

Case T-65/89

**BPB Industries plc and British Gypsum Limited**

v

**Commission of the European Communities**

(Competition — Abuse of a dominant position — Exclusive purchase contract — Loyalty payments — Effect on trade between Member States — Attributability of the infringement)

Judgment of the Court of First Instance (Second Chamber), 1 April 1993 ..... II - 392

Summary of the Judgment

1. *Competition — Administrative procedure — Access to the file — Commission's obligation by virtue of rules which it formulated itself in a report on competition policy*
2. *Competition — Administrative procedure — Access to the file — Purpose — Observance of the rights of the defence — Right to be heard*  
(Regulation No 17 of the Council, Art. 19(1) and (2); Regulation No 99/63 of the Commission, Art. 2)
3. *Competition — Dominant position — Abuse — Exclusive supply contracts — Loyalty discounts*  
(EEC Treaty, Art. 86)
4. *Competition — Dominant position — Abuse — Meaning*  
(EEC Treaty, Art. 86)
5. *Competition — Dominant position — Abuse — Meaning — Absence of fault*  
(EEC Treaty, Art. 86)

6. *Competition — Dominant position — Abuse — Prohibition — Exemption under Article 85(3) — No effect*  
(EEC Treaty, Arts 85(3) and 86)
7. *Competition — Dominant position — Abuse — Meaning — Priority deliveries, in times of shortages, to customers not obtaining supplies from competitors*  
(EEC Treaty, Art. 86)
8. *Competition — Dominant position — Abuse — Loyalty discount*  
(EEC Treaty, Art. 86)
9. *Competition — Dominant position — Effect on trade between Member States — Criteria*
10. *Competition — Community rules — Infringement committed by a subsidiary — Attributed to parent company — Conditions*
11. *Competition — Community rules — Infringements — Committed intentionally — Meaning*  
(Regulation No 17 of the Council, Art. 15)

1. Since the Commission has established a procedure for access to the file in competition cases and has formulated and published the rules in one of its reports on competition policy, it has an obligation to make available to the undertakings involved in proceedings under Article 85(1) of the Treaty all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved.

conclusions reached by the Commission in its Statement of Objections on the basis of that evidence. Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard, provided for in Article 19(1) and (2) of Regulation No 17 and Article 2 of Regulation No 99/63, can be exercised effectively.

2. The procedure for access to the file in competition cases is intended to enable the addressees of a Statement of Objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the

3. An undertaking in a dominant position in the market has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market. An undertaking which is in a dominant position in a market and ties

purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article 86 of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. Where an economic operator holds a strong position in the market, the conclusion of exclusive supply contracts in respect of a substantial proportion of purchases constitutes an unacceptable obstacle to entry to that market.

4. Whilst the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked and whilst such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.
  5. The concept of abuse is an objective one and, accordingly, the conduct of an undertaking in a dominant position may be regarded as abusive within the meaning of Article 86 of the EEC Treaty even in the absence of any fault.
  6. An exemption under Article 85(3) of the Treaty does not prevent the application of Article 86.
  7. Article 86 of the Treaty prohibits a dominant undertaking from strengthening its position by having recourse to means other than those falling within competition based on merits. Accordingly, whilst it is open to an undertaking in a dominant position, in times of shortage, to lay down criteria for according priority in meeting orders, those criteria must be objective, must not be discriminatory in any way and must be objectively justified, in accordance with the rules governing fair competition between economic operators.
- That requirement is not met by a criterion based on a distinction between customers who obtain their supplies only from the undertaking holding the dominant position and those who also market products bought from certain of its competitors.
8. The application by a supplier who is in a dominant position, and upon whom as a result the customer is more or less dependent, of any form of loyalty rebate through which the supplier endeavours, by means of financial advantages, to prevent its customers from obtaining supplies from competitors constitutes an abuse within the meaning of Article 86 of the Treaty.
  9. For Article 86 of the Treaty to be applicable, it is necessary and sufficient for the abusive conduct to be liable to affect trade between Member States; it is not necessary to make a finding that inter-State trade is actually being affected at the

present time. The condition concerning the effect on trade must be deemed to be fulfilled where it is established that intra-Community trade has actually been affected or that it was, at least potentially, significantly affected.

respects, the instructions given to it by the parent company. A wholly owned subsidiary, in principle, necessarily follows the policy laid down by the parent company.

10. The fact that a subsidiary has legal personality separate from that of its parent company is not sufficient to exclude the possibility that its conduct may be attributed to the parent company, in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct in the market but carries out, in all material

11. For an infringement to be regarded as having been committed intentionally, it is not necessary for the undertaking to have been aware that it was infringing the prohibition laid down by the competition rules in the Treaty; it is sufficient that it could not have been unaware that the contested conduct had as its object or could have had as its effect the distortion of competition in the common market.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)  
1 April 1993 \*

Summary

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\* Language of the case: English.