculosis drugs than the countries of the Community, where tuberculosis has largely disappeared. The sales outlets of Zoja in the Common Market are further reduced by the fact that in many Member States Zoja is blocked by the patents of other companies, in particular American Cyanamid, which prevent it from selling its specialities based on ethambutol. Therefore abuse of the dominant position, even if it were established, would not come within the ambit of Article 86, which prohibits such an abuse only 'in so far as it may affect trade between Member States'.

31 This expression is intended to define the sphere of application of Community rules in relation to national laws. It cannot therefore be interpreted as limiting the field of application of the prohibition which it contains to industrial and commercial activities supplying the Member States.

32 The prohibitions of Articles 85 and 86 must in fact 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 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 86 therefore covers abuse which may directly prejudice consumers as well as abuse which indirectly prejudices them by impairing the effective competitive structure as envisaged by Article 3 (f) of the Treaty.

33 The Community authorities must therefore consider all the consequences of the conduct complained of for the competitive structure in the Common Market without distinguishing between production intended for sale within the market and that intended for export. When an undertaking in a dominant position with the Common Market abuses its position in such a way that a competitor in the Common Market is likely to be eliminated, it does not

matter whether the conduct relates to the latter's exports or its trade within the Common Market, once it has been established that this elimination will have repercussions on the competitive structure within the Common Market.

34 Moreover the contrary argument would in practice mean that the control of Zoja's production and outlets would be in the hands of CSC and Istituto. Finally its cost prices would have been so affected that the ethambutol produced by it would possibly become unmarketable.

35 Moreover it emerged at the hearing that Zoja is at present able to export and does indeed export the products in question to at least two Member States. These exports are endangered by the difficulties caused to this company and by reason of this trade between Member States may be affected.

*(e) CSC and Istituto as an economic unit*

36 The applicants refer to the case law of the Court and in particular to Judgments 48/69, 52/69 and 53/69 of 14 July 1972 (Rec. 1972, p. 619, 787 and 845), and dispute whether CSC effectively exercises a power of control over Istituto and whether these constitute an economic unit. The two companies have always acted independently, so that CSC cannot be deemed responsible for the acts of Istituto nor Istituto for those of CSC. Therefore even if CSC holds a dominant position within the world market in raw materials for the manufacture of ethambutol, it has not acted within the Community, and therefore the author of the conduct complained of can only be Istituto which however does not have a dominant position within the market in question.

37 In the disputed Decision in Section II-A CSC's holding of share capital and involvement in the administration of Istituto are set out. It is pointed out in that section that the annual reports of CSC show Istituto as one of its subsidiaries. It is inferred from the prohibition issued in 1970 by CSC to its distributors on reselling nitropropane and aminobutanol for the manufacture of ethambutol that CSC was not abstaining from exercising its power of control over Istituto. It takes note of an attempt on the part of Istituto to take over Zoja by means of a merger in which it is unlikely that CSC played no

part. The conclusion is reached that 'CSC holds the power of control of Istituto and exercises its control in fact at least with respect to Istituto's relations with Zoja' and it is therefore proper 'to treat the companies of CSC and Istituto as constituting in their relations with Zoja and for the purposes of the application of Article 86 a single undertaking or economic unit'.

38 It follows from the passages quoted that there is no foundation in the complaint, which must therefore be rejected, that the Commission altered its position during the course of the present proceedings in that after having agreed in its Decision that the two companies constituted an economic unit in every respect, it restricted its position to the argument that in any case they acted as such a unit in their relations with Zoja.

39 As to the substance of the submission, besides the particulars given in Section II-A, the disputed Decision contains other particulars which are capable of showing that the argument that, in their conduct vis à vis Zoja, CSC and Istituto act as one economic unit, is well-founded. In this respect the coincidence pointed out in Section II-A of the periods when CSC decided to prolong its production to a stage beyond finishing and Istituto, a former distributor of nitropropane aminobutanol, began its activities as a producer of ethambutol is highly significant. It is difficult not to associate the decision by CSC no longer to sell nitropropane and aminobutanol with the fact it made an exception in favour of Istituto, which was supplied with dextroaminobutanol for the purposes of its own production of ethambutol and specialities based on this product.

40 The fact, pointed out in Section III-A of the Decision, that Istituto bought quantities of nitropropane which was still available on the market for resale to paint manufacturers who were forbidden to resell for pharmaceutical purposes outside the Common Market is likewise significant.

41 As regards the market in nitropropane and its derivatives the conduct of CSC and Istituto has thus been characterized by an obviously united action, which, taking account of the power of control of CSC over Istituto, confirms the conclusions in the Decision that as regards their relations with Zoja the two companies must be deemed an economic unit and that they are jointly and severally responsible for the conduct complained of. In these circumstances the argument of CSC that it did not do business within the Community and

that therefore the Commission lacked competence to apply Regulation No 17/63 to it must likewise be rejected.

## II — The measures ordered and the sanctions imposed by the disputed Decision

42 The disputed Decision ordered CSC and Istituto under penalty of a fine to supply Zoja within a period of 30 days with 60 000 kg of nitropropane or 30 000 kg of aminobutanol and to submit to the Commission within two months proposals for the subsequent supply of Zoja, and imposed on them jointly and severally a fine of 200 000 units of account, i.e. 125 000 000 lire.

43 In the first place the applicants disagree that the provision of Regulation No 17/62 (3) whereby the Commission, where it finds that there is an infringement, may require the undertakings concerned to bring such infringement to an end, enables the Commission to order specific supplies.

44 In the second place they complain that the Commission has misused the powers intended to prevent competition from being distorted within the Common Market and applied the provisions of Article 86 beyond the territory of the Community by ordering supplies disproportionate to the needs of Zoja for the supply of its customers within the Community and which correspond rather to its activities in the world market.

45 As to the first submission, according to the wording of Article 3 of Regulation No 17, where the Commission finds that there is an infringement of Article 86, 'it may by decision require the undertakings . . . concerned to bring such infringement to an end'. This provision must be applied in relation to the infringement which has been established and may include an order to do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain action, practices or situations which are contrary to the Treaty. For this purpose the Commission may, if necessary, require the undertaking concerned to submit to it proposals with a view to bringing the situation into conformity with the requirements of the Treaty.

46 In the present case, having established a refusal to sell incompatible with Article 86, the Commission was entitled to order certain quantities of raw material to be supplied to make good the refusal of supplies as well as to order that proposals to prevent a repetition of the conduct complained of be put forward. In order to ensure that its decision was effective the Commission was entitled to determine the minimum requirements to ensure that the infringement was made good and that Zoja was protected from the consequences of it. In choosing as a guide to the needs of Zoja the quantity of previous supplies the Commission has not exceeded its discretionary power.

47 Therefore the first submission is unfounded.

48 As to the second submission, it has been established above that it cannot be inferred from the expression 'in so far as it may affect trade between Member States' that only the effects of a possible infringement on trade within the Community must be taken into account when it is a question of defining the infringement and its consequences. Moreover the rather limited measure that the applicants suggested would have resulted in the production and sales outlets of Zoja being controlled by CSC-Istituto and in Zoja being in a position where its cost price would have been affected to such an extent that its production of ethambutol would have been in danger of being unmarketable. In these circumstances the Commission could well consider that the maintenance of an effective competitive structure necessitated the measures in question.

49 Although in the disputed Decision and during the course of the present proceedings the Commission has constantly avoided meeting the complaint in the way that the applicants argued it, it has on the other hand ever since the Notice of Objections maintained that since the conduct complained of aimed at eliminating one of the principal competitors within the common market, it was above all necessary to prevent such an infringement of Community competition by adequate measures. Both in the disputed Decision and in the written procedure the measures taken were justified by the necessity of preventing the conduct of CSC and Istituto having the effect referred to and eliminating Zoja as one of the principal manufacturers of ethambutol in the Community. This reasoning is at the root of the litigation and cannot therefore be considered as insufficient.

50 This submission, therefore, also fails.

## III — The penalty imposed

51 The disputed Decision imposes jointly and severally on the companies CSC and Istituto a fine of 200 000 units of account, that is to say 125 000 000 lire. Although the seriousness of the infringement justifies a heavy fine, the duration of the infringement should also be taken into account, which in the Decision was calculated as two years or more, but it might have been shorter if the Commission, which had been put on inquiry by the complaint of Zoja on 8 April 1971, that is six months after the first refusal by CSC-Istituto, had intervened more quickly. Moreover the ill effects of the conduct complained of have been limited by reason of the fact that CSC-Istituto have provided the supplies ordered by the Decision.

52 Having regard in particular to these circumstances it is proper to reduce the fine to 100 000 units of account, namely 62 500 000 lire.

## Costs

53 By Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs. As the applicants have substantially failed in their submissions they should bear the costs of the present proceedings.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 86;

Having regard to the Financial Regulation of 30 July 1968, especially Article 17;
Having regard to Regulations No 17/62 of the Council and No 99/63 of the Commission of the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby:

1. Orders that the application for an annulment in Cases 6 and 7/73 be rejected;

2. Orders that the fine imposed jointly and severally on the applicants by the Decision of the Commission of 14 December 1972 (OJ L 299, p. 51 et seq.) be reduced to 100 000 units of account, namely 62 500 000 lire;

3. Orders the applicants to pay the costs.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 6 March 1974.

A. Van Houtte
Registrar

R. Lecourt
President