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.

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 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.

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

* Language of the case: English.

In Case T-65/89,

BPB Industries plc, a company governed by English law, established at Slough, United Kingdom, and

British Gypsum Limited, a company governed by English law, established at Nottingham, United Kingdom,

represented by Michel Waelbroeck, of the Brussels Bar, and by Gordon Boyd Buchanan Jeffrey, Solicitor, with an address for service in Luxembourg at the Chambers of Messrs Arendt and Harles, 4 Avenue Marie-Thérèse,

applicants,

v

Commission of the European Communities, represented initially by Norbert Koch, Legal Adviser, and Ida Langermann, of its Legal Service, and subsequently by Julian Currall and Berend-Jan Drijber, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Kingdom of Spain, represented by Javier Conde de Saro, Director General for Community Legal and Institutional Coordination, and Rosario Silva de Lapuerta, State Attorney in the Legal Department for matters before the Court of Justice, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

and by

Iberian Trading (UK) Limited, a company governed by English law, established in London, represented by John E. Pheasant and Simon W. Polito, Solicitors, of Messrs Lovell White Durrant, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Wolter, 8 Rue Zithe,

interveners,

APPLICATION for the annulment of Decision 89/22/EEC of the Commission of the European Communities ('the Commission') of 5 December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.900 — BPB Industries plc, OJ 1989 L 10, p. 50, rectified in OJ 1989 L 52, p. 42),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: J. L. Cruz Vilaça, President of the Chamber, A. Saggio and C. P. Briët, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 23 January 1992,

gives the following

Judgment

The facts

1 The present case concerns Commission Decision 89/22/EEC of 5 December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.900 — BPB Industries plc, OJ 1989 L 10, p. 50, rectified in OJ 1989 L 52, p. 42), which imposed fines on the applicants for infringing Article 86 of the EEC Treaty.

2 BPB Industries plc ('BPB') is the United Kingdom holding company of a group which controls about half the production capacity for plasterboard in the Community, having a net consolidated turnover of ECU 1 116 000 000 in the financial year to 31 March 1987. In Great Britain, BPB operates in the building plaster and plasterboard sectors essentially through a wholly owned subsidiary, British Gypsum Ltd ('BG'). In Ireland, gypsum products, in particular building plasters and plasterboard, are produced by BPB's Irish subsidiary Gypsum Industries plc ('GIL'), which supplies the market in Ireland and, through BG, Northern Ireland.

3 In Great Britain, BG produces plasterboard at eight plants situated in the Midlands, the South-East and Northern England. BPB normally supplies the British plasterboard market from mills in Great Britain, whereas the mills in Ireland supply the market in Ireland and Northern Ireland.

4 Plasterboard consists of a core of gypsum plaster set between two sheets of heavy paper. It is cut to various sizes and supplied essentially in two thicknesses. It is mainly used in the construction of ceilings and the lining of walls in housing, and the construction and lining of partitions.

5 Plasterboard used in the United Kingdom and Ireland is almost all supplied through builders' merchants ('the merchants'). Merchants provide an effective chain of distribution to builders. They also have the function of assuming the credit risk of builders. Over the relevant period, there was an ongoing trend of concentration in the builders merchanting sector.

6 Before 1982, there were no regular imports of plasterboard into Great Britain. In that year, Lafarge UK Ltd ('Lafarge'), a company in the French Lafarge Coppée group, started importing plasterboard manufactured in France. Lafarge has gradually expanded its imports. However, because of supply difficulties linked with its dependence on its manufacturing plant in France, Lafarge was not able to provide normal deliveries to a large number of customers.

7 In May 1984, Iberian Trading UK Ltd ('Iberian') started importing plasterboard manufactured in Spain by Española de Placas de Yeso ('EPYSA'). Its prices were lower than those of BG, the difference generally being in a range of 5 to 7%, although certain larger price discrepancies have been noted. The range of products supplied by Iberian was restricted to a limited range of standard plasterboard sizes from among those most in demand. Iberian also encountered supply difficulties on a number of occasions.

8 In 1985 and 1986, BG supplied about 96% of the plasterboard sold in the United Kingdom, the remainder of the market being shared between Lafarge and Iberian.

9 On 17 June 1986, Iberian sent the Commission an application requesting that it find, pursuant to Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'), that there were infringements of Article 86 of the EEC Treaty on the part of BPB. On 3 December 1987, the Commission decided to initiate a proceeding under Article 3(1) of Regulation No 17.

10 After giving the undertakings an opportunity to reply to the objections raised by it, pursuant to Article 19(1) of Regulation No 17 and Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47) and after consulting the Advisory Committee on Restrictive Practices and Dominant Positions, on 5 December 1988 the Commission adopted the contested decision ('the Decision'), the operative part of which is as follows:

'*Article 1*

Between July 1985 and August 1986 British Gypsum Ltd infringed Article 86 of the EEC Treaty by abusing its dominant position in the supply of plasterboard in Great Britain through a scheme of payments to builders' merchants who agreed to purchase plasterboard exclusively from British Gypsum Ltd.

Article 2

In July and August 1985 British Gypsum Ltd infringed Article 86 of the EEC Treaty by implementing a policy of favouring customers who were not trading in imported plasterboard in the provision of priority orders for the supply of building plasters at a time of extended delivery for that product which constituted an abuse of its dominant position in the supply of plasterboard in Great Britain.

Article 3

BPB Industries plc, through its subsidiary British Gypsum Ltd, infringed Article 86 of the EEC Treaty by abusing its dominant position in the supply of plasterboard in Ireland and Northern Ireland:

— in June and July 1985 by successfully applying pressure on and thereby procuring the agreement of a consortium of importers to renounce importing plasterboard into Northern Ireland,

— by a series of rebates on BG products supplied to builders' merchants in Northern Ireland between June and December 1985 conditional on their not handling any imported plasterboard.

Article 4

The following fines are imposed:

— on British Gypsum Ltd, a fine of ECU 3 million in respect of the infringements of Article 86 of the EEC Treaty referred to in Article 1,

— on BPB Industries plc, a fine of ECU 150 000 in respect of the infringements of Article 86 of the EEC Treaty referred to in Article 3.

Articles 5 and 6

[omissis] '.

Procedure

11 In those circumstances, by an application lodged at the Registry of the Court of Justice on 23 February 1989, BPB and BG brought the present action for annulment of the Decision.

12 The written procedure was completed before the Court of Justice. By order of 4 October 1989, the Court of Justice granted leave to the Kingdom of Spain to intervene in support of the defendant. By order of 15 November 1989, the Court of Justice referred the case to the Court of First Instance, pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities. By order of 18 January 1990, the Court of First Instance granted leave to Iberian to intervene in support of the defendant.

13 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. However, by way of measures of organization of procedure, the Court, by letter from the Registrar of 8 November 1991, put a number of questions to the defendant, to which it replied by a letter lodged at the Registry of the Court of First Instance on 16 December 1991.

14 The main parties and the interveners presented oral argument and answered questions put to them by the Court at the hearing on 23 January 1992.

Forms of order sought

15 In their application, the applicants claim that the Court should:

'— declare that the decision of the Commission of 5 December 1988 ordering the first applicant to pay a fine of ECU 150 000 and the second applicant to pay a fine of ECU 3 000 000 for an alleged infringement of Article 86 of the Treaty establishing the European Economic Community is void;

— order the costs of proceedings to be borne by the defendant'.

16 In their reply, the applicants claim that the Court should:

'— annul the Commission's decision;

— in the alternative, reduce the fines imposed on BPB and/or BG;

— order the Commission to pay the costs'.

17 The defendant contends that the Court should:

'— dismiss the application;

— order the applicants to pay all the costs of the proceedings'.

18 The Kingdom of Spain, intervening, contends that the Court should dismiss the action brought by BG and BPB against the Decision, declare that decision to be valid and order the applicants to pay the costs, including those of the intervener.

19 Iberian, intervening, contends that the Court should:

— dismiss the application lodged by the applicants against Decision 89/22/EEC;

— declare that decision valid in all respects;

— order the applicants to pay all costs in the case, including those of the interveners.

The claims for annulment of the Decision

20 In support of their claims for annulment of the Decision, the applicants make two series of allegations, concerning, firstly, breach of the rights of the defence and, secondly, failure to establish any infringement.

Non-disclosure of documents and observance of the rights of the defence

— *The parties' arguments*

21 The applicants maintain that the Decision should be annulled since the Commission failed to disclose to them all the relevant documents which were in its possession, to their considerable detriment. They observe, in particular, that BG did not have access to certain documents which appear to relate directly to its situation and certain objections raised against it. They submit that they are entitled to doubt whether some of the documents withheld may be irrelevant.

22 The applicants refer in particular to the documents supplied to the Commission during inspection visits at the premises of third parties. In their view, the fact of refusing any access to the information contained in the document supplied to the Commission by a third party constitutes an excessive breach of the rights of the defence. The applicants also maintain that the undisclosed documents could have been helpful to BG's case and in such circumstances there should be no reason not to disclose such documents to BG. The criterion for non-disclosure should not be whether or not the Commission relies on a document but whether a document is truly confidential. The fact that the Commission does not rely on a document does not mean that it is not relevant or that the Commission was not influenced by its content and is not sufficient reason to refuse to communicate it.

23 The applicants state that it is manifestly impossible for BG to specify the documents of which disclosure was refused by the Commission and that it was not able to consult. According to the applicants, the Commission wrongly asserts that its case is based exclusively on documents which BG was able to consult.

BG refers toa letter from a merchant of 23 December 1985, to which the Commission refers in paragraph 63 of the Decision in order to incriminate BG, although the latter was not authorized to examine it. In its view, it follows from the judgment of the Court of Justice in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965 that the Commission is under a duty to disclose confidential documents to an undertaking whenever they are liable to harm its interests and, therefore, the Commission should have disclosed to it at least a summary of the documents in its possession.

24 The applicants maintain that their reservations concerning the Commission's claim that it was not influenced by undisclosed documents are justified since it was only after BG insisted that it do so that the Commission disclosed the evidence of Mr May, a building consultant, which it later used in the Decision. BG should be entitled to make its own judgment about which documents are relevant to its interests.

25 As regards the documents described in the Commission's letter of 19 February 1988, BG draws attention to the fact that the Commission failed to distinguish between the documents disclosed by third parties on a confidential basis and documents which contained business secrets. As regards the documents mentioned in the Commission's defence, BG considers that that information should have been disclosed to it in the course of the administrative procedure (Opinion of Advocate General Warner in Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, at 2267).

26 The Commission contends that the Decision is based exclusively on documents to which BG had access. It maintains that BG has not specified any document on which it relied to form its opinion and to which BG did not have access. According to the Commission, the right of access to its files does not extend to all documents which do not contain business secrets. It refers to the judgment of the Court of Justice in Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 25, taking the view that the judgment in *AKZO Chemie* v *Commission*, cited above, to which BG refers, relates to a different issue, namely whether it is possible for the Commission to supply certain information to a complainant.

27 In the present case, the Commission considers that it granted the applicants access to certain documents on which it did not rely, thus going beyond its obligations. In giving BG access to the files, the Commission excluded only documents that were disclosed to the Commission by third parties subject to a request for confidentiality, the annual accounts of one undertaking, publicity sheets of two undertakings, the organization chart of one undertaking, and documents considered to be of interest as possibly disclosing the existence of Article 85 infringements by undertakings which did not include BPB. Moreover, a non-confidential description was given of those documents in the Commission's letter of 19 February 1988. The Commission considers that that description was sufficient to enable BG to ascertain that they had no bearing on the findings which it made.

28 As to the letter from a merchant of 23 December 1985 referred to by BG, the Commission states that it was annexed to a letter which BG sent to the Commission on 30 September 1986 and that consequently BG had access to each of those letters. As regards Mr May's report, the Commission states that it always considered it to be accessible to BG; it refers, in that connection, to the summary in the annex to the Statement of Objections and to the documents appended to the application. Finally, the Commission states that the distinction between business secrets and other information suggested by the applicants is not decisive in establishing whether an undertaking is entitled to access to the Commission's file.

The Court's assessment

29 As the Court of First Instance noted in its judgment in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, the Commission, in its Twelfth Report on Competition Policy (pp. 40 and 41), imposed on itself a number of rules concerning access to the file in competition cases. According to those rules: 'the Commission permits the undertakings involved in a procedure to inspect the file on the case. Undertakings are informed of the contents of the Commission's file by means of an annex to the Statement of Objections or to the letter rejecting a complaint, listing all the documents in the file and indicating documents or parts thereof to which they may have access. They are invited to come and consult these documents on the Commission's premises. If an undertaking wishes to examine only a few of them the Commission may forward copies. However, the Commission regards the documents listed below as confidential and accordingly inaccessible to the undertaking concerned: (i) documents or parts thereof containing other undertakings' business secrets; (ii)

internal Commission documents, such as notes,drafts or other working papers; (iii) any other confidential information, such as documents enabling complainants to be identified where they wish to remain anonymous, and information disclosed to the Commission subject to an obligation of confidentiality'. The Court inferred from this that the Commission 'has an obligation to make available to the undertakings involved in Article 85(1) proceedings 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' (paragraphs 53 and 54).

30 Furthermore, in its judgment in Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, the Court of First Instance held that '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 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. It follows that the right of access to the file compiled by the Commission is justified by the need to ensure that the undertakings in question are able properly to defend themselves against the objections made against them in the Statement of Objections' (paragraph 38).

31 In the present case, it is apparent from the documents before the Court that the Commission did not deny the applicant undertakings access to the file compiled by it. It appears, in particular, from the documents produced by the applicants themselves that, in pursuance of the abovementioned commitments given by the Commission in its Twelfth Report on Competition Policy, published in 1982, the Statement of Objections was accompanied by an annex containing a list summarizing all the 2095 documents which make up the Commission's file. It is apparent from that document, produced as Annex 6 to the application submitted to the Court, that it contained, in addition to the date on which each of the documents was drawn up, information of two kinds. First, it gave a breakdown of the documents according to their nature. For that

purpose, a classification under 15 headings was notified to the applicants. The document in question contains, for each document or group of documents, an indication of the key figure or, as the case may be, figures corresponding to the heading appropriate to the document or group of documents. Secondly, the list indicates, for each document or group of documents, whether it is accessible to the applicant (A), partially accessible to the applicants (B) or not accessible to the applicants (N).

32 Thus, it appears that six categories of documents were not made accessible to the applicants. They are, first, documents for purely internal Commission purposes (documents 234, 235, 290 to 318, 321, 324 to 335, 337 to 347, 367 to 382, 1329 and 1330, 1535 to 1539, 1543, 1580 to 1589, 1594, 1880 to 1882, 1907 to 1971, 1985 to 2049, 2054 to 2095); secondly, certain correspondence with third-party undertakings (documents 240, 252, 253 to 281, 322 and 323, 336, 348 to 361, 363 to 366, 385, 386 to 395, 1323 to 1328, 1529 and 1530, 1544 to 1546, 1559, 1596 to 1599, 1602 to 1607, 1613 to 1683, 1891 to 1903, 1972 to 1984); thirdly, certain correspondence with the Member States (documents 282 to 289, 1690 and 1691); fourthly, certain published information and studies (documents 1904, 2051 and 2052); fifthly, certain reports of verifications (documents 399 to 506); sixthly, and lastly, a reply to a request for information made under Article 11 of Regulation No 17 (document 1699).

33 It is thus apparent that the applicants have no real grounds for complaining that the Commission did not make accessible to them certain purely internal documents, which the Court of First Instance has already decided did not have to be disclosed. The same applies necessarily to certain correspondence with the Member States and published documents and studies. The same applies again to the reports of verifications, the answer to a request for information made by the Commission and certain correspondence with third-party undertakings, to which the Commission was entitled to refuse access by reason of their confidential nature. An undertaking to which a Statement of Objections has been addressed, and which occupies a dominant position in the market, may, for that very reason, adopt retaliatory measures against a competing undertaking, a supplier or a customer, who has collaborated in the investigation carried out by the Commission. Finally, for the same reason, the applicants cannot maintain that the complaint submitted to the Commission under Article 3 of Regulation No 17 was wrongly made only partially available to them (documents 1 to 233). Accordingly, the Commission's refusal to disclose those documents to the applicants cannot, in this case, affect the legality of the Decision.

34 It must also be observed that the Commission, which was not contradicted on that point at the hearing, established in its rejoinder that the letter from a merchant referred to in paragraph 63 of the Decision was annexed to another letter sent by BG itself to the Commission. Thus, on the one hand, BG was familiar with the letter in question and, on the other, that document, numbered 1312, was in any event, as contended by the Commission, perfectly accessible to the applicants, as is apparent from Annex 6 to the application, described above. It must also be pointed out that, in any event, Mr May's report was made available to the applicants, and the applicants cannot base any argument relating to the regularity of the administrative procedure on the fact that they were initially refused access to that document.

35 Having regard to all the foregoing considerations, it follows that the administrative procedure before the Commission was conducted in observance of the rights of the defence and that in particular the applicants, which, moreover, merely make uncertain and hypothetical allegations to the contrary, were in a position to put forward all their arguments and pleas in their defence effectively at the hearing before the Commission. It follows that the applicants' allegation that the rights of the defence were disregarded has no factual basis and must therefore be dismissed.

Establishment of the infringement

36 The applicants make two pleas to the effect that no infringement of Article 86 of the Treaty was established. Those pleas relate, first, to the abuse of a dominant position — the existence of which is not denied — and, secondly, to the effect on trade between Member States.

I — *Abuse of a dominant position*

37 The first plea, namely that no abuse of a dominant position was established, has three limbs. It concerns, firstly, the exclusive supply arrangements and promotional payments; secondly, the priority deliveries of plaster; and, thirdly, the specific practices adopted in Ireland and Northern Ireland.

A — The exclusive supply arrangements and promotional payments

— The contested measure

38 According to Article 1 of the Decision, between July 1985 and August 1986 BG infringed Article 86 of the EEC Treaty by abusing its dominant position in the supply of plasterboard in Great Britain through a scheme of payments to builders' merchants who agreed to purchase plasterboard exclusively from it.

39 The Decision (paragraphs 58, 60-64, 68 and 69) indicates that, from January to June 1985, BG set up a system providing for regular payments to merchants who were prepared to obtain their supplies exclusively from BG. Those payments were to be made in the form of regular contributions by BG to their advertising and promotional expenses. The arrangements were to be negotiated at the highest level and would not be disclosed publicly. In return for those promotional payments, the merchants had to agree to obtain their supplies exclusively from BG. On 2 July 1985, or even earlier, BG decided that the scheme should be offered to a very large customer, which was under pressure to reconsider its buying policy in view of competition from other merchants who were selling Lafarge and Iberian plasterboard. Monthly payments in sterling were made from August 1985. Subsequently, similar arrangements were offered to other merchants all of whom, with one exception, were or had been handling plasterboard from Lafarge or Iberian. Monthly payments were made to those merchants. The payments, based on oral agreements or exchanges of letters, were subject to certain conditions, in particular the obligation for the recipients to buy only BG plasterboard. From September 1986, BG phased out payments to the merchants as it introduced a stock incentive scheme (*Super Stockist Scheme*).

40 The Decision (paragraphs 123, 124 and 127) concludes that, as a response to competition, BG adopted a policy of rewarding the 'loyalty' of customers who obtained all their plasterboard requirements from it. The offer of promotional payments to individually selected merchants, rather than under a general scheme based on objective criteria, served further to reinforce a close trading relationship between BG and the recipients of the payments, strengthening the

ties between BG and those customers as a result of the exclusionary nature of the scheme. Exclusivity or 'loyalty' was an objective in itself, namely to prevent the merchants in question from buying and selling imported plasterboard.

41 According to the Decision (paragraphs 128 and 129), the payments made by BG were the immediate cause of the merchants' decision to cease handling imported plasterboard. The exclusive purchase arrangements meant that the merchants tied themselves to BG for the future, and this constituted an abuse of a dominant position by BG.

— The parties' arguments

42 The applicants maintain that the Commission wrongly concluded that BG established a system of payments to merchants of which one of the purposes was to ensure exclusivity of purchases by them. They do not accept that the supply arrangements which operated between July 1985 and August 1986 could have amounted to an abuse of a dominant position. They put forward various arguments in that connection.

43 First, they consider that the arrangements were normal buyer/seller agreements, negotiated *ad hoc* with individual customers, on lines which are standard practice in the United Kingdom building suppliers' industry, and responded to the growing buying power of merchants. The system, applied in a situation where there was little brand loyalty, involved an offer to make regular payments to merchants in the form of contributions to their advertising and promotional expenses, subject to compliance with a number of conditions, one of which was that they should stock a large range of plasterboard and undertake promotional activities.

44 According to the applicants, the Commission wrongly concluded from the documents referred to in paragraph 58 of the Decision that the main purpose of those payments was to ensure exclusive purchasing by the merchants and, consequently, to close the market to foreign competition. In fact, they state, those documents related simply to discussions of plans and possible strategies, which cannot, in themselves, constitute an infringement of the competition rules. The reference to exclusivity was merely the response to merchants who

suggested various exclusivesupply arrangements. The system was thus a response to some of BG's customers, being designed to reward their loyalty and primarily intended to establish close links with long-standing valued customers, in a competitive environment which was changing as a result of the growing buying power of those customers. The applicants deny that the exclusivity arrangements were an essential precondition for a merchant to be able to receive promotional support. They refer to a company which received such support, even though it continued to import Spanish plasterboard. Thus, in their view it is clear from the documents before the Court that not all the conditions in the scheme as originally devised were applied.

45 The applicants then state that BG did not discriminate between merchants who entered into a promotional payments agreement and those who did not. They state that the merchants who traded with Iberian never stopped trading with BG and that the promotional payments did not have the effect of causing relations with merchants who did not accept them to be discontinued. The attitude of merchants who did not order imported plasterboard after accepting promotional payments might have been inspired by other factors, such as difficulties in obtaining supplies of imported plasterboard, quality and limitations on the range of sizes and types of imported plasterboard available.

46 Contrary to the conclusion arrived at by the Commission in paragraph 129 of the Decision, the applicants do not accept that merchants tied themselves to BG for the future. They were free to cancel their contractual arrangements with BG at any time or to refuse promotional payments and continue to sell imported plasterboard.

47 The applicants also state that, as the main supplier to the United Kingdom plasterboard market, BG has a responsibility for ensuring that distribution of plasterboard is maintained on a regular and reliable basis. The loyalty on the part of merchants which BG wished to establish was necessary in order to ensure continuity and regularity of supplies to the whole market, on the most advantageous terms. That would have been impossible if the most demanded products could have been offered at a small discount by Iberian to BG's larg-

est customers, leaving only theless profitable products and outlets to be supplied by BG. The applicants consider that BG's behaviour contributed to improving the distribution of plasterboard in the United Kingdom. They also submit that the deliveries of Spanish plasterboard, characterized as they were by their low prices, their concentration on a few sizes that were in high demand and irregularity of supplies, constituted a threat to the adequate supply of the United Kingdom market as a whole.

48 The applicants, relying on the judgment of the Court of Justice in Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, also submit that the promotional agreements with merchants fulfil the requirements for an exemption under Article 85(3) of the EEC Treaty. The lack of notification does not constitute an obstacle to exemption provided that, as held in the judgment of the Court of Justice in Case 43/69 *Bilger* [1970] ECR 127, a contract between a producer and a retailer by which the latter undertakes to obtain his supplies solely from the said producer, who is established in the same Member State, is exempt from notification. According to the applicants, the Commission prejudged the issue by declaring that there is no scope for any derogation.

49 In response to the Commission's argument that merchants were prevented from building up sufficient stocks of competing products, the applicants state that that argument would be correct only if BG required merchants to hold an abnormally wide range of plasterboard, thus reducing the stock space available for the most popular sizes of boards, which were the only ones that were being imported. However, that did not happen.

50 The applicants claim that the Commission's view that an exclusive relationship is established to the extent to which an undertaking agrees to abstain from business with third parties, even if that abstention relates to a limited quantity of its requirements, represents an attempt to alter the basis of the Decision. They consider that such a broad interpretation of the notion of exclusivity has no foundation in law or in practice. According to the applicants, it is normal commercial practice to establish long-term business relationships with certain

suppliers and it is inherentin competition that a contract concluded with one supplier precludes the possibility for another supplier to obtain that contract. Exclusivity or quasi-exclusivity means, in their view, that a merchant is under an obligation to buy all or most of his requirements from a given supplier. Accordingly, it is incorrect to assert, as the Commission does, that encouraging fidelity or close ties with merchants would in practice result in an agreement between BG and its merchant customers to take a certain proportion of the customers' requirements from BG.

51 The applicants also emphasize that the fact that BG did not practise discrimination against customers who bought imported plasterboard shows that the system was not intended to tie merchants. The promotional payments have no bearing on the arrangements concerning rebates. In so far as they are intended to reward merchants for the promotional efforts made by them, those payments cannot be regarded as equivalent to the grant of more advantageous conditions to such merchants.

52 Finally, it is, in the applicants' view, incorrect to state that the system of promotional payments was a reaction to the threat of imports or that it was intended to dissuade Iberian from importing or to weaken Iberian. The scheme was intended to increase market penetration for plaster products against non-gypsum products and not against imported plasterboard as such, in view of the absence of brand loyalty. Moreover, since the promotional payments made were subject to the requirement that the merchants buy plasterboard exclusively from BG, it was of little importance that, after promotional payments were made, instructions were given not to place further orders for imported plasterboard.

53 The Commission, for its part, first states that it is the attempt of BG, an undertaking in a dominant position, to secure the loyalty of the merchants in order to prevent the delivery of certain competing products which it described, in the Decision, as an abuse of a dominant position. According to the Commission, it is of little importance that the making of promotional payments is standard practice. Even a standard practice may be abusive where it is pursued by an undertaking in a dominant position.

54 As regards the purpose of the system, the Commission considers that an agreement intended to reserve a specified quantity of supply or demand in favour of one or several parties does restrict competition irrespective of the percentage of the total requirements of the buyer or seller covered by the agreement. The restrictive nature of exclusive dealing lies not in a possibly total foreclosure of the undertaking's demand but in the undertaking's relinquishment of its free choice of contract partners for the quantities reserved under the loyalty or fidelity agreement, regardless of whether those quantities represent 80, 60 or even 30% of the buyer's requirements. The Commission points out, in that regard, that BG sought to establish a link with its customers which involved the exclusion of imported plasterboard and that that — albeit relative — loyalty, being a precondition for receiving the payments, was equivalent to an exclusive arrangement. According to the Commission, it is immaterial that promotional agreements may have other objectives than mere exclusivity or loyalty; it is even pointless to ask whether that was the main or secondary purpose, since it is sufficient, in order to establish the existence of abuse, for exclusivity to be one of the aims of the agreements. At the hearing, the Commission emphasized that the idea of loyalty payments was put forward for the first time in an internal memorandum of 16 January 1985. In that memorandum — and also in that of 1 May 1985 — the first condition laid down for receipt of the payments was the obtaining of supplies exclusively from BG. Finally, in the report of the meeting where the question of imports had been discussed, the only answer given by the Chairman, when the idea was put forward, was: 'Look into ways of getting exclusivity'.

55 As regards the question whether BG practised discrimination between merchants who had signed an agreement with a view to obtaining promotional payments and those who had not done so, the Commission states that that argument is irrelevant, since the Decision does not contain any finding of abuse committed by BG through discrimination between its customers.

56 As regards the effects into the future of the promotional payments, the Commission states that the agreements rewarded past loyalty and the payments offered had to be earned by the merchants. The possibility of termination of loyalty arrangements at any time does not eliminate their abusive nature. The Commission also considers that the applicants' statement that it was the merchants who asked for the loyalty payments is contradicted by the documents

before the Court, from which it appears that BG discussed and planned a scheme for payments to be offered subject to certain conditions, one of which was exclusivity. In any event, a dominant undertaking commits an attempt to exclude a competitor not only when it imposes exclusive arrangements but also when it agrees to participate in such arrangements after having been approached by its customers.

57 As regards the claimed entitlement to an exemption under Article 85(3) of the EEC Treaty, the Commission points out that the Decision is not based on Article 85 but on Article 86 of the Treaty. In any event, the conditions for an exemption — for which, moreover, the applicants never applied — were, in the Commission's opinion, manifestly not satisfied.

58 As regards the conduct of Iberian, the Commission states that, whatever the circumstances in which Iberian introduced plasterboard into the market, its conduct did not authorize BG to appoint itself the guardian, through exclusive arrangements, of the reliability of plasterboard supplies which was allegedly threatened by Iberian's marketing strategy.

59 The applicants' argument that the system of promotional payments was intended to promote plaster products, not BG's products, is rejected by the Commission. First, it doubts, on the basis of Mr Clark's statement, which was annexed to the application, that brand loyalty for plaster products is as limited as the applicants claim. Secondly, the Commission considers that it is impossible to separate the two objectives pursued by a scheme designed to ensure customer loyalty, namely the concern to secure exclusivity of purchases on their part and the desire to prevent imports of plasterboard. Loyalty is an exclusionary concept irrespective of the underlying intention or motive.

60 The Spanish Government considers, referring *inter alia* to paragraph 59 of the Decision, that BG's internal documents to which the Commission had access show that BG's intention was to tie its customers by making payments to them

in returnfor exclusive purchasing, in order to recover in that way part of the market which had been lost to importers. Even without such evidence, that aim is apparent from the context in which BG's practices developed. The Spanish Government points out, in that connection, that the making of loyalty payments is a practice expressly excluded by Article 86(c) of the EEC Treaty, as the Court emphasized in its judgment in Case 87/76 *Hoffman-La Roche*, cited above.

61 The intervener, Iberian, states that loyalty payments made by a dominant supplier to its customers have an exclusionary effect and that it has had experience of this, by discovering that it was denied access to new customers. At the hearing, it added that BG's practices led it to abandon any marketing activity for plasterboard in the United Kingdom and Ireland.

— The Court's assessment

The extent to which the facts are established

62 It is apparent from the documents before the Court, and in particular the abovementioned memorandum of 16 January 1985, produced by the applicants themselves and appended as Annex 13 to the application, and from the minutes of the Senior Management Committee of BG, produced by the applicants and appended as Annex 14 to the application, and to which the Decision refers in paragraph 58, that at the beginning of 1985 discussions were held within BG concerning the strategy to be adopted in the face of competition from imported plasterboard from France and Spain. At the meeting of the Senior Management Committee, the Managing Director instructed the Marketing Director 'to give adequate consideration in formulating the market strategy of how to reward loyalty to those merchants who remained exclusively with' BG. At the same time, the Marketing Director felt that it was appropriate to support merchants who were prepared to cooperate with BG, as is apparent from the abovementioned memorandum, according to which 'The merchant should buy his plasterboard, and accessories if appropriate, from us exclusively'. In a memorandum of 1 May 1985, produced by the applicants and appended as Annex 15 to

the application, and to which the Decision refers in paragraph 59, the Marketing Director of BG, referring to discussions within the Executive Meeting, outlined the conditions which the latter wished to see negotiated. The first of those conditions was exclusivity, whereby the merchant had to undertake to purchase all his plasterboard and related products exclusively from BG. According to that memorandum, that action would prevent the loss of customers and at the same time would make it possible to recover the market share lost by BG to its competitors.

63 Even though BG emphasizes that the documents referred to in paragraph 58 of the Decision were merely the basis for a discussion of possible plans and strategies, it is apparent from the documents before the Court — and BG does not seriously contest this — that from July 1985 it implemented the marketing strategy decided on during the previous months and concluded individual oral or written contracts with, in particular, dealers who handled or had handled Lafarge or Iberian plasterboard. As is apparent in particular from, first, paragraph 68 of the Decision, the accuracy of which has not been contested, according to which BG, during the procedure before the Commission, supplied copies of letters offering and accepting the monthly payments and, secondly, the letter from a merchant of 23 December 1985, referred to above, produced as Annex A to the rejoinder, in which that merchant informs BG of its agreement regarding promotional payments of UK £500 per month in return for an undertaking to obtain supplies exclusively from BG, those dealers undertook, *inter alia*, to buy plasterboard exclusively from BG, whilst BG undertook periodically to make promotional payments to them. As from September 1986, BG phased out the promotional payments as it introduced the *Super Stockist Scheme*.

64 That is the background against which it must be decided whether the contracts at issue constituted abuse of BG's dominant position.

The abusive nature of the exclusive purchasing arrangements

65 The Court considers, *in limine*, that the applicants are correct in their view that the making of promotional payments to buyers is a standard practice forming part of commercial cooperation between a supplier and its distributors. In a normal competitive market situation, such contracts are entered into in the

interest of bothparties. The supplier thereby seeks to secure its sales by ensuring loyalty of demand, whereas the distributor, for his part, can rely on security of supply and related commercial facilities.

66 It is not unusual for commercial cooperation of that kind to involve, in return, an exclusive purchasing commitment given by the recipient of such payments or facilities to his supplier. Such exclusive purchasing commitments cannot, as a matter of principle, be prohibited. As the Court of First Instance stated in its judgment in Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, appraisal of the effects of such commitments on the functioning of the market concerned depends on the characteristics of that market. As the Court of Justice held in Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935, it is necessary, in principle, to examine the effects of such commitments on the market in their specific context.

67 But those considerations, which apply in a normal competitive market situation, cannot be unreservedly accepted in the case of a market where, precisely because of the dominant position of one of the economic operators, competition is already restricted. An undertaking in a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market (judgment of the Court of Justice in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 57).

68 As regards the nature of the contested obligation, the Court observes that, as the Court of Justice has held, 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 EEC Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate (judgment of the Court of Justice in Case 85/76 *Hoffman-La Roche*, cited above, paragraph 89; judgment of the Court of Justice of 3 July 1991 in Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 149). That solution is justified by the fact that where, as in the present case, 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 entryto that market. The fact — even if it were established — that the promotional payments represented a response to requests and to the growing buying power of the merchants does not, in any case, justify the inclusion in the supply contracts in question of an exclusivity clause. Consequently, the applicants cannot maintain that the Commission has not established the abusive nature of the practice at issue, and it is unnecessary to give a decision on the dispute between the parties as to the meaning of exclusivity in regard to purchasing since it is in any event clear from the documents before the Court that the contractual condition at issue related to all or nearly all the customers' purchases.

69 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 said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it (see the judgment of the Court of Justice in Case 27/76 *United Brands* v *Commission* [1978] ECR 207). It follows that neither the argument that BG was under a duty to ensure continuity and reliability of supplies nor the argument relating to Iberian's commercial practices can be upheld (see judgment of the Court of First Instance in Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 118, and the judgment of the Court of Justice in Case 226/84 *British Leyland* v *Commission* [1986] ECR 3263).

70 The Court further observes that the concept of abuse is an objective one (see paragraph 91 of the judgment of the Court of Justice in Case 85/76 *Hoffman-La Roche*, cited above) and that, 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. Consequently, the applicants' argument according to which BG never had any intention to discourage or weaken Iberian has no bearing on the legal classification of the facts.

71 Even if it is conceded that one of the aims of that system might, as maintained by the applicants, have been to promote plaster products in general, it must nevertheless be stated that it leads to the grant of payments which are strictly conditional upon exclusive loyalty to BG and are therefore abusive, irrespective of the merits of the argument that brand loyalty is lacking.

72 Similarly, the applicants' reference to their competitors' supply difficulties cannot justify the exclusive supply arrangements which they brought into being, since they cannot reasonably contend that their customers were not in a position to adjust their marketing policy to take account of those difficulties.

73 The argument that the merchants were entitled to discontinue their contractual relations with BG at any time has no force since the right to terminate a contract in no way prevents its actual application until such time as the right to terminate it has been exercised. It should be observed that an undertaking in a dominant position is powerful enough to require its customers not only to enter into such contracts but also to maintain them, with the result that the legal possibility of termination is in fact rendered illusory.

74 As regards the argument that BG practised no discrimination between merchants, it need merely be stated that the Decision makes no such charge and accordingly that argument is irrelevant.

75 As regards, finally, the argument concerning the application of Article 85(3) of the EEC Treaty, the Court points out, first, that the Decision is concerned with the application not of Article 85 of the EEC Treaty but of Article 86 and, secondly, in any event, an exemption under Article 85(3) of the Treaty does not prevent the application of Article 86 (judgment of the Court of First Instance in Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309).

76 It is apparent from the foregoing considerations that the applicants are wrong to claim that the Commission erred in concluding that the system of payments to merchants, one of the purposes of which was to ensure exclusivity of purchases by them, constitutes an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty.

77 The first limb of the plea concerning the finding of abuse of a dominant position must therefore be dismissed.

B — Priority deliveries of plaster

— The contested measure

78 According to Article 2 of the Decision, in July and August 1985 BG infringed 'Article 86 of the EEC Treaty by implementing a policy of favouring customers who were not trading in imported plasterboard in the provision of priority orders for the supply of building plasters at a time of extended delivery for that product which constituted an abuse of its dominant position in the supply of plasterboard in Great Britain'.

79 It appears from paragraphs 81 to 85 and 141 to 147 of the Decision that in July 1985 BG drew up and applied a system of priority deliveries of plaster to its 'loyal' customers, that is to say those who did not handle imported plasterboard. According to a BG memorandum of 29 July 1985, produced as Annex 20 to the application and quoted partially in paragraph 81 of the Decision:

'In an effort to try to control the situation and also to create a position whereby we can help those loyal merchants who have not regularly bought and stocked imported plasterboard, arrangements have been made for us to accommodate a small number of priority requests. Any priority deliveries will be arranged largely at the expense of stockists of imported material and the Sales Offices have been provided with a list of customers who we know carry stocks and deal in either French or Spanish plasterboard'.

80 According to the Decision, the object and effect of that practice was to eliminate from the marketplace BG's competitors which marketed imported plasterboard.

81 In the Decision, the Commission considers that that practice, of which certain 'non-loyal' customers were informed individually by BG and which was described in a press interview by a representative of BG, constituted an abuse of a dominant position, since the criterion for selecting merchants who could be granted priority deliveries was not objective but was designed to reward merchants who sold only BG plasterboard.

— The parties' arguments

82 The applicants regard as incorrect the Commission's allegation that the adoption and implementation of a policy of granting priority to orders of plaster from customers who were not stockists of imported plasterboard was an abuse by BG of its dominant position. In their view, the Commission did not establish that BG occupied a dominant position in the plaster market. It could not therefore claim that BG used the plaster market to abuse its dominant position in the plasterboard market.

83 According to the applicants, the Commission did not establish that BG set up a priority delivery system or that the merchants who handled imported plasterboard ever had to suffer delays in delivery by BG by reason of their imports. Moreover, the applicants do not accept that their conduct, in temporarily giving preference to their loyal customers, was in any way abusive. They also state that the conclusion set out in paragraph 81 of the Decision, according to which 'if it were necessary to accommodate a priority order, an order for a merchant on the list would be delayed' is incorrect.

84 The applicants explain that in July 1985 the delivery objective of three days was not achievable and therefore four-day delivery was being quoted to all cus-

tomers, even those who might have purchased plasterboard of Spanish origin. According to the applicants, the instruction given to staff was that if circumstances arose where two merchants requested priority supplies, one buying Spanish board and one buying BG board, and there was sufficient production for only one load, the customer chosen would be the one enjoying a full commercial relationship with BG.

85 According to BG, there was no specific intent to speed up plaster orders for loyal merchants. In practice, customers' normal requirements were met during the period in question. No customer, whether or not an exclusive buyer of BG plasterboard, suffered unnecessary or undue delay. The applicants deny that priority delivery of plaster within a maximum of one day is a great asset, even in times of shortage of plaster. The equal treatment of customers referred to by the Commission is unrealistic in times of shortage, and priorities necessarily have to be laid down.

86 At the hearing, the applicants explained the circumstances under which the delivery of a priority order of plaster from a customer who, in the past, had not been 'loyal' to BG had been delayed. They emphasized that the order in question had been delivered with only one day's delay. According to the applicants, the advantage for 'loyal' customers was hypothetical and of very limited scope.

87 The Commission contends that, contrary to the applicants' assertion, the finding of abuse has no bearing on the applicants' position in the plaster market. Moreover, the Commission never stated that BG was dominant in that market. The grant of priority delivery of plaster was only one of the advantages procured by BG for its customers, in order to ensure exclusivity of plasterboard deliveries.

88 The Commission concedes that the additional delays suffered by unloyal merchants did not exceed one day. Moreover, that was the reason why no fine was imposed in respect of that abuse. The Commission considers, however, that as

an undertakingin a dominant position BG engaged in abuse by attempting to secure the merchants' loyalty. In its view, the guarantee of that loyalty was priority for deliveries, which is valuable in times of shortage. A dominant undertaking should observe equality of treatment of customers as a fundamental rule of conduct and fidelity cannot justify failure to comply with that rule. That would clearly amount to applying dissimilar conditions to equivalent transactions.

89 The Commission considers that BG used its financial strength to offer more favourable terms to its loyal customers in order thereby to exclude a competitor. According to the defendant, such more favourable terms may consist of a rebate, but they may also consist of the direct or indirect grant of other advantages in order to secure exclusivity of plasterboard supplies. The granting of priority for plaster deliveries was one such advantage.

90 According to the Spanish Government, the applicants' allegation that the Commission did not establish that BG was in a dominant position in the plaster market is difficult to understand. It is apparent from the Decision that both BG's dominant position and the abuse of that position related to the plasterboard market. Moreover, the fact that the preference given to regular customers in times of shortage is current practice does not mean that it cannot constitute an abuse where, as in the present case, it is intended to reinforce the effect of other measures which pursued a precise objective, namely that of hampering imports.

91 Iberian claims that a system of priority supplies is exclusionary in nature. It submits that the influence, both economic and psychological, brought to bear by a dominant company is liable to make any infringement of the competition rules extremely damaging to undertakings which enter into competition with such a company. Even though the delivery delays never exceeded one day and the shortage of supply was not protracted, those facts did not diminish the exclusionary effect of the applicants' conduct.

— The Court's assessment

92 The Court observes, in the first place, that the analysis of the relevant market, defined by reference to products, is contained in paragraphs 13 to 20 and 106 to 109 of the Decision. Paragraph 106 states 'This case concerns the business conduct of BPB, as a supplier of plasterboard, and its effects on competition and trade in the plasterboard market, in particular *vis-à-vis* competing suppliers of plasterboard. *A priori*, the relevant product should therefore be regarded as plasterboard'. The Commission is thus right to maintain that the question whether BG is in a dominant position in the plaster market is not relevant to the decision to be given in this case.

93 The Court considers that, for the practices adopted in the plaster market to be capable of having the object or effect of affecting competition in the plasterboard market, first, economic operators other than BG, and in particular distributors which are victims of the alleged practices, must be present in both markets — which is not contested — and, secondly, the functioning of the plaster market must display certain particular characteristics. In that regard, the Decision indicates, in paragraphs 143 and 146, that the practice to which exception is taken is all the more effective since the possibilities of substitution available to purchasers for supplies on the plaster market are small on account of the technical characteristics of the product, which, as is well known, limit the possibilities of substitution and the possibility of changing supplier and place customers in a dependent position in the plaster market *vis-à-vis* their supplier. Moreover, the error allegedly contained in paragraph 81 of the Decision, could not, even if established, have had any influence on the Commission's reasoning. Accordingly, the merchants were not able to avoid, on equivalent conditions for themselves, the delivery times for plaster imposed on them by their supplier BG. Consequently, the practice adopted, in so far as it penalized those of its purchasers of plaster who were not 'loyal' to it in the plasterboard market, certainly had the aim of affecting the functioning of that market.

94 As regards the abusive nature of the practice in question, the Court observes that, whilst, as the applicants maintain, it is open to an undertaking in a dominant position and is also a matter of normal commercial policy, in times of shortage, to lay down criteria for according priority in meeting orders, those criteria must be objective and must not be discriminatory in any way. They

must be objectively justified and observe the rules governing fair competition between economic operators. 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 (judgment of the Court in Case C-62/86 *AKZO*, paragraphs 69 and 70). That requirement is not met by the criterion adopted in this case by BG, which was based on a distinction between, on the one hand, customers who marketed plasterboard imported and produced by certain of its competitors and, on the other, 'loyal' customers who obtained their supplies from BG. Such a criterion, which results in the provision of equivalent services on unequal terms, is in itself anti-competitive by reason of the discriminatory purpose which it pursues and the exclusionary effect which may result from it. That conclusion is not affected by the fact that the period — summer 1985 — in which the abuse was committed, was limited, or again by the contention that the delays in delivery imposed on certain customers by comparison with 'loyal' customers could not exceed one day. Moreover, those factors were taken into account by the Commission, which did not impose a fine on BG in relation thereto.

95 Furthermore, the Court observes that, where the competitive structure of a market has already been weakened by the conduct of an undertaking in a dominant position, any additional restriction on that competitive structure is liable to constitute abuse of the dominant position thus acquired (judgment of the Court of Justice in Case 85/76 *Hoffman-La Roche*, cited above).

96 It follows that BG's attempt to exclude its competitors, by giving priority to orders for plaster placed by customers who did not handle imported plasterboard, the implementation of which practice cannot be seriously denied, as is apparent in particular from paragraphs 84 and 145 of the Decision, whose accuracy has not been challenged, constitutes an abuse, within the meaning of Article 86 of the Treaty, of its dominant position in the market for the supply of plasterboard.

97 It follows from the foregoing considerations that the second limb of the plea in law, by which the applicants deny having abused their dominant position, must, in the terms in which it is expressed, be dismissed.

98 However, the Court, whose duty it is, if necessary, to draw attention of its own motion to a sufficiently manifest disregard of the obligations imposed on the Commission by Article 190 of the Treaty (judgment of the Court of First Instance in Case T-61/89 *Dansk Pelsdyravlerforening*, cited above), finds that, whilst Article 2 of the operative part of the Decision refers to practices carried out in July and August 1985, it is undisputed that the grounds of the Decision (paragraph 141 and more particularly paragraph 169), where the Commission states the reasons for its not imposing a fine for that part of the infringement, refers only to practices carried out in August 1985. However, since it is not denied that the practices were carried out for only a short period, the Commission should have defined, with an even greater degree of precision, the period during which they were liable to distort competition in the relevant market. Furthermore, in reply to the questions put to it by the Court, the Commission, explaining that there was no contradiction between Article 2 of the operative part and paragraph 169 of the grounds of the Decision, expressly recognized that the Decision applied to practices which had been 'devised' in July 1985. However, an infringement of Article 86 can be penalized only to the extent to which it has been duly found to exist. The Decision is therefore vitiated, on that point, by an inadequate statement of grounds and, moreover, an error of law, and it is therefore appropriate for the Court to annul Article 2 of the Decision, but only to the extent to which it refers to a practice carried out in July 1985.

C — The practices carried out in Ireland and Northern Ireland

— The contested measure

99 In Article 3 of the Decision, the Commission states that BPB, through its subsidiary BG, abused its dominant position in the market for the supply of plasterboard in Ireland and Northern Ireland in June and July 1985 by applying pressure on a group of importers and by procuring their agreement to renounce importing plasterboard into Northern Ireland and, between June and December 1985, by granting rebates to merchants in Northern Ireland conditional on their not handling any imported plasterboard.

100 According to the Decision (paragraphs 4 and 86), BPB is, through its subsidiary GIL, the only producer of plasterboard in the island of Ireland. Accord-

ing to its own estimates, its market share is 93% in Ireland and 90% in Northern Ireland. In Northern Ireland, BG markets plasterboard imported from Ireland, where it is produced by GIL.

101 The practices carried out in Ireland and Northern Ireland are described in paragraphs 86 to 103 of the Decision and are assessed, in relation to Article 86 of the Treaty, in paragraphs 148 to 152.

102 The Decision (paragraph 88) refers to an internal report of BG on imports into Northern Ireland, according to which merchants asked BG for help to protect themselves against imports. According to that report, the action taken by BG in response to that request was successful and resulted in the importer in question having its access to merchants blocked.

103 In paragraphs 91 and 92, the Decision also refers to a BG memorandum of 14 June 1985 according to which a consortium of the largest merchants in Northern Ireland had established an agency for imports of plasterboard from Spain. BG informed those merchants that it regarded the Northern Ireland market as its own and intended to keep a maximum share of it. The memorandum made it clear that any rebate would be denied to merchants which imported plasterboard, whilst BG proposed offering the other merchants in Northern Ireland a discount on plaster and an increased discount on BG plasterboard of the same sizes as the imported board. The grant of those discounts was conditional in particular upon BG's being designated as exclusive supplier. Furthermore, loyal merchants would enjoy priority deliveries at peak times. On 17 June 1985, BG gave written notice of those measures to the merchants in Northern Ireland.

104 According to the Decision (paragraph 94), a BG internal note preparing for a meeting on 2 July 1985 with the importers at BG's head office proposed measures that would be taken if they were prepared to agree with BG not to make further imports. At that meeting — which was followed by another, on 15 July 1985, in Belfast (paragraph 95) — BG brought pressure to bear on importers in order to secure from them an undertaking not to import plasterboard.

105 The Decision states (paragraph 97) that an agenda note for the meeting of July 1985 of the BPB Executive Committee indicates that a group of merchants had imported plasterboard through Belfast and that BG reacted by granting a discount to loyal customers. According to that note, that action 'had the effect of bringing the group of merchants to the table to discuss with us and it would appear that they are now prepared to abandon imports following our discussions'.

106 In paragraph 98, the Decision states that, on 7 August 1985, BG confirmed the application of quantity rebates to those merchants in Northern Ireland that had achieved a certain annual turnover in BG products, provided that they helped to promote BG products and BG secured exclusivity of supply. BG terminated that rebate at the end of 1985, considering that it was being used by recipients in price competition with other merchants.

107 The Decision adds (paragraph 100) that, at a meeting held on 12 September 1985 with the merchants who had imported, BG agreed to pay them retrospectively three-quarters of the rebates which had been reserved for loyal merchants up to the time they agreed to cancel further imports. That was 'in consideration of' the cancellation of imports.

108 Again according to the Decision (paragraph 148), the withdrawal of the rebate which BG granted to the Northern Ireland merchants who it learned intended to import Spanish plasterboard, was intended to penalize those merchants. The additional discounts offered to all the merchants, provided that they obtained their supplies exclusively from BG and did not deal in imported products, were also intended to penalize the importers. That pressure was increased by other inducements to cease importing, such as the application of a confidential quantity discount or the promise of a payment if imports were brought to an end.

109 The Decision (paragraphs 149 to 151) describes all the measures mentioned above as an abuse of a dominant position in that, on the one hand, they were intended to bring imports to an end and succeeded in doing so and, on the other, strengthened the exclusivity arrangements between BG and the merchants.

The parties' arguments

110 The applicants claim that the BG's conduct in Northern Ireland could not have constituted an abuse of a dominant position. They maintain that the Decision misread the situation on the Northern Irish market. The introduction of rebates was not an initiative to counter competition from imported plasterboard but a response to a threat from a group of four merchants in Northern Ireland to sell imported plasterboard from Spain at 'appeal' prices. BG claims that it was attempting to defend its legitimate interests and those of its customers and that its actions contributed to maintaining and strengthening competition.

111 In that regard, BG considers that even a dominant undertaking has a legitimate right to defend itself against activities seriously destabilizing the market. In its view, there can be no possibility of competing on the merits against attractive prices offered by unscrupulous merchants who have cornered a cheap source of supply to the detriment of their competitors.

112 In response to the Spanish Government's observations, the applicants contended that it was following a complaint concerning dumping by GIL that EPYSA entered into price undertakings which were accepted by Commission Decision 85/209/EEC of 26 March 1985 (OJ 1985 L 89, p. 65). The Spanish Government therefore incorrectly contends that that complaint was shelved. BG responded to that new situation on the market by proposing to reduce the discounts granted to the four merchants and to grant increased discounts to the other merchants. That response cannot be regarded as abusive.

113 The Commission states, with regard to the conditions attached to the rebate system, the benefit of which was conditional upon an undertaking to obtain supplies of BG products exclusively, that the only conduct admissible for a dominant firm is competition on the merits. It states that the applicants admitted that the measures taken made it difficult for plasterboard importers to penetrate the market.

114 At the hearing, the Commission stated, first, that the measures taken by BG were intended to prevent the four merchants in question from using their imports in order to attack BG's position and, secondly, that the dumping proceedings referred to by the applicants took place at the beginning of 1985, that is to say before the period when the finding of abuse was made.

115 The Spanish Government maintains that, contrary to the applicants' contention, it has not been established that the import prices amounted to unfair competition. In any event, it is not permitted to break the law on the pretext of avoiding an allegedly unfair situation. According to the Spanish Government, the dumping complaint was shelved by the Commission. The measures taken by the Irish merchants, in forming a group to handle imports from Spain together, was the only way of avoiding the pressure brought to bear by BPB.

116 Iberian, for its part, maintains that the exclusionary nature of the applicants' conduct on the market in Northern Ireland is manifest. In its view, the rebates granted to merchants in Northern Ireland had the inevitable consequence of eliminating outlets and thus effectively excluding new competitors.

— The Court's assessment

117 The Court points out, *in limine*, that, although the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it (judgment of the Court of Justice in Case 27/76 *United Brands*, cited above).

118 The Court considers that it is not appropriate for an undertaking in a dominant position to take, on its own initiative, measures intended as retaliation against commercial practices which it considers unlawful or unfair. Accord-

ingly, it is irrelevant whether the measures referred to in the Decision were adopted in response to 'appeal' prices applied by certain competitors or, as the applicants maintain, relying in particular in that regard on the documents produced as Annexes 22 and 23 to the application, to forestall 'appeal' prices which certain merchants intended applying to imported products. The only important issue is whether, through recourse to methods different from those governing normal competition in products based on traders' performance, the conduct at issue was intended or likely to affect the structure of a market where, as a direct result of the presence of the undertaking in question, competition had already been weakened (judgment of the Court in Case 322/81 *Michelin*, cited above).

119 In that regard, the Court considers, first, that it is sufficiently clear from the documentary evidence — not contested on this point — submitted to it, as previously analysed in connection with the presentation of the Decision, that BG decided to withdraw the 4% rebate that it was granting to Northern Ireland merchants which, it learned, intended to import plasterboard from Spain. At the same time, it decided to grant a rebate of 5% to the merchants who agreed to obtain their supplies exclusively from BG. Such a practice, by virtue of its discriminatory nature, was clearly intended to penalize those merchants who intended to import plasterboard and to dissuade them from doing so, thus further supporting BG's position in the plasterboard market.

120 The Court points out, secondly, that, as the Court of Justice has held (in the judgment in *Michelin*, cited above), 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. In the present case, the rebates granted between June and December 1985 to Northern Irish builders' merchants were indeed intended to prevent them from obtaining products from competing suppliers, it being sufficiently proved that those rebates, being conditional on exclusivity, necessarily implied that the recipients were not to handle imported plasterboard. It is of little importance, in that regard, whether, as the applicants maintain, the exclusive supply arrangements on which the benefit of the discounts at issue was conditional merely constituted one of several conditions imposed on the merchants.

121 It is apparent from all the foregoing considerations that the third limb of the plea in law alleging failure to establish abuse of a dominant position, as found in the Decision, must be dismissed.

122 It is apparent from all the foregoing considerations that, first, the plea concerning failure to establish the abusive nature of the contested practices must be dismissed and, secondly, Article 2 of the Decision must be annulled in so far as it refers to the practices carried out in July 1985.

II — *The effect on trade between Member States*

123 The second plea concerning the failure to establish an infringement of Article 86 of the Treaty concerns the effects of BG's practices on trade between Member States.

— The contested measure

124 The impact of the practices described above on trade between Member States is analysed in paragraphs 153 to 159 of the Decision. As far as the abuse by BG of its dominant position in the market in Great Britain is concerned, the Decision states, in paragraph 153, that BG was the only producer in the country and that its only competitors were importers. Consequently, the measures taken by BG were capable of having a substantial effect on imports from other Member States, in particular France, and, as from 1 January 1986, the date of its accession to the Community, Spain.

125 According to the Decision (paragraphs 154 to 157), the measures taken by BG in order to tie its customers regarding supplies of plasterboard and to dissuade them from handling imported plasterboard had the effect of excluding both Lafarge and Iberian from trade with the merchants. Where inter-State trade is already limited by other factors, any action which is liable further to restrict it contravenes the Treaty competition rules. That is particularly the case where the elimination of such trade has the effect of reinforcing a near monopoly in

a Member State. In the present case it was important to safeguard trade between Member States not only as a source of actual competition but also as a possible prelude to the establishment of new production facilities in Great Britain. The action taken by BG was also liable to eliminate or weaken Iberian and reinforce the dominant position of BG in the British market, in particular its position of strength vis-à-vis Lafarge and other potential importers.

126 As regards the measures taken by BG in Northern Ireland, the Decision states, in paragraphs 158 and 159, that the elimination of competition from the consortium of merchants importing Spanish plasterboard was liable to lead to the reinstatement of BG's monopoly and its market power, and those practices also affected plasterboard manufactured by EPYSA in free circulation in Ireland and any plasterboard which might be imported from any other Member State. Since BG was the only supplier of plasterboard in Northern Ireland and nearly all the plasterboard supplied by it in Northern Ireland was produced in Ireland and imported from that Member State, the measures taken to prevent imports of plasterboard from Spain gave rise to a pattern of trade which would not have existed in their absence. They thus directly affected trade between Member States.

— The parties' arguments

127 The applicants maintain that, assuming that the practices which, according to the Commission, tied customers regarding supplies of plasterboard were established, they were not liable to affect trade. The only trade which could have been affected was trade between the United Kingdom, Spain and France. A large proportion of the commercial practices which the Decision considers to have contravened Article 86 took place before Spain became a member of the Community. As regards trade with France, Lafarge had, according to the applicants, reached its targeted level of sales in the United Kingdom and was not seeking new customers. According to the applicants, the structure and nature of the plasterboard market in the United Kingdom and Ireland was such that BG's conduct could not and indeed did not affect international trade. In view of the costs of shipping plasterboard by sea and the advantages of placing production facilities close to markets, it is not economically feasible to supply the

markets in Great Britain and Ireland on a large scale and forprolonged periods from abroad, which, moreover, the Commission conceded at the hearing. In addition there is also a particular need for regularity of supplies in the plasterboard market and for the offer of a wide range of products, which cannot be satisfied by suppliers which do not have a manufacturing facility within the United Kingdom or Ireland. With regard more particularly to Northern Ireland, the applicants deny that the normal patterns of trade between Ireland and Northern Ireland were modified by the alleged activities of BG, referring in that connection to the judgment of the Court of Justice in Case 22/78 *Hugin Kassaregister AB and Hugin Cash Register Ltd* v *Commission* [1979] ECR 1869.

128 The applicants maintain, finally, that the plasterboard imported into Northern Ireland was sold at predatory prices, as confirmed by the anti-dumping measures adopted by the Community. As regards the implementation of BG's policy of priority delivery of plaster, BG alleges that the Commission disregarded the evidence of its Marketing Director, J. H. Garner, at the hearing. It submits that the Commission's theoretical argument is not validly applicable to the facts of this case. There were no competitors other than Iberian and Lafarge and they were only competitors in a very limited sense. Redland and Knauf, which were genuine competitors, were not prevented from entering the United Kingdom market. The applicants also point out that imports from Spain into Northern Ireland continued through Ulster Partitions Ltd.

129 The Commission rejects the applicants' assertions that BG's conduct could not affect trade between Member States. It emphasizes that Iberian and Lafarge actually imported plasterboard and that their imports were not negligible. Moreover, another undertaking started to import plasterboard into Northern Ireland after the action taken by BG, which shows that that business was economically sustainable. The elimination of the intra-Community trade which existed led to the reinforcement of a near monopoly in a Member State and thus had an impact on the competitive structure within the Community. It was important to safeguard trade between the Member States as a source of actual competition to BG and as a possible prelude to the establishment of new production facilities in Great Britain. According to the Commission, BG's abu-

sive behaviour of tying customers for thesupply of plasterboard, which was initiated on the basis of imports from France and Spain, meant that BG's customers could not purchase any imported plasterboard from other Member States.

130 As to BG's argument relating to imports from Spain at a time when Spain was not a member of the Community, the Commission emphasizes that it took account of that fact in setting the fine.

131 As regards the situation in Northern Ireland, the Commission is of the opinion that the present circumstances differ from those of the *Hugin* case, cited above, since, in the present case, there was actual trade in plasterboard between the United Kingdom and Ireland, on the one hand, and other Member States, on the other. The Commission states that the patterns of trade to which BG refers are those which would have existed in the absence of abusive behaviour. Those patterns of trade included imports from Spain and Ireland. The abusive behaviour was therefore liable to have a direct effect on trade between Member States.

132 The Commission refers to the Decision with regard to the question whether the plasterboard from Spain was imported into Ireland and Northern Ireland at the market price. In the Commission's view, the activities of Redland and Knauf confirm its assessment; it states that Redland had obtained 5% of the market solely through imports, even before setting up a production facility in Great Britain.

133 The Spanish Government considers that the applicants' statements to the effect, on the one hand, that the commercial practices which the Commission regards as contrary to Article 86 of the Treaty ante-dated Spain's accession to the Community and, on the other, that BG's activities could not have perceptibly harmed international trade are incorrect since, according to Article 1 of the Decision, the practices in question were carried out until August 1986, and at that time Spain was already a member of the Community. Moreover, EPYSA

was not the only undertakingharmed: Lafarge, a French undertaking, and Iberian, a United Kingdom undertaking, were also harmed. The fact that attempts were made to penetrate the markets in Great Britain and Ireland also show that inter-State trade was feasible. Consequently, the Spanish Government considers that the applicants' conduct was liable to have a direct or indirect, actual or potential, impact on patterns of imports between Member States and that it was thereby liable to impede the economic inter-penetration sought by the Treaty.

— The Court's assessment

134 As regards the condition that trade between Member States must have been affected, it should be observed *in limine* that, for Article 86 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 (see in particular the judgments of the Court of Justice in Case 322/81 *Michelin*, cited above, paragraph 104, and Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 32).

135 In the present case, the Court finds that the contested measures partitioned the United Kingdom market by directly affecting actual or potential trade flows between France and Spain, on the one hand, and the United Kingdom, on the other. Trade flows between Ireland and Northern Ireland were also affected. The favouring of customers who did not deal in imported plasterboard impeded the marketing of imported plasterboard within the territory of the United Kingdom. Finally, as the Commission contends, the practices carried out in the island of Ireland tended, by hindering imports, to maintain the existing patterns of trade, since all the products marketed in Northern Ireland consisted of imports of products manufactured in Ireland by GIL. Those practices thus gave rise to different patterns of trade from those which would have resulted from a market open to competition.

136 As regards the applicants' argument that it is not economically possible to supply the territory of the United Kingdom on a large scale for prolonged peri-

ods, andthat the conditions for trade, whether actual or potential, between Member States do not exist, the Court finds that at the date of the contested practices there were in fact imports from Spain and France into the territory of the United Kingdom. According to the information — which has not been disputed — referred to in paragraphs 32 and 36 of the Decision, in 1985 those imports attained 3.3 million square metres in the case of Lafarge and 1.8 million square metres in the case of Iberian. Those imports were directly affected by the contested measures. It is therefore unnecessary to answer the question whether, as the applicants maintain, Lafarge considered that it had attained its marketing targets in Great Britain and did not seek to expand its sales there.

137 As regards the argument that the practices referred to in Article 2 — in so far as they were carried out in August 1985 — and Article 3 of the Decision antedated the accession of Spain to the Community, the Court points out, in the first place, that, as the Court of Justice held in Joined Cases 6 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, the fact that the practices at issue affect trade with one or more non-member countries is not in itself sufficient to exclude the possibility that the requirement that trade be affected, as a condition for the application of Article 85 or Article 86, can be regarded as not satisfied. The Court of First Instance also points out that the measures taken by BG in Great Britain in this case did not merely affect imports from Spain but also made it more difficult to market, within the territory of the United Kingdom, plasterboard produced in non-member countries which was in free circulation within the territory of other Member States.

138 As regards, finally, the practices referred to in Article 1 of the Decision, the Court finds, first, that they were carried out, in part, after 1 January 1986 when Spain acceded to the Communities and, secondly, that the exclusive supply obligation thus entered into was also liable to make it more difficult for an importer to gain access to the British market and therefore to affect, at least potentially, patterns of intra-Community trade. Having regard to the applicants' strong position in the market in Great Britain and the world market, that effect must be regarded as being sufficiently significant.

139 It follows from the foregoing considerations that the measures and practices adopted by BG were liable to exercise a sufficiently significant real or potential influence on intra-Community trade. Accordingly, the plea that the contested practices could not have influenced such trade must be dismissed.

The claims concerning attributability of the infringement and the amount of the fines

140 As stated above (paragraph 10), Article 4 of the Decision imposes on BG a fine of ECU 3 million on account of the exclusive supply practices referred to in Article 1 of the Decision and a fine of ECU 150 000 on BPB for the practices carried out in Ireland and Northern Ireland, referred to in Article 3 of the Decision. No fine was imposed for the practice of granting priority for deliveries of plaster with which Article 2 of the Decision is concerned. The applicants contest both the imposition of a fine on BPB for practices carried out in Ireland and the amount of the fines imposed.

The imposition of a fine on BPB

— *The contested measure*

141 In its Decision (paragraph 165), 'the Commission considers that abuses in Northern Ireland of BPB's dominant position in the island of Ireland should also attract a fine'.

— *The parties' arguments*

142 The applicants consider that, in so far as it relates to the fine imposed on BPB, the Decision must be annulled on the ground that it contains an inadequate statement of reasons. They consider that there is no reason for attributing to BPB responsibility for BG's actions in Northern Ireland. The Decision does not, in their view, contain the slightest reasoning to that effect. On the contrary, paragraphs 87 to 103, where the events that occurred in Northern Ireland are described, and paragraphs 141 to 152, where the legal inferences that

the Commission draws from them areanalysed, refer exclusively to actions taken by BG. The only references to BPB in the Decision — which, moreover, are incorrect — are to the routine reports of the BPB Executive Committee. Moreover, it is apparent from those reports that BPB was informed only after the event and in a general manner and that it did not play any part in carrying out the practices referred to in those reports. The applicants see no reason justifying the imposition of a fine on BPB.

143 The applicants state that the Decision relates to what happened in Northern Ireland only, not in the whole island of Ireland, and consider that the fact that plasterboard was produced in Ireland by GIL — another company in the group — is irrelevant. The relevant circumstance is that the board was sold by BG. The system of rebates applied in Northern Ireland was operated by BG and not by BPB. BG carried on its business wholly independently.

144 At the hearing, the applicants submitted that the Decision should be annulled on the ground that no statement of reasons was given for attributing responsibility for the abuse of a dominant position in Northern Ireland to BPB rather than to BG. In their view, it was only in the pleadings which it submitted to the Court that the Commission explained the reasons for doing so. The applicants deny that there is any basis whatsoever for holding a parent company liable for activities of its subsidiary merely because it was informed of the latter's activities. They state that, by contrast with the situation with which the judgment of the Court of Justice was concerned in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, the marketing policy adopted in this case by the subsidiaries of BPB was not laid down by the parent company. The applicants consider, finally, that if the Commission's reasoning is correct, it is incomprehensible that the fines for BG's actions in Great Britain were not imposed on BPB.

145 According to the Commission, BPB's allegation that there is no valid reason for attributing to it the actions of its subsidiary BG with respect to the Northern Ireland market must be rejected. It contends that BPB has a dominant position in Ireland in the market for the supply of plasterboard, which it abused through the actions of its wholly-owned subsidiary BG. Consequently, BPB and BG must be regarded as constituting one and the same undertaking as far as the action taken in Northern Ireland is concerned. The Executive Committee of BPB was kept constantly informed about the measures taken by BG in Northern Ireland to combat imports.

146 In response to the questions put to it by the Court, the Commission stated that whilst BG was the correct addressee of the Decision with regard to action found to have taken place in the market in Great Britain, that was not the case as regards the action taken in the Irish market, where account had to be taken of the existence of two subsidiaries of BPB, since the latter holding company was directly involved in the Irish market, as is apparent from paragraphs 90, 97 and 102 of the Decision. That is why the Commission considered that, as far as the Irish market is concerned, the parent company should be the addressee of the Decision.

147 The Spanish Government observes that BG is a wholly-owned subsidiary of BPB and considers that the latter is responsible for BG's activities in Northern Ireland. The fact that the subsidiary has separate legal personality is not sufficient to exclude the possibility that its conduct may be attributed to the parent company (judgment of the Court of Justice in Case 48/69 *ICI* v *Commission* [1972] ECR 619). The Spanish Government states that the conduct of BG and BPB was characterized by unity of action and the two companies must therefore be regarded as forming a single economic unit. Accordingly, the conduct penalized should be attributed to them jointly and severally.

— *The Court's assessment*

148 In reviewing the legality of the Decision, in so far as concerns the attribution to BPB of responsibility for BG's practices in the Irish market, the Court must decide whether the Commission, as it contends, gave sufficient reasons in the Decision for attributing BG's behaviour in that market to BPB.

149 With respect to the attributability to a parent company of the conduct of a subsidiary, the Court observes that such conduct may be attributed to the parent company where the subsidiary does not decide independently upon its own conduct in the market but carries out, in all material respects, the instructions given to it by the parent company (judgment of the Court of Justice in *ICI* v *Commission*, cited above, paragraph 133). A wholly owned subsidiary, in principle, necessarily follows the policy laid down by the parent company (judgment of the Court of Justice in *AEG* v *Commission*, cited above, paragraph 50).

150 In the present case, the Court finds that BPB is a holding company operating in Great Britain through BG, which it controls as to 100%. In Great Britain, BG itself markets its own products. In Ireland, plaster products are manufactured by GIL, also a wholly owned subsidiary of BPB. In Northern Ireland, the group's products are sold by BG. Although a small proportion of those products was, at the material time, accounted for by the production of BG itself, the majority of sales derived from imports from Ireland by BG which, for that purpose, purchased the products in question from GIL.

151 It must be observed that, by contrast with the market in Great Britain, BPB's dominant position in the market of the island of Ireland as a whole — which, moreover, has not been disputed — is based on the existence of two subsidiaries, one of which undertakes, within the territory of Northern Ireland, the marketing of the products manufactured by the other, whereas the latter itself is responsible for both the production and the marketing of its own products in Ireland. It follows that, by contrast with the position in the British market, neither the dominant position nor the abuse thereof in the market of the whole island of Ireland can be specifically attributed to either of the subsidiaries of BPB, particularly when the entire BPB group profited from BG's practices in Northern Ireland, in that its subsidiary, GIL, increased deliveries of plasterboard to the other subsidiary, BG, to an extent which varied directly according to the effectiveness of the abuses committed by the latter in Northern Ireland.

152 In this context, and as is confirmed by the clarifications given at the hearing, it must also be emphasized, first, that BPB and BG constitute a single economic entity and, secondly, that it is apparent from paragraphs 90, 97 and 102 of the Decision that the Executive Committee of BPB kept itself regularly informed of the practices of its subsidiaries in the Irish market, whereas no such interest is apparent from the Decision regarding the market in Great Britain.

153 In view of the characteristics just mentioned, which, moreover, the contested commercial practices tended to maintain, the applicants have no grounds for claiming that the Commission was wrong, in the circumstances of this case, to attribute BG's practices in Northern Ireland to BPB and to impose the con-

tested fine on it for that reason. This conclusion is not undermined either by BG's commercial independence or, for the reasons set out above (paragraphs 152 and 153), by the different course taken with respect to the market in Great Britain, relating to which the abusive practices were held to constitute an infringement on the part of BG.

154 As regards the argument that the Commission did not, in the preamble to the Decision, give the reasons for which the fines in respect of BG's actions in the market in Great Britain were not imposed on BPB, the Court considers that, whilst it is indeed true that the Commission could have imposed those fines on the parent company, since BPB and BG constitute a single economic entity, the Decision nevertheless gives a description, which is sufficient for legal purposes, of the features peculiar to each of the two markets, thus justifying the course of action adopted in each case. In that regard, the Commission was able, lawfully and without contravening Article 190 of the Treaty, to give details, in the course of the procedure, and in particular in reply to the questions put to it orally and in writing by the Court, of the information on which the reasoning adopted in the Decision is based. In any event, the alleged inadequacy of the statement of reasons did not in this case prevent the applicants from putting forward their arguments or make it difficult for the Court to exercise its review of legality.

155 Accordingly, the allegation that the Commission wrongly imposed a fine on BPB for practices engaged in by BG in Northern Ireland must be rejected.

The amount of the fines imposed

— *The contested measure*

156 The information considered by the Commission in fixing the amount of the fines imposed on BG and BPB is dealt with in paragraphs 162 to 174 of the Decision. The Decision states that the system tying selected merchants in Great Britain to BG constitutes a serious abuse of BG's dominant position, in particular because, first, most of the payments form a pattern in which BG offered the scheme to large customers of Iberian and, secondly, the payments were made in consideration of exclusive purchase ties.

157 According to the Decision, the abuses concerned were intentional. In Great Britain, BG deliberately set out, through the measures it took, to tie customers to itself. In Northern Ireland, BG's action was specifically designed to bring imports by a group of merchants to an end and to tie merchants to BG, in the face of the competition from imports (paragraph 170). In setting the fine, the Commission took account of the fact that, when the exclusive purchase arrangements in Great Britain were implemented, Spain was not a member of the Community and that the scheme continued only for seven months after Spain's accession (paragraph 173).

158 According to the Decision, abuses in Northern Ireland of BPB's dominant position in the island of Ireland should also attract a fine (paragraph 165).

— *The parties' arguments*

159 As regards the intentional nature of the practices carried out, the applicants are of the opinion that the alleged abuses did not have as their specific intent either the tying of customers to BG or the frustration of imports into Northern Ireland. Furthermore, BPB was not involved in any way in the supply of plasterboard in Ireland and Northern Ireland. BPB's knowledge of BG's operations in Northern Ireland was confined to references in routine reports by BG to BPB's group Executive Committee. In their rejoinder, the applicants confirm, for the avoidance of doubt, that in the alternative they seek a reduction in the fines.

160 The Commission first observes that the applicants did not, in their application, specifically ask the Court to reduce the fines. As to whether the contested practices were intentional, the Commission considers that there can be no doubt that both the exclusive supply arrangements in Great Britain and the measures taken to exclude imports were intentional. It also points out that no fine was imposed regarding priority deliveries of plaster.

161 In reply to the questions put to it by the Court, the Commission explained that the operative part of the Decision takes account of the fact that the infringement by BG lasted much longer than that by BPB. Moreover, the practices resorted to in the Northern Ireland market had only limited effects on intra-Community trade. Moreover, the BG infringement concerned a far larger market than the Irish market, namely that of Great Britain.

— *The Court's assessment*

162 It must be stated *in limine* that, although the applicants did not expressly state in their application that their claims for the annulment of the Decision should be construed as incorporating, in the alternative, claims that the amount of the fines imposed should be reduced, they stated in their application that 'the level of the fines imposed is too high'. Accordingly, the claims that the Court should annul the Decision must, in the circumstances of the case, be construed as incorporating claims that the amount of the fines imposed should be reduced. Accordingly, the Commission's argument that the applicants did not expressly seek a reduction in the amount of the fines must be rejected.

163 Pursuant to Article 15(2) of Regulation No 17, the Commission may impose a fine only for infringements of Article 86 of the Treaty which are committed either intentionally or negligently.

164 It is apparent from all the foregoing assessments by the Court that the Decision sufficiently established for legal purposes that between July 1985 and August 1986 BG infringed Article 86 of the Treaty by abusing its dominant position in the supply of plasterboard in Great Britain and that BPB, through its subsidiary BG, infringed Article 86 of the Treaty by abusing its dominant position in the Irish market for the supply of plasterboard.

165 As to whether those infringements were committed intentionally or negligently, the Court observes that, as has been consistently held (see in particular the judgment of the Court of Justice in Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261), 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 applicable to undertakings; 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.

166 The Court considers that it is apparent from the very nature of the conduct referred to in the Decision, which was in fact characterized by the imposition of the requirement not to deal in plasterboard other than that manufactured by the applicants, that the latter could not have been unaware that such conduct constituted an infringement of Article 86 of the Treaty. Accordingly, for the purposes of the application of Regulation No 17, that conduct must be regarded as having been pursued intentionally.

167 Moreover, it is apparent from the foregoing considerations (paragraphs 151 to 156) that, despite the contrary contention of the applicants, BPB was indeed involved in the contested practices regarding Northern Ireland, of which it was kept regularly informed and which were dealt with at meetings of its own Executive Committee.

168 The applicants ask that, if they are not cancelled, the fines imposed should be reduced. In that regard, it is apparent from the grounds of the Decision and from the further details given at the hearing that the Commission took account of the seriousness and duration of the abuses, the aggregate turnover of the undertakings, the respective sizes of the markets, the fact that Spain was not yet a member of the Community when the system of promotional payments and the system of rebates applied in Northern Ireland were put into operation and, lastly, the fact that the system of promotional payments was maintained for only seven months after Spain's accession to the Community. Accordingly,

the Commission has provided sufficient proof that the penalties imposed were commensurate with the infringements committed and the claims for a reduction in the amount of the fines must also be dismissed. Finally, the partial annulment of Article 2 of the Decision concerns an objection in respect of which no fine was imposed.

169 It follows from the foregoing that the fines imposed are justified in principle and as regards their amount and that those liable to pay them were correctly designated; accordingly, the applicants' claims for the annulment or amendment of Article 4 of the Decision must be dismissed.

170 It follows from all of the foregoing that Article 2 of the operative part of the Decision must be annulled in so far as it relates to July 1985 and that the remainder of the application must be dismissed.

Costs

171 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission asked that the applicants be ordered to pay the costs, the latter must, in the circumstances of this case, be ordered to pay the costs, including those incurred by the intervener Iberian.

172 Under Article 87(4) of the Rules of Procedure, Member States which intervened in the proceedings are to bear their own costs. Accordingly, the Kingdom of Spain must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Annuls Article 2 of Commission Decision 89/22/EEC of 5 December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.900, BPB Industries plc, OJ 1989 L 10, p. 50, rectified in OJ 1989 L 52, p. 42) in so far as it relates to July 1985;**

2. **Dismisses the remainder of the claims made in the application;**

3. **Orders the applicants to pay all the costs, including those of the intervener, Iberian;**

4. **Declares that the Kingdom of Spain is to bear its own costs.**

Cruz Vilaça Saggio Briët

Delivered in open court in Luxembourg on 1 April 1993.

H. Jung J. L. Cruz Vilaca

Registrar President