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 [UNION], 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 102 TFEU],

THE COURT

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

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

gives the following

JUDGMENT

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 off ice 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 101 and 102 TFEU], the latter by letter dated 25 April 1972 initiated under Article 3 of Regulation No 17/62 the procedure for alleged infringement of [Article 102 TFEU] 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 102 TFEU] 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 lstituto 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 102 TFEU]

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 ased 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 E[U] 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 102 TFEU],

(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 102 TFEU]. 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 11-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 102 TFEU]' (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 E[U], 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 TEU] and set out in greater detail in [Articles 101 and 102 TFEU], 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 102 TFEU]. 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 [Union], 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 102 TFEU], 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 [Union] 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 101 and 102 TFEU] must in fact be interpreted and applied in the light of [Article 3 TEU], which provides that the activities of the [Union] shall include the institution of a system ensuring that competition in the Common Market is not distorted, and [Article 3 TEU], which gives the [Union] the task of promoting 'throughout the [Union] harmonious development of economic activities'. By prohibiting the abuse of a dominant position within the market in so far as it may affect trade between Member States, [Article 102 TFEU] 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 TEU].

33 The [Union] 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 [Union], 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 aminoburanol 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 i 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 102 TFEU] 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 a 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 diff icult 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 [Union] 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 102 TFEU] beyond the territory of the [Union] by ordering supplies disproportionate to the needs of Zoja for the supply of its customers within the [Union] 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 102 TFEU], '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 102 TFEU], 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 [Union] 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 [Union] 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 [Union]. 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 [on the Functioning of the European Union, especially [Article 102];
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 [Union];
Having regard to the Protocol on the Statute of the Court of Justice of the European [Union];
Having regard to the Rules of Procedure of the Court of Justice of the European [Union];

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 Sorensen Monaco Mertens de Wilmars

Pescatore Kutscher O Dalaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 6 March 1974.

A. Van Houtte — Registrar

R. Lecourt — President