# Judgment of the Court, Walt Wilhelm and Others/Bundeskartellamt, Case 14/68 (13 February 1969)

**Caption:** According to the Court of Justice, in its judgment of 13 February 1969, in Case 14/68, Walt Wilhelm and Others v Bundeskartellamt, so long as a regulation adopted pursuant to Article 87(2)(e) of the EEC Treaty (now Article 83 of the EC Treaty) in the field of competition law has not provided otherwise, national authorities may take action against an agreement in accordance with their national law, even where an examination of the agreement from the point of view of its compatibility with Community law is pending before the Commission, subject, however, to the condition that the application of national law may not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it.

**Source:** Reports of Cases before the Court. 1969. [s.l.].

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# Judgment of the Court 13 February 1969 (1)
# Walt Wilhelm and Others v Bundeskartellamt (2)
# (Reference for a preliminary ruling by the Kammergericht Berlin)

Case 14/68


**Summary**

*1. EEC — Community legal system — Special nature — Status in relation to national legal systems — Supremacy of rules of Community law*

*2. Policy of the EEC — Competition rules — Cartels — Parallel action by Community and national authorities — Permissible subject to observance of Community law — Requirement of natural justice in the event of concurrent application of Community and national sanctions (EEC Treaty, Article 85 (1); Article 87(2))*

*3. EEC Treaty — Principles — Discrimination on grounds of nationality — Prohibition — Disparity of treatment resulting from differences between national legislative systems not referred to (EEC Treaty, Article 7)*

1. The EEC Treaty has established its own system of law, integrated into the legal systems of the Member States, and which must be applied by their courts. It would be contrary to the nature of such a system to allow Member States to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty.

The binding force of the Treaty and of measures taken in application of it must not differ from one state to another as a result of internal measures lest the functioning of the Community system should be impeded and the achievement of the aims of the Treaty placed in peril.

Consequently, conflicts between the rules of the Community and national rules must be resolved by applying the principle that Community law takes precedence.

2. So long as a regulation adopted pursuant to Article 87(2)(e) of the Treaty has not provided otherwise, national authorities may take action against an agreement in accordance with their national competition laws, even when an examination of the agreement from the point of view of its compatibility with Community law is pending before the Commission, subject however to the condition that the application of national law must not prejudice the full and uniform application of Community law or the effects of measures taken to implement it. If the existence of parallel procedures entails consecutive sanctions, a general requirement of natural justice demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed.

3. Article 7 of the EEC Treaty which prohibits each Member State from applying its law differently on the ground of the nationality of the parties concerned is not concerned with the disparities in treatment or the distortions which may result, for persons and undertakings subject to the jurisdiction of the Community, from divergences existing between the laws of the various Member States, provided that these affect all persons subject to them in accordance with objective criteria and without regard to their nationality.


In Case 14/68

Reference to the Court under Article 177 of the EEC Treaty by the Kammergericht (Kartellsenat), Berlin, for a preliminary ruling on the interpretation of the EEC Treaty, in particular Articles 5, 7 and 85, and also of Regulation No 17 of the Council of 6 February 1962, in particular Article 9, in the action pending before that court between

1. WALT WILHELM, Director of Farbenfabriken Bayer AG, Hahnwald, Hasengarten 31,

2. HANS GÖLZ, Director of Cassella-Farbwerke Mainkur AG, Frankfurt-am-Main, Hammannstrasse 6,

3. HANS ULRICH FINTELMANN, Sales Manager of Farbwerke Hoechst AG, Frankfurt-am-Main-Hoechst, Farbwerke Hoechst AG,

4. BADISCHE ANLIN- & SODA-FABRIK AG, Ludwigshafen am Rhein,

5. FARBENFABRIKEN BAYER AG, Leverkusen,

6. FARBWERKE HOECHST AG, formerly Meister Lucius & Brüning, Frankfurt-am-Main-Hoechst,

7. CASELLA FARBWERKE MAINKUR AG, Frankfurt-am-Main-Fechenheim,

and

BUNDESKARTELLAMT, Berlin,

THE COURT

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

Advocate-General: K. Roemer
Registrar: A.Van Houtte

gives the following

JUDGMENT

**Issues of fact and of law**

**I — Facts and procedure**

The facts and procedure in the present case may be summarized as follows: By an order of 28 November 1967 the Bundeskartellamt (Federal Cartel Bureau), Berlin, fined the applicants under head (i) of the first section of paragraph 38, jointly with paragraph 1, of the GWB (Gesetz gegen Wettbewerbsbeschränkungen the German law against restraint of competition of 27 July 1957).

The Bundeskartellamt alleges that on 18 July 1967 these undertakings agreed amongst themselves, and with other manufacturers of dyestuffs from other Member States as well as from third countries, to raise the price of aniline by 8 % from 16 October 1967. This decision is the subject of the case pending before the Kammergericht (Kartellsenat), Berlin.

The Commission of the European Communities had on its own initiative commenced proceedings under Articles 9(3) and 3 of Regulation No 17 of 31 May 1967, against four of the German undertakings affected by the order of the Bundeskartellamt, as well as other aniline manufacturers from the Community and third countries. These proceedings may, according to Article 15(2) of Regulation No 17, result in the imposition of fines.

At first the Commission proceedings were concerned with verifying the compatibility with the EEC Treaty of the price increases for aniline of January 1964 and January 1965; subsequently the Commission also included the new increases of 16 October 1967 among the complaints made against the undertakings concerned in the proceedings, and they were informed of this by the Commission during October 1967 in accordance with Article 19(1) of Regulation No 17, in conjunction with Article 2 of Regulation No 99/63.

The Commission claims that these repeated and uniform price increases are evidence of concerted practices within the meaning of Article 85 (1) of the EEC Treaty.

The undertakings concerned alleged before the Berlin Kammergericht, *inter alia*, that the Bundeskartellamt was not competent under German law to take proceedings against a breach of law which was simultaneously the subject of parallel proceedings before the Commission for infringement of Article 85 (1) of the EEC Treaty.

By an order of 18 July 1968, entered in the Court Registry on 25 July 1968, the Berlin Kammergericht asked

the Court for a preliminary ruling under Article 177, first and second paragraphs, of the EEC Treaty on the following questions:

1. Is it in accordance with Article 85 (1) and (3) of the EEC Treaty and Article 9 of Regulation No 17 of 6 February 1962 (on cartels), and with the prevailing general principles of Community law, to apply concurrently to a situation capable of fulfilling the conditions set out in Article 85 (1) of the EEC Treaty not only the prohibition prescribed by that Article but also the restrictive provisions contained in the cartel law of a Member State, in this instance paragraph 1 together with paragraph 38 (1) (i) of the GWB (the German Law against Restraint of Competition), when the Commission of the European Communities has already asserted its jurisdiction under Article 3 of the EEC Treaty through action taken under Article 14 of Regulation No 17 (on cartels) (Case No IV/26.267/E1 of the Commission of the European Communities)?

2. Or is this impossible because of the risk of its resulting in a double sanction imposed by the Commission of the European Communities and by the national authority with jurisdiction in cartel matters   in this case, the Bundeskartellamt?

3. Does Article 5 of the EEC Treaty, in conjunction with Article 3 (f) of the EEC Treaty and with Article 9 of Regulation No 17 (on cartels) make this impossible in particular because Member States must refrain from applying their own law regarding competition when the uniform legal assessment of a case would otherwise be placed at risk and/or when there would thereby result a distortion of competition in the common market to the detriment of those subject to that law?

4. Does Article 7 of the EEC Treaty make this impossible, in particular when the national authority with jurisdiction in cartel matters   in this case the Bundeskartellamt   addresses its measures exclusively to the nationals of its own state and thereby may place them at a disadvantage in comparison to the nationals of other Member States in a comparable situation?

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC the plaintiffs in the main action together with the Governments of the Federal Republic of Germany, of the French Republic and of the Kingdom of the Netherlands, and the EEC Commission, submitted written observations. The plaintiffs in the main action, the German Government and the Commission presented oral observations at the hearing on 27 November 1968.

The Advocate General delivered his opinion at the hearing on 19 December 1968.

**II — Observations submitted under Article 20 of the Protocol of the Statute**

The observations submitted under Article 20 of the Protocol of the Statute of the Court of Justice of the EEC may be summarized as follows:

The first and third questions

The *plaintiffs in the main action* claim that the general principles expressed by the EEC Treaty in Articles 3 (f), 5 (2) and 7, the principle to be drawn from Article 9 (3) of Regulation No 17, and the principle ‘non bis in idem’ all indicate that when a situation fulfils both the conditions for the application of Article 85 of the EEC Treaty and those of paragraph 1 of the GWB, then it is exclusively the rules of Community competition law which must be applied.

According to *the first, fourth and fifth plaintiffs*, to apply national cartel laws to cases of European importance would create artificially specialized conditions of competition in a national market, thereby provoking distortion in the conditions of competition in the common market contrary to Article 3 (f) and Article 5 (2) of the EEC Treaty. This incompatibility would occur not only when the prohibition in Article 85 (1) was applied but also where the Commission authorized a cartel under paragraph 3 of that Article. In the latter case if national authorities could prohibit, under national law, the agreement authorized by the EEC

Commission, the latter would be prevented from pursuing a uniform economic policy throughout the Community and a kind of island inside the common market would be created within which the objectives of the competition policy pursued would be other than those selected by the Commission for the common market as a whole.

In all these cases the Community could not pursue any competition policy unless the application of national law were set aside where it was incompatible with the EEC Treaty. It is true that the distortion in competition which might result from the simultaneous existence of differing national rules and measures in a number of areas (for instance in fiscal matters) could only be eliminated by harmonizing national laws. But, unlike the legal position in that context, the Community system contains both procedural and substantive rules for cartels, which are directly applicable, concrete and exhaustive. One is therefore forced to exclude the possibility that national authorities may adopt measures which would interfere with the use of the instruments available to the Commission in this field.

The *fourth plaintiff in the main action*, referring to the two conflicting theories of the 'single barrier' (which says that Community law and the national law on competition apply each exclusively of the other within their respective spheres of application) and of the 'double barrier' (which holds that the cartel which has effects both within a Member State and in trade between Member States is subject not only to Community law but also to national law), maintains that there is no need here for a commitment to either theory. In fact the prohibitions which the Bundeskartellamt seeks to apply are, to the extent that they are applicable to the actions complained of in the present instance, wholly covered by the provisions of the Community law on competition. There is no question, therefore, of having to decide whether, apart from the prohibitions prescribed by Community law, *other* prohibitions derived from national cartel laws may be applied to the actions complained of: the question to be answered is which authorities are competent to apply the existing law on cartels to the plaintiffs in the main action.

According to this plaintiff, the idea that the role of national law in competition matters is subsidiary to that of Community law is a dominating theme throughout the Treaty, and it is on the basis of that concept that the national authorities decided in certain cases not to apply concurrently the legal effects of different systems where their rules coincided. In the perspective of the EEC Treaty all restrictions on competition affecting trade between Member States must be considered as a single entity: they cannot be subdivided into restrictions on competition in the internal market and thus be evaluated in accordance with the individual national laws.

The *second, third, sixth and seventh plaintiffs in the main action* echo the Commission's observation that hitherto the 'double barrier' theory has never been examined in the context of the imposition of fines, and are concerned to prove that this theory has no legal basis in Community law. The reference to the state of the law in the United States is not conclusive because of significant divergences regarding the legal concept of the cartel existing between that country and the EEC, particularly with regard to the approach to rules providing for exceptions. On the other hand there has been no case, in several decades of practice, where the federal authorities and the state authorities have each separately taken parallel proceedings in respect of the same case.

Application of the 'double barrier' theory in the Common Market countries has been limited to the Federal Republic of Germany, but even in that country the theory has provoked a number of criticisms. The report by the Bundestag's Economic Policy Committee on the draft law against restraint of competition expressly rejected the applicability of this theory for the period following the entry into force of the rules implementing Articles 85 and 86 provided by Article 87 of the EEC Treaty.

The Spaak report (p. 55 in the French version) supports this.

In addition to this, even the supporters of the theory concerned acknowledge that it has certain legal consequences which cannot be justified and that therefore legislation is necessary to remove them.

As regards, in particular, the written provisions of Community law, these plaintiffs examine the various

provisions in the EEC Treaty on which this theory is claimed to be founded, in order to prove the absence of any legal basis for it.

In the first place Article 87 (2) (e) in no way implies that the provisions of the two legal systems can be applied concurrently to the same circumstances.

Article 88, while limited in principle to the transitional period, appears to be still in force to a limited extent in view of the reference made to it in Article 9(3) of Regulation No 17; but the wording of Article 88, which says that the authorities in Member States shall rule in accordance with the law of their country and with the provisions of Articles 85 and 86 of the Treaty, contains, according to these plaintiffs, inherent contradictions when applied to the fundamental rules of national cartel law. That is why this provision is generally taken to mean that the reference to the law of Member States only embraces the procedural rules applicable in this field.

This interpretation is also adopted in Article 28 of the Belgian Law of 27 May 1960.

Nor is it possible to base the ‘double barrier’ theory on the supposed separation of the interest protected by the national law from that protected by the Community laws on competition for, as the *EEC Commission* also concedes, no restrictive agreements on competition affect solely trade between Member States without at the same time adversely affecting trade within at least one Member State.

The main purpose of the criterion of the adverse effect upon trade between Member States is to define the limits of the spheres of application of the two legal systems, Community and national, where the interests protected coincide in principle, as the Court of Justice stated in the *Grundig* judgment. There can be no reason, therefore, to apply these two systems of law concurrently.

Arguing against the proposition that Article 85 (3) is not designed to protect the interests of national trade and that consequently the authorities in Member States must be able to take action themselves later, the *same plaintiff's* state that not one of the criteria mentioned in that provision takes into account the peculiarities of trade between Member States. On the contrary, an examination of the conditions for exemption entails an analysis of the conditions of competition and those of the market in the Member States within which the agreement in restraint of competition takes effect. Participation by the appropriate national authorities in the proceedings before the Commission is justified precisely because of the need to take account of the interests and requirements of Member States.

These plaintiffs claim that in the Community's scheme of competition prohibition and exception are two sides of the same coin: they cannot be separated and can only be applied in their totality. Were it possible for the national administrations to frustrate the object of Article 85 (3) only there would be nothing left of the Community law save the prohibitory rule. They add that ordinarily the measures taken by a Member State with respect to agreements in which undertakings from several States take part do produce effects in those other states. So, for instance, a specialization agreement made between undertakings from various Member States and authorized by the Commission under Article 85 (3) would be frustrated completely if prohibited by national legislation. The administration of a Member State would thus be able to influence the direction of Common Market competition policy simply by applying national law. If a cartel authorized by the Commission contributes towards the realization of the Treaty's general objectives, then for a Member State unilaterally to place at issue the Community's competition policy could amount to a failure to fulfill the obligation imposed by Article 5 of the EEC Treaty.

The said plaintiffs believe that certain procedural points and, above all, the principle ‘non bis in idem’ are also in opposition to the theory which they criticize. Whilst Community law is bound to respect that principle, it seems doubtful in view of the precedence of Community law over the laws of Member countries that measures emanating from national authorities can prevent Community institutions themselves from initiating proceedings; that would seem to be borne out by the decision of the Court of Justice in Case 6/64 [1964] E.C.R. 585. In view of this, they draw the conclusion that the competent authorities must refrain from instituting proceedings where there is reason to believe that the agreement or practice concerned falls within

the terms of Articles 85 and 86 of the EEC Treaty.

The argument used by the Bundeskartellamt and the German Government which excludes the application of the principle ‘non bis in idem’ to the present case on the basis of paragraph 7 of the German Strafgesetzbuch (the German penal code) according to which the principle does not apply to acts of sovereignty committed by foreign powers, ignores the fact that Community law cannot be considered as, nor in any way assimilated to, foreign law.

Nor would it be correct to say that under German law the principle applies only to a penal measure adopted by the same power. On the contrary, support can be found in the case law of the Bundesverfassungsgericht (the German Federal Constitutional Court) for the argument that this principle is always applicable in the case of the exercise of sovereign rights founded on the constitutional law of the Federal Republic of Germany. However, EEC law was ratified by the German legislature on the basis of the Constitution.

The *Governments of the Federal Republic of Germany, of the French Republic and of the Kingdom of the Netherlands* cite Article 87 (2) (e) of the EEC Treaty which reveals clearly that national laws can be applied to cases which also involve Community law. These governments maintain that the *prohibitory rules* in the national cartel laws are in no way restricted by the effects of Community law and that nothing therefore prevents the concurrent application of these together with any sanctions they involve.

The *French and Netherlands Governments* say that the supremacy of Community law means only that a cartel prohibited by the Community authorities cannot be authorized by the national authorities.

The *German Government* considers that Article 85 (1) is of limited scope and does not constitute an exhaustive set of rules, even for those cases it expressly covers. It is possible, in fact, for a cartel in the import export field to have disastrous effects on local markets even though it has little harmful effect as far as the realization of the common market is concerned. In such a case the prohibition prescribed by Community law could be disregarded. This proves   and this is also the view of the *Netherlands Government* that the public interest of each Member State requires that the rule of Community law as it is at present should not have exclusive effect, even within its limited sphere of application.

The *German Government* adds that since Article 85 only seeks to safeguard the freedom of trade between Member States against disturbances created by agreements in restraint of competition, its emphasis is purely on the fact of incompatibility with the common market, and it shows thereby that it is not designed to protect those interests which merit protection and which do not coincide with the concept of the common market and that, therefore, such protection can be left to national law.

As regards the general principles of Community law, the German Government denies that there is any rule preventing the application of national law, even in a subsidiary or complementary manner, in the areas covered by Community law.

The *Netherlands Government* is likewise of the opinion that it is neither necessary nor useful, in order for the prohibition in Article 85 (1) to produce the effect required by the objective of the provision, for the national rules or their implementing measures which prohibit an agreement to be rendered ineffective when the agreement is similarly prohibited by the Community law on competition.

As regards Article 5, the *German Government* claims that where cartels are concerned this provision does no more than compel Member States to assist the Commission in applying the Treaty provisions on competition, but that it cannot prevent a concurrent application of Community law and the national law on competition, for the effect would otherwise be to disrupt the Treaty's scheme of competition based on the principle of the co existence, and parallel application, of national systems of competition with the Community system.

The *three intervening Governments* claim that Article 3 (f) of the EEC Treaty is not intended to establish a uniform competition policy, but simply to introduce a system which does not distort the conditions of

competition.

As. regards Article 9(3) of Regulation No 17 the *German Government* maintains that this provision is not relevant to the application of the prohibitory rules of national cartel law, for it is limited to setting out the conditions governing the powers of national administrations in applying Articles 85 and 86 of the Treaty, and says nothing as to the power of the national authorities with regard to the application of internal law.

The *German and French Governments* emphasize that Regulation No 17 requires close and permanent cooperation to be maintained between the Commission and the national authorities only for the purpose of applying the Community law on cartels, and that only in the context of applying that law were the respective spheres of jurisdiction of the Commission and the authorities defined in relation to each other.

As regards, in particular, the section of the first question put by the Kammergericht which refers to paragraph 3 of Article 85, the *Netherlands Government* observes that the procedure initiated by the Commission, and mentioned in the question put by the Kammergericht, concerns the possible application only of paragraph 1 of Article 85 and that consequently it is doubtful whether a reply to this part of the question is necessary in order to enable the Kammergericht to give its judgment.

As to the substance of the case, the *German and Netherlands Governments* observe that paragraph 3 of Article 85 can only be used to exempt an agreement from the Community prohibition, not to guarantee the existence of such an agreement in the face of other prohibitory rules laid down by the national law on cartels, since the sole purpose of this provision is to mitigate the effects of the prohibition pronounced in paragraph 1. On the other hand, it does not allow the Commission to pursue an independent policy on cartels by excluding the application of the prohibitory rules of law of Member States. If this were not so as the *German Government* points out a national cartel could evade the national anti trust legislation by creating an international connexion by taking in an undertaking from another Member State.

The *Netherlands Government* admits that cases could arise in which it would positively serve the interests of the Community to apply Article 85 (3). But the crucial point, in its opinion, is that the conditions governing the application of this provision give no guarantee that the exemption from prohibition would apply solely in those circumstances. It would in fact open the way to authorizing in addition agreements in restraint of competition where the positive elements in the agreements would prevent Community interests from being affected. This consideration suffices to prevent the applicability of Article 85 (3) from automatically excluding national rules or measures which do not permit undertakings to take advantage of it. This conclusion is confirmed by the fact that in certain cases, according to the Netherlands Government, Article 87 (2) (e) makes it possible, *inter alia*, to apply Article 85 (3) in such a way that its effect is to remove or limit the restrictions on applying it imposed by national rules or measures.

The *Commission of the EEC* concedes that, in principle, two legal systems one Community, one national can be applied concurrently to the same case, as is apparent from Article 87 (2) (e) of the EEC Treaty. But there are limits to this principle. Such co existence is capable of giving rise to conflict every time the material content of the two legal orders does not coincide. Until a universal set of rules is introduced under a Community regulation, these conflicts must be resolved in each individual case on the basis of the general principles of Community law.

On the other hand, there is usually no conflict when these two sets of laws concur in prohibiting a particular course of conduct. In this case, the national authorities remain competent, in principle, to take action against a restriction of competition under national law. However, if the effect of such action by the national authorities is to make the Community unable to apply and implement Community law uniformly throughout the Member States, then the action could be incompatible with Article 5 of the Treaty.

In order to avoid the differences in treatment between citizens of different Member States which would result in the application of Community law, Article 5 of the Treaty obliges these Member States to refrain from instituting domestic proceedings until the Community proceedings commenced by the Commission in the same individual case have come to an end. In particular, national authorities may not make any decision

the substance of which would entail, as one of its practical effects, revision of a decision already taken by the Commission in pursuance of Community competition law.

On a more general note the Commission observes, however, that the fact that the undertakings concerned may, as a result of the application of the national law of a Member State, find themselves placed at a disadvantage in relation to other undertakings situated in other Member States and being parties to the same agreement in restraint of competition, is not sufficient by itself to prevent the application of national laws.

The distortion which might thus occur could only be eliminated by applying Articles 100 to 102 of the EEC Treaty.

The second question

The *plaintiffs in the main action* would like an affirmative reply to this question, and in support of this they advance in particular the principle of 'non bis in idem' acknowledged by all the Member States and therefore by the Community itself. These undertakings claim that to allow the application of a double sanction for one and the same breach would be contrary to this principle.

The *second, third, sixth and seventh plaintiffs* maintain that the condition proposed by the German Government, that the Commission should take into account the fines imposed by the Bundeskartellamt, is impossible to apply in practice because of the total lack of guidance to be found in the legal texts. Article 90, second paragraph, of the ECSC Treaty does not contain any general legal principle capable of being transposed to the law of the EEC. On the other hand the application of this provision by analogy to the law of the EEC Treaty on cartels founders *inter alia* on the fact that even in the ECSC this provision is not applicable to the law on cartels.

Lastly, since there is no clear text governing the question the Commission cannot be placed under a duty to take into account the decisions of national authorities without violating the principle of the precedence of Community law, for previous national decisions would prevent the Commission from applying Community law without restriction and in a uniform manner to all parties concerned.

The *three Governments* consider that the second question should be answered in the negative.

The *German Government* says that the principle 'non bis in idem' does not prevent the national authority from adopting a decision imposing a fine for a breach of national cartel law when the Commission has imposed, or may impose, fines on the same parties for the same conduct. In the first instance the purpose of the fine is to prevent disturbance of the national economy, whilst in the second the mischief resides solely in the disturbance of international trade. Consequently the mischief resulting from conduct which violates both national and Community rules could not be fully remedied by fines imposed under one rule only. On this argument, the sanctions are therefore not doubled, but are merely designed to complement one another.

Article 90 of the ECSC Treaty, moreover, shows that Community law does accept the notion that Community and national sanctions may be applied concurrently for the same breach.

According to paragraph 7 of the German penal code the German authority must, in the case argued above, take into account the fines already imposed by the Commission. In any event, the question how the German authority is to take into account, in deciding what fine to impose under internal law, the fine previously imposed by the Commission in the same case and for the same breach is one of internal German law, and thus outside the jurisdiction of the Court.

The *French Government* points out that the sanctions of Community law on cartels and of French national law are fundamentally different: the former are administrative in character, whilst those in Article 59, second paragraph, et seq. of Law 45/1483 of 30 June 1945 come within the category of penal sanctions. The government claims that there is no rule compelling the national authority to take into account sanctions

which may be ordered by the Community authority, but there is nothing to stop the authority which is the last to make its decision from so doing.

The *Netherlands Government* observes, for its part, that if a particular party has already suffered a sanction imposed by the national authorities under internal law, the Community authorities would be well advised to take this into account in deciding what sanction they should apply, and vice versa.

The *EEC Commission* observes that conflict could arise where, on the basis of national law, a Member State imposed a penalty for conduct which under Community law, and for essentially the same reasons, could be the subject of a fine; that situation is one which might correspond to the facts in the present case.

Member States have an obligation under Article 5 of the EEC Treaty to refrain from initiating procedures leading to a penalty under national law or from continuing such procedures until the Commission has completed any proceedings it commenced in application of Article 15 of Regulation No 17. The principle is one which is in harmony with the rules contained in Article 10(2) of that Regulation requiring close and constant liaison between the Commission and the national authorities. On the other hand a counterpart of these rules is the Commission's duty to inform the national authorities as soon as it decides that the facts in question do not amount to a breach of Community law on cartels, so that the authorities may be free to apply their own law. On the other hand, it is open to the latter to ask the Commission whether it intends to take action under Article 15 of Regulation No 17 in a given case.

If the Commission finds that there has been a breach but does not impose a fine, the national authorities, by virtue of Article 5 of the EEC Treaty and of the principle that Community law takes precedence over national law, must not order sanctions under national cartel law when the facts are to be evaluated on the basis of legal criteria which are identical or essentially similar in both national and Community law.

But if, on the other hand, the Commission has imposed a fine and if, should the parties appeal, the decision is confirmed by the Court of Justice, then the Commission, whilst taking the view that the EEC Treaty does not provide the answer to the problem because it contains no provision similar to Article 90 of the ECSC Treaty, considers, having undertaken a comparative examination of the various principles and rules in force in each Member State, that the national authorities must be guided by a uniform criterion, that is to say, that they should deduct from the fine imposed by the Commission the amount of the fine they would impose under the national law on cartels. Otherwise the uniform application of Community law would be jeopardized.

The fourth question

The *second, third, sixth and seventh plaintiffs in the main action* consider that if the argument that Articles 85 and 86 apply exclusively within their own sphere is accepted there is no need to answer this question, or the third question put by the Kammergericht.

The *first, fourth and fifth plaintiffs* claim that the refusal of the Bundeskartellamt, contrary to subparagraph 2 of paragraph 98 of the GWB, to penalise the actions in the Federal Republic of the foreign undertakings involved in the alleged agreement constitutes discriminatory treatment contrary to Article 7 of the EEC Treaty.

Apart from this discrimination within the Federal Republic there would be further discrimination in the broader context of the Community owing to the restrictions entailed by the decision of the Bundeskartellamt on the behaviour of undertakings concerned in the common market.

The *three intervening Governments* favour a negative reply to the fourth question asked by the Kammergericht.

According to the *German Government*, Article 7 does not apply to a set of rules dependent not on nationality

but on other criteria. Consequently it has no relevance to national laws on cartels, which apply to all undertakings established in a Member State. The German law on cartels embraces without discrimination all restrictions on competition which produce effects within the Federal Republic

Particularly as regards the application of the national law on cartels to specific cases, it is not contrary to Article 7 for a national administration to act, for reasons of expediency and of the practical applicability of internal law, solely against the firms principally concerned which are established in the Member States in question.

The government notes that the undertakings fined in the present case hold about 80% of the German market in colouring agents derived from tar, and so the influence on the German market of the undertakings not fined is negligible. If this decision by the Bundeskartellamt is not addressed to foreign undertakings that, too, is because the persons in charge of those undertakings responsible for their participation in an international price fixing agreement do not tarry on German territory.

The *French Government* observes that the 'double barrier' theory is not liable to bring about discrimination within the meaning of Article 7 of the Treaty All it can do is to reveal the lack of harmony between the various national laws, and between each of those and Community law but that is a problem to be dealt with exclusively by Articles 100 to 101 of the EEC Treaty, and not Article 7.

The *Netherlands Government* adopts a similar view of Article 7 of the EEC Treaty but, on the question of the application in practice of national law relating to cartels, it adds that it is not compatible with this Article for national punitive action to be taken solely against parties of the same nationality as the country taking such action, excluding nationals from other Member States who are in a comparable position and whose conduct has infringed the provisions of the national law on cartels. Like the other two governments, the Netherlands Government does not accept that the concept of discrimination can be used in the territorial sense.

The *Commission of the EEC* points out that Article 7 contains a directly applicable prohibition which is equally capable of being used to protect nationals of Member States from measures taken by their own country. So far as legal persons are concerned, the prohibition against discrimination can also be applied in favour of companies deemed to be nationals of Member States. This prohibition is applicable to any kind of economic activity within the common market, and thus also to the application by a country of its own economic legislation.

The Commission concludes that in the present case the Kammergericht will have to consider, in the light of those principles, whether the Bundeskartellamt treated the persons and undertakings concerned in a discriminatory fashion on the ground of nationality, by imposing fines only on the persons and undertakings residing within the area of application of the national provisions which it has to apply.

**Grounds of judgment**

1 By order of 18 July 1968, which reached the Registry of the Court of Justice on 25 July 1968, the Kammergericht (Kartellsenat), Berlin, a court having jurisdiction in the Federal Republic of Germany in the matter of cartels, referred to the Court of Justice four questions under Article 177 of the Treaty establishing the EEC for an interpretation of Articles 3(f), 5, 7 and 85 of the EEC Treaty, as well as of Article 9 of Regulation No 17 of the Council of 6 February 1962.

**I — The first and third questions**

2 In the first question the national court asks whether, when a procedure has already been initiated by the Commission under Article 14 of Regulation No 17 of 6 February 1962, it is compatible with the Treaty for the national authorities to apply to the same facts the prohibitions laid down by the national law on cartels. This request is elaborated in particular in the third question, relating to the risk of a different legal assessment of the same facts and to the possibility of distortions of competition in the common market to the

detriment of those subject to the said national law. In this respect reference is made to Article 9 of Regulation No 17, to Articles 85, 3(f) and 5 of the EEC Treaty and to the general principles of Community law.

3 Article 9 (3) of Regulation No 17 is concerned with the competence of the authorities of the Member States only in so far as they are authorized to apply Articles 85 (1) and 86 of the Treaty directly when the Commission has taken no action of its own. This provision does not apply where the said authorities are acting in pursuance not of the said articles but only of their internal law. Community and national law on cartels consider cartels from different points of view. Whereas Articles 85 regards them in the light of the obstacles which may result for trade between Member States, each body of national legislation proceeds on the basis of the considerations peculiar to it and considers cartels only in that context. It is true that as the economic phenomena and legal situations under consideration may in individual cases be interdependent, the distinction between Community and national aspects could not serve in all cases as the decisive criterion for the delimitation of jurisdiction. However, it implies that one and the same agreement may, in principle, be the object of two sets of parallel proceedings, one before the Community authorities under Article 85 of the EEC Treaty, the other before the national authorities under national law.

4 Moreover this interpretation is confirmed by the provision in Article 87 (2) (e), which authorizes the Council to determine the relationship between national laws and the Community rules on competition; it follows that in principle the national cartel authorities may take proceedings also with regard to situations likely to be the subject of a decision by the Commission. However, if the ultimate general aim of the Treaty is to be respected, this parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the Common Market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules.

5 Any other solution would be incompatible with the objectives of the Treaty and the character of its rules on competition. Article 85 of the EEC Treaty applies to all the undertakings in the Community whose conduct it governs either by prohibitions or by means of exemptions, granted subject to conditions which it specifies in favour of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress. While the Treaty's primary object is to eliminate by this means the obstacles to the free movement of goods within the common market and to confirm and safeguard the unity of that market, it also permits the Community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole Community, in accordance with Article 2 of the Treaty. Article 87(2)(e), in conferring on a Community institution the power to determine the relationship between national laws and the Community rules on competition, confirm the supremacy of Community law.

6 The EEC Treaty has established its own system of law, integrated into the legal systems of the Member States, and which must be applied by their courts. It would be contrary to the nature of such a system to allow Member States to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty. The binding force of the Treaty and of measures taken in application of it must not differ from one state to another as a result of internal measures, lest the functioning of the Community system should be impeded and the achievement of the aims of the Treaty placed in peril. Consequently, conflicts between the rules of the Community and national rules in the matter of the law on cartels must be resolved by applying the principle that Community law takes precedence.

7 It follows from the foregoing that should it prove that a decision of a national authority regarding an agreement would be incompatible with a decision adopted by the Commission at the culmination of the procedure initiated by it, the national authority is required to take proper account of the effects of the latter decision.

8 Where, during national proceedings, it appears possible that the decision to be taken by the Commission at the culmination of a procedure still in progress concerning the same agreement may conflict with the effects of the decision of the national authorities, it is for the latter to take the appropriate measures.

9 Consequently, and so long as a regulation adopted pursuant to Article 87 (2) (e) of the Treaty has not provided otherwise, national authorities may take action against an agreement in accordance with their national law, even when an examination of the agreement from the point of view of its compatibility with Community law is pending before the Commission, subject however to the condition that the application of national law may not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it.

**II — The second question**

10 In the second question the Kammergericht asks whether ‘the risk of its resulting in a double sanction imposed by the Commission of the European Communities and by the national authority with jurisdiction in cartel matters ...’ renders impossible the acceptance for one set of facts of two parallel procedures, the one Community and the other national.

11 The possibility of concurrent sanctions need not mean that the possibility of two parallel proceedings pursuing different ends is unacceptable. Without prejudice to the conditions and limits indicated in the answer to the first question, the acceptability of a dual procedure of this kind follows in fact from the special system of the sharing of jurisdiction between the Community and the Member States with regard to cartels. If, however, the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a general requirement of natural justice, such as that expressed at the end of the second paragraph of Article 90 of the ECSC Treaty, demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed. In any case, so long as no regulation has been issued under Article 87 (2) (e), no means of avoiding such a possibility is to be found in the general principles of Community law; this leaves intact the reply given to the first question.

**III — The fourth question**

12 Finally the national court asks whether, when a procedure has been initiated by the Commission against an agreement, it would be compatible with Article 7 of the EEC Treaty for the national authority to take punitive action in respect of the same agreement. This question envisages in particular cases in which the authorities of a state which have jurisdiction in cartel matters address their measures exclusively to the nationals of that state, thereby possibly placing the latter at a disadvantage in comparison with the nationals of other Member States who are in a comparable situation.

13 Article 7 of the EEC Treaty prohibits every Member State from applying its law on cartels differently on the ground of the nationality of the parties concerned. However, Article 7 is not concerned with any disparities in treatment or the distortions which may result, for the persons and undertakings subject to the Jurisdiction of the Community, from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them, in accordance with objective criteria and without regard to their nationality.

**IV — Costs**

14 The costs incurred by the Commission of the European Communities and by the governments, which have submitted observations to the Court, are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Kammergericht, Berlin, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties to the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 3(f), 5, 7,

85, 87(2)(e) and 177;
Having regard to Regulation No 17 of the Council of 6 February 1962;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Kammergericht, Berlin, by an order of that court of 18 July 1968, hereby rules:

**1. So long as a regulation adopted pursuant to Article 87 (2) (e) of the Treaty has not provided otherwise, national authorities may take action against an agreement in accordance with their national law even when an examination of the position with regard to that agreement from the point of view of its compatibility with Community law is pending before the Commission, subject however to the condition that the application of national law must not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it;**

**2. Article 7 of the EEC Treaty prohibits Member States from applying their laws on cartels differently on the ground of the nationality of the parties concerned, but it is not concerned with disparities in treatment resulting from divergences existing between the laws of Member States, so long as these affect all persons subject to them in accordance with objective criteria and without regard to nationality.**

Lecourt
Trabucchi
Mertens de Wilmars
Donner
Strauß
Monaco
Pescatore

Delivered in open court in Luxembourg on 13 February 1969.

A. Van Houtte
Registrar

R. Lecourt
President

(1) Language of the Case: German
(2) CMLR