

some months, possibly until the date of the customers' next price computation, in order to derive an advantage from their ["at least dye manufacturers"] own "good behavior" as a result of the unfavorable impression which the price increase—already unjustifiable, in the opinion of the customers, because of its timing and of the cost situation—would provoke.

That most of the customers would reward the lower prices with increased orders could be expected, all the more so since the last—substantial—price increase became effective less than two years ago and since at that time the customers and their trade associations had already considered the same action as a concerted action—the then-existing economic situation had caused the manufacturers to withdraw their requested prices; especially for these reasons, a new price increase would now encounter particular resistance. From another point of view, when the short period of time which had elapsed since the last price increase and the other circumstances mitigating against a new increase were taken into consideration, each dye manufacturer should have calculated that his competitors would irritate their customers with a substantial new price increase. Thus, if a manufacturer intended to increase his prices at such an unfavorable moment and wanted to maintain the previous behavior consisting of a uniform increase of the price level alone, the present market situation clearly shows that such a manufacturer would not autonomously decide upon the increase or announce it by himself to his customers, but would rather induce common consent on the part of the competing enterprises. This effectively occurred then with the declaration of August 18, 1967, made by the representative of the ----- company⁵ in Basle: Considering the earlier identical behavior of the competitors as to price increases and other measures, the ----- company⁶ could and must have expected that the dye manufacturers to whom this appeal was directed would immediately make known their view that the announced date [October 16, 1967] of the price increase or the extent of such increase would go amiss, and that they therefore would not behave identically.

Because the declaration of ----- company was made eight weeks before the date on which the intended increase would become effective and, therefore, kept open the possibility of withdrawing the declaration, the rest of the dye manufacturers were, under these circumstances, invited to increase prices and to make declarations on this subject, especially if they would also participate in an increase of the price level by exactly 8% and exactly as of October 16, 1967. Logically connected with this invitation was the promise [by "the Swiss corporation"] to increase itself the level of its prices; since, for the enterprises in question, this promise necessarily resulted from their earlier uniform behavior, it was tacitly tied to the condition that the dye manufacturers to whom it was addressed would increase their prices uniformly and simultaneously. The offer to reach an agreement could be conclusively accepted by announcing an increase of one's own prices, or conclusively rejected by announcing that the timing or the magnitude of the increase would make participation impossible this time. Given the constant practice of arriving at uniform behavior in accordance with available opportunities at least with respect to the basis for quoting prices and other terms, the meaning of the declaration of ----- company was not at all ambiguous to the persons to whom it was addressed. In view of the earlier uniform action involved in this case, it was also not ambiguous to the defendants that, in case the proposition made by ----- company was accepted, they would be "morally" obligated to respect the arrangement, that is, despite customer resistance, really to increase the level of prices by 8% as of October 16, 1967.

As required by [the conditions for applying] article 1 GWB under the concept of "agreement," with the decision likewise to increase one's own prices, an increase which would necessarily come to the immediate attention of ----- company and the other competitors, common consent was reached respecting performance and matching performance (increase of the price level favoring ----- company and other competitors as well as for one's own advantage). That a few defendants possibly wanted to reach a decision about ----- company's proposition only after knowing the reactions of the other dye manufacturers and actually made their decisions only thereafter, does not change anything in the relationship of cause and effect between ----- company's proposition and its acceptance by the enterprises in question and the consequent conclusion of an agreement.

⁵ "The Swiss corporation"; see p. 4.

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