JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
7 October 1999 *

In Case T-228/97,

Irish Sugar plc, a company incorporated under Irish law, established in Carlow, Ireland, represented by Alexander Böhlke, of the Brussels and Frankfurt am Main Bars, and Scott Crosby, Solicitor, with an address for service in Luxembourg at the Chambers of Victor Elvinger, 31 Rue d'Eich,

applicant,

v

Commission of the European Communities, represented by Klaus Wiedner, of its Legal Service, acting as Agent, assisted by Conor Quigley, Barrister, with an address for service in Luxembourg at the Chambers of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

APPLICATION for the annulment of Commission Decision 97/624/EC of 14 May 1997 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.621, 35.059/F-3 — Irish Sugar plc) (OJ 1997 L 258, p. 1) or, in the alternative, for the annulment of the third and fourth paragraphs of Article 3 of the operative part of that decision, in so far as they contain instructions exceeding the scope of the abuses established in points 5 and 6 of Article 1, and reduction of the fine imposed on the applicant by Article 2 of the operative part,

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

composed of: M. Jaeger, President, K. Lenaerts and J. Azizi, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 14 January 1999,

gives the following

Judgment

Facts

1 This action challenges Commission Decision 97/624/EC of 14 May 1997 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.621, 35.059/F-3 — Irish Sugar plc) (OJ 1997 L 258, p. 1; 'the contested decision'), in which the applicant, the sole processor of sugarbeet in Ireland and the principal supplier of sugar in that Member State, was fined for infringing Article 86 of the EC Treaty (now Article 82 EC). The product forming the subject-matter of the contested decision is white granulated sugar, on both the industrial sugar market and the retail sugar market.

2 On 25 and 26 September 1990 the Commission inspected the applicant's head office in Dublin. On 7 and 8 February 1991 it inspected the Dublin offices of Sugar Distributors Ltd ('SDL'), the distributor of sugar supplied by the applicant. On 13 February 1991 it inspected the Belfast offices of William McKinney Ltd ('McKinney'), a subsidiary of the applicant responsible for distributing sugar supplied by the applicant in Northern Ireland.

3 In a first administrative proceeding concerning the existence of market-sharing agreements between the applicant and its two competitors in the United Kingdom (Case IV/33.705), the Commission sent the applicant on 4 May 1992 a statement of objections within the meaning of Article 2(1) of 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 1963-64, p. 47; 'Regulation No 99/63'). The applicant replied on 11 September 1992. This first proceeding also led, on 6 October 1992, to a hearing as provided for by

Article 19 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). On 2 August 1995 the applicant was advised that the proceeding had been terminated.

4 On 22 April 1993 the Commission opened a second administrative proceeding (IV/34.621) concerning infringements of both Article 85 of the EC Treaty (now Article 81 EC) and Article 86 of the Treaty by sending a fresh statement of objections to the applicant and a number of other parties. The applicant replied on 1 September 1993 and took part in a hearing on 21 and 22 September 1993. On 28 June 1995 the Commission informed the applicant that the objections relating to Article 85 of the Treaty had been dropped. On 19 July 1995 the Commission adopted a decision under Article 11 of Regulation No 17 requiring the applicant to provide certain information.

5 On 16 January 1995 the Commission inspected the Dublin offices of Greencore plc ('Greencore'), a holding company which has held the applicant's capital since April 1991. On the same date it also inspected the applicant's offices in Carlow, Ireland.

6 On 25 March 1996 the Commission sent the applicant a revised statement of objections replacing the previous one in its entirety and thereby commencing a third administrative proceeding (IV/34.621, 35.059). The applicant sent its reply on 12 July 1996.

7 On 14 May 1997 the Commission adopted the contested decision, in which it established the existence of infringements of Article 86 of the Treaty from 1985 to 1995, consisting more precisely in seven individual abuses by the applicant (and/or SDL for the period up to February 1990) on the market in granulated sugar intended for retail and for industry in Ireland. The contested decision imposed a fine of ECU 8 800 000 on the applicant for those abuses.

Procedure

8 The contested decision was notified to the applicant on 23 May 1997.

9 By application lodged at the Registry of the Court of First Instance on 4 August 1997 the applicant brought the present action.

10 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and adopted measures of organisation of procedure in which it requested the parties to reply to certain written questions. The parties complied with those requests.

11 The parties presented oral argument and answered questions put to them by the Court at the hearing on 14 January 1999.

Forms of order sought

12 The applicant claims that the Court should:

— annul the contested decision;

— in the alternative, reduce the fine imposed in Article 2 and annul the third and fourth paragraphs of Article 3 in so far as they exceed the scope of the abuses established in points 5 and 6 of Article 1;

— order the Commission to pay the costs.

13 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs of the proceedings.

Principal forms of order sought

14 In support of its principal claim for the annulment of the contested decision, the applicant relies on four pleas in law. In the first, alleging infringement of Articles 86 (now Article 82 EC) and 190 of the EC Treaty (now Article 253 EC), of the principle of legal certainty and of Article 4 of Regulation No 99/63, the applicant argues that it did not occupy a joint dominant position together with SDL. In the second, alleging infringement of Article 86 of the Treaty, it maintains that it did not occupy a dominant position on the industrial sugar market. In the third and fourth pleas, which allege infringements of Article 86 of the Treaty and which will be examined together, it argues that it did not abuse its alleged dominant position on either the industrial or the retail sugar market.

1. The existence of a joint dominant position of the applicant and SDL

15 In this first plea, the applicant argues, first, that the operative part of the contested decision is incomplete and contradictory; second, that the finding of the existence of two different markets in the contested decision alters the intrinsic nature of the infringements attributed to the applicant; and, third, that the contested decision has not established the existence of a joint dominant position.

The argument that the operative part of the contested decision is incomplete and contradictory

16 The applicant argues first that the operative part of the contested decision contains no formal finding of the existence of a dominant position and a joint dominant position. Whilst recognising that that question is examined in other

parts of the contested decision, the applicant nevertheless maintains that, to be lawful, a finding cannot simply be inferred from the legal assessment in the contested decision. The legal assessment is not definitive with regard to the addressee of such a decision, since its function is to state the reasons on which the decision is based and thus to explain the findings set out in the operative part. An infringement can be penalised only to the extent to which it has been duly found to exist, as otherwise there would be an infringement of the principle of legal certainty, which is a fundamental principle of the Community legal order.

17 It should be remembered that the operative part of a measure must be read in the light of its reasoning, the measure forming a whole (see in particular Case T-145/89 *Baustahlgewebe* v *Commission* [1995] ECR II-987, paragraph 146, and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 104). In this case, the applicant does not deny that the grounds for the contested decision include a finding of a dominant position on its part and a joint dominant position with SDL. Points 99 to 113 of the contested decision conclude, in point 113, with wording that is quite unequivocal in that respect:

'It is therefore concluded that, throughout the relevant period, [the applicant] held an individual, or at least, prior to February 1990, a joint, dominant position on the granulated sugar market for both retail and industrial sale in Ireland.'

18 In Article 1 of the operative part of the contested decision, the Commission found that the applicant had infringed Article 86 of the Treaty 'as part of a sustained and comprehensive policy of protecting its position on the sugar market in Ireland'. As the Commission rightly observes, to infringe Article 86 an undertaking must be in a dominant position. The formal finding which the applicant requires is therefore implied but clear in the operative part of the contested decision, inasmuch as it is found that Article 86 was infringed.

19 The applicant's argument based on the lack of a formal finding of the existence of a dominant position and a joint dominant position therefore fails on the facts and must be rejected (Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 98).

20 Secondly, the applicant alleges that the operative part is inconsistent with the grounds of the contested decision as regards the definition of the relevant market. The Commission referred in the operative part of the contested decision to the 'sugar market in Ireland', whereas in the grounds it accepted that the retail and industrial sugar markets were different markets (points 90, 99 and 118). The definition of the relevant market in the operative part of the contested decision in fact corresponds to the definition which the Commission adopted in the last two statements of objections sent to the applicant (proceedings IV/34.621 and IV/34.621, 35.059). Consequently, any finding in the operative part of the contested decision of the existence of a dominant position and a joint dominant position related to a market, the sugar market in Ireland, which was not defined in the grounds of the contested decision.

21 The alleged contradiction has not been demonstrated. Since the operative part of the contested decision is to be read in the light of its grounds, in accordance with the requirements of the case-law cited in paragraph 17 above, use of the expression 'the sugar market in Ireland' in Article 1 of the operative part is not capable of misleading the applicant or the Court as to the nature of the objections raised against the applicant.

22 The wording used in points 90 and 98 of the contested decision shows that, following the explanations given by the applicant in response to the statement of objections, the Commission decided that in this case there were two distinct markets. In point 90 it states: 'The Commission accepts, however, as was argued by [the applicant] [footnote 71, which reads: In its response to the Statement of Objections of 12 July 1996 at 3.2.1 to 3.2.7], that the market for white granulated sugar is further subdivided into two markets, that of industrial sugar

and that of retail sugar. The two markets have overlapping characteristics... However, while there is a degree of substitution on the supply side, in terms of the use to which the products are put, the volumes sold and the type of customers, the markets are different.' In point 98, the Commission states: 'On the basis of the above characteristics, the Commission concludes that the relevant markets are those of retail and industrial granulated sugar in Ireland. It is further concluded that this is a substantial part of the common market within the meaning of Article 86 on the basis of the volumes of production and consumption of sugar.'

23 Moreover, a reading of Article 1 of the operative part of the contested decision as a whole clearly shows that that provision, like the grounds for the decision, draws a distinction between the retail granulated sugar market and the industrial granulated sugar market in Ireland. The applicant's argument alleging a contradiction between the grounds and the operative part of the contested decision therefore fails on the facts and must also be rejected.

24 Thirdly, the applicant challenges the interpretation of Article 1 of the contested decision advanced by the Commission for the first time in its defence, to the effect that it formally found that the applicant occupied a sole dominant position throughout the period in question and, in the alternative, that the applicant and SDL occupied a joint dominant position prior to February 1990. The applicant argues that neither the statement of reasons (points 111, 112, 113, 117, 135 and 167) nor the operative part of the contested decision confirms the Commission's belated allegations. In any event the applicant considers that if this reading of the contested decision were to be endorsed the contested decision would infringe its rights of defence in so far as it deviates from the position adopted in the statement of objections (paragraphs 106, 108 and 150). Furthermore, the matters accepted in the contested decision as proof of a joint dominant position between 1985 and February 1990 are attributable to Sugar Distribution (Holding) Ltd ('SDH') and SDL.

25 It is plain that the applicant is right to dispute the interpretation of the contested decision defended on that point by the Commission in these proceedings. Even if the Commission's interpretation may appear to correspond with the legal assessment in the grounds of the contested decision and in the statement of objections to the effect that there was both a dominant position and an abuse of that position, it cannot be reconciled with the other extracts from the contested decision and the statement of objections cited by the applicant. The distinction between establishing the dominant position held by the applicant and establishing the abuses committed in that respect which the Commission seeks to rely upon in these proceedings to justify that variation in the terms used is not pertinent. A number of extracts from the legal assessment in the contested decision dealing with abuses make express reference to the abuse by the applicant and SDL of their 'joint dominant position'.

26 It is apparent from points 99 to 113 of the grounds, for instance, under the heading 'B. Dominant position', that the Commission considered that throughout the period concerned, that is to say from 1985 to 1995, the applicant held an individual dominant position, but that the Commission took account of the applicant's argument that it did not exercise control of SDL before the purchase of all the shares of its parent company, SDH, in February 1990. That analysis is no different from that which the Commission put forward in paragraphs 95 to 106 of the statement of objections, dealing with the existence of a dominant position. Points 114 and 116 of the contested decision, under the heading 'C. Abuse of the dominant position,' are along the same lines. Paragraph 110 of the statement of objections also confirms that position on the part of the Commission.

27 However, several parts of the contested decision dealing with abusive practices and the wording of the operative part show that before 1990 the applicant and SDL abused a joint dominant position by either individual or joint conduct. Thus, in point 117, it is stated:'The actions taken by [the applicant] before 1990 with regard to the transport restriction, by both companies with respect to border rebates, export rebates and the fidelity rebate and by SDL with respect to the product swap and selective pricing, were undertaken from a position of joint dominance'. The final sentence of point 135 states: 'It is therefore concluded that [the applicant] and SDL abused a joint dominant position by engaging in these

practices'. Point 167 likewise states: 'The other abusive behaviour of [the applicant] and/or SDL... [is] not time-barred for fining purposes. [The applicant] has sought, by this behaviour, to maintain or reinforce its dominant position and, in the period prior to February 1990, [the applicant] and SDL sought, by their behaviour, to maintain a position of joint dominance... The Commission therefore considers that [the applicant] has intentionally or at least negligently abused its dominant position and that, prior to February 1990, [the applicant] and SDL intentionally or at least negligently abused their joint dominant position. The Commission therefore intends to impose a fine on Irish Sugar for its own infringements and, as appropriate, as successor in title, for the infringements of SDL...'. Article 1 of the contested decision states: '... To this effect, [the applicant] (and/or Sugar Distributors Limited in the period before February 1990) engaged in the following abusive conduct on the granulated sugar market for retail and industrial sale in Ireland...'. Those passages show that the interpretation of the contested decision argued for by the applicant is well founded. The same applies to paragraph 150 of the statement of objections mentioned by the applicant, which states, like point 167 of the contested decision: '[the applicant] has sought, as a result of this behaviour, to maintain or reinforce its dominant position and in the period prior to February 1990 [the applicant] and SDL sought, as a result of their behaviour, to maintain a position of joint dominance... The Commission therefore considers that [the applicant] has intentionally or at least negligently abused its dominant position and that, prior to February 1990, [the applicant] and SDL intentionally or at least negligently abused their joint dominant position. The Commission therefore intends to impose a fine on [the applicant] for its own infringements and, as successor in title, for the infringements of SDL prior to February 1990...'.

28 The various terms used in the contested decision to describe the applicant's position on the market before February 1990 are the result of the special nature of its links with SDL before that date. The Commission claims to have established

the existence of infringements of Article 86 of the Treaty from 1985 to February 1990 committed by the applicant alone, by SDL alone, or by both together. Having accepted the applicant's argument that it did not control the management of SDL, despite holding 51% of SDH's capital, the Commission decided that even if it was not possible to regard the applicant and SDL as a single economic entity, they had, together at least, held a dominant position on the market in question. Paragraph 110 of the statement of objections confirms that that was the Commission's view: 'To defend its market [the applicant] had recourse to different forms of abusive conduct which were used alternatively or in combination with one another whenever it was felt necessary throughout the period from 1985. Some of the relevant practices were carried out by [the applicant] itself; others, on the retail sugar market, by SDL, the commercial subsidiary of [the applicant]'.

29 The characteristics of the relations between the applicant and SDL before February 1990 do not, however, enable the Commission to maintain that it has established on the same facts that, before February 1990, the applicant held at the same time both an individual dominant position and a joint dominant position with SDL. Similarly, if it permits doubt to remain as to the nature of the dominant position in question that will affect the specific nature of the complaints concerning the applicant and prevent it from effectively preparing its defence, thereby infringing the defence rights guaranteed by Article 4 of Regulation No 99/63. The Court therefore shares the applicant's view that, in line with the statement of objections, the contested decision finds the existence of a joint dominant position of the applicant and SDL from 1985 until February 1990 and an individual dominant position of the applicant from February 1990 until 1995.

30 The allegations by the Commission in these proceedings as to the nature of the dominant position between 1985 and February 1990 found in the contested decision to exist, even if inaccurate, do not entail an infringement either of the applicant's rights of defence or of the duty to state reasons because they concern the interpretation of the contested decision, which is ultimately a matter for the Court to determine, as the preceding paragraph makes clear.

31 The first limb of the first plea made by the applicant in support of its principal claim must therefore be dismissed.

Alteration of the intrinsic nature of the infringements attributed to the applicant

32 The applicant maintains that the distinction in the contested decision between the retail sugar market and the industrial sugar market undermines its rights of defence and thus infringes Article 4 of Regulation No 99/63. That distinction, which alters the intrinsic nature of the infringements with which it was charged in the statement of objections, should have been intimated to it before the contested decision was adopted.

33 However, the applicant has failed to show how its defence rights have been affected by the fact that one of the arguments it put forward during the administrative procedure was taken into account (see paragraph 23 above). It is not enough to allege that the nature of the objections has been altered as a result of the distinction drawn between the retail and the industrial sugar markets without submitting the least detail in that regard.

34 The taking into account of an argument put forward by an undertaking during the administrative procedure, without it having been given the opportunity to express an opinion in that respect before the adoption of the final decision, cannot as such constitute an infringement of defence rights, especially where taking account of the argument does not alter the nature of the complaints against it. The applicant had the opportunity to express its view on the definition of the product market used by the Commission in the statement of objections, and it could therefore expect that its own explanations would lead the Commission to alter its opinion (Joined Cases 40/73 to 48/73, 50/73, 54/73 to

56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 437 and 438).

35 Moreover, observance of the rights of the defence requires that the undertaking concerned be afforded the opportunity from the stage of the administrative procedure effectively to put forward its view as to the truth and relevance of the facts and circumstances alleged and objections raised by the Commission (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 11; Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 39; Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 48), so that the statement of objections must supply the undertaking with all the information necessary to enable it properly to defend itself before the Commission adopts a final decision (Case 45/69 *Boehringer Mannheim* v *Commission* [1970] ECR 769, paragraph 9; Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 11; Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 274 and 277; *Hoffmann-La Roche*, paragraph 10; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, '*Woodpulp*', paragraph 42). The statement of objections must set out clearly all the essential facts upon which the Commission is relying at that stage of the procedure. That may be done summarily and the decision is not necessarily required to be a replica of the statement of objections (Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 14).

36 Since the distinction between the retail and industrial sugar markets has not altered the complaints against the applicant, and the latter have been set out sufficiently clearly and precisely in the statement of objections for the applicant to take cognisance of them and defend itself properly, or, at the very least, the applicant has not in any way demonstrated how the complaints have been modified, no infringement of its defence rights can be found.

37 The second limb of the first plea raised by the applicant in support of its principal claim must therefore be dismissed.

The finding of a joint dominant position

38 The applicant denies that it held a joint dominant position together with SDL between 1985 and February 1990.

39 In that regard, it sets out the historical background of its relations with SDH, which at that time held all the shares in SDL. It emphasises that, even though it held 51% of the shares in SDH before acquiring all of them in February 1990, it did not control the management of that company. Since 1982, responsibilities had been allocated for practical purposes between it and its sales subsidiaries in such a way that it was responsible for technical services and marketing, including consumer promotions and rebates, while its sales subsidiaries were responsible for the operation and funding of sales, trade promotions, merchandising and distribution of the products. Contrary to what the Commission alleges in the contested decision (point 30), however, that arrangement did not deprive SDL of the right to trade in competing products. It refers in that respect to transactions by SDL which until 1991 involved, through McKinney's, the purchase and sale in Northern Ireland of sugar from a British supplier. The applicant states, moreover, that its responsibilities under that arrangement were the subject of a management services agreement pursuant to which SDL paid the applicant management charges between 1982 and 1989, the amount of which varied each year and was calculated by the financial director of SDL. It adds that, in practice, the pricing of sugar was essentially a matter for SDL. In order to confirm the autonomy of SDL's management, the applicant also cites extracts from a report drawn up by two experts appointed by the High Court in 1992 and from a report drawn up by Arthur Andersen.

40 The applicant also asserts that since its economic ties with SDH did not have the effect of uniting the two undertakings they were not capable of supporting a finding of a joint dominant position in the retail and industrial markets in granulated sugar in Ireland. It criticises the Commission for using in the contested decision (point 112) a false criterion, the parallel interests of the two companies *vis-à-vis* third parties, in order to find that they held a joint dominant position. It also claims that the reference to the judgment in Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraph 358, is not logical.

41 The applicant maintains that its links with SDH guaranteed the independence of the board and management of the latter. The test used in the case-law to determine the existence of a joint dominant position held by linked undertakings is the adoption of the same conduct on the relevant market (Case C-393/92 *Almelo* v *Energiebedrijf IJsselmij* [1994] ECR I-1477, paragraph 42, and Joined Cases T-24/93, T-25/93, T-26/93 and T/28/93 *Compagnie Maritime Belge Transports and Others* v *Commission* [1996] ECR II-1201, paragraphs 62 to 68). Adopting the same conduct on the market represents more than mere parallel interests, which tends to be the rule in a producer-trader relationship, and the more so in a situation of structural oversupply, as in this case. The applicant also points out that in the statement of objections the Commission did not address the issue of whether the relationship between the two undertakings led them to adopt the same conduct on the market, since it merely found that there were structural ties between the applicant and SDH/SDL (statement of objections, paragraphs 102, 103 and 104 et seq.).

42 Similarly, the applicant points out that, whilst the absence of competition in a vertical commercial relationship between a producer and a trader may be a salient feature of a collective dominant position, it is not sufficient to establish the existence of such a dominant position. The applicant questions the relevance of the concept of a collective dominant position in a vertical commercial relation-

ship. Furthermore, all the collective dominant position cases decided by the Community judicature so far concerned horizontal commercial relationships. In its reply the applicant adds that a vertical commercial relationship is characterised by the absence of competition.

43 The applicant also criticises the allegedly collective nature of most of the abuses committed in the context of the joint dominance alleged. In that regard, it points out that although the Commission finds that the product swap operations were exclusively arranged by SDL (point 48 of the contested decision) and that the applicant was only informed of these on 18 July 1988 (point 52), it none the less considers that this amounted to abusive exploitation of a joint dominant position. It accuses the Commission of 'recycling' certain facts in the contested decision by using them to establish both the existence of a joint dominant position (point 112) and abusive exploitation of that joint dominant position (points 117, 127 and 128), contrary to the principle laid down in the case-law in that regard (*Compagnie Maritime Belge Transports*, paragraph 67). That 'recycling' exercise is said also to amount to an infringement of the applicant's rights of defence, and therefore of Article 4 of Regulation No 99/63, since the fact that the applicant financed the rebates allowed by SDL, as distinct from granting them, was not considered to constitute an abuse in the statement of objections.

44 It is obvious, first, that although the applicant disputes the collective nature of the dominant position which it is alleged to have held with SDH/SDL on the retail sugar market between 1985 and February 1990, it has not in any way denied in its application that it carried out more than 88% of sales registered on that market for the entire duration of the infringement period (point 159 of the contested decision). Thus, even if it formally denies having held an individual or joint dominant position on the industrial sugar market (see the examination of the second plea of the principal claim below), it has not raised any specific arguments capable of casting doubt on the assessment that it held a dominant position on the retail sugar market.

45 Moreover, whilst the applicant castigates as inappropriate the criterion used by the Commission at point 112 of the contested decision to establish the existence of a joint dominant position, the parties nevertheless agree on a number of the conditions required by the case-law to establish the existence of a joint dominant position. They thus maintain that, according to the case-law, two independent economic entities may hold a joint dominant position on a market (*SIV*, paragraph 358, cited in point 112 of the contested decision). They also consider that there must be close links between the two entities, and that those links must be such as to be capable of leading to the adoption of the same conduct and policy on the market in question. In that respect, both parties cite the judgments in *Almelo* and *Compagnie Maritime Belge Transports*.

46 Their analysis of the state of the case-law on this question must be accepted. Following its earlier case-law and the case-law of the Court of First Instance (*Almelo*, paragraph 42; Case C-96/94 *Centro Servizi Spediporto* v *Spedizioni Marittima del Golfo* [1995] ECR I-2883, paragraphs 32 and 33; Joined Cases C-140/94, C-141/94 and C-142/94 *DIP and Others* v *Comune di Bassano del Grappa* [1995] ECR I-3257, paragraph 26; Case C-70/95 *Sodemare and Others* v *Regione Lombardia* [1997] ECR I-3395, paragraphs 45 and 46; *SIV*, paragraph 358; *Compagnie Maritime Belge Transports*, paragraph 62), the Court of Justice has confirmed that a joint dominant position consists in a number of undertakings being able together, in particular because of factors giving rise to a connection between them, to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and ultimately consumers (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 221).

47 It is therefore necessary to determine in this case whether, by reason of the factors connecting the applicant and SDL from 1985 to February 1990, they had the power to adopt a common market policy.

48 The applicant relies on the nature of its relations with SDL up to 1990 to dispute the existence of a joint dominant position. It insists that the two entities were

independent, making existence of links of the type claimed by the Commission *ipso facto* impossible.

49 In the first place, the applicant's argument is based on the false premiss that the economic independence of the two entities prevents them from holding a joint dominant position. In fact, the case-law relied on by the applicant and referred to in paragraph 46 above shows that the mere independence of the economic entities in question is not sufficient to remove the possibility of their holding a joint dominant position.

50 Secondly, the factors connecting the applicant and SDL identified in the contested decision show that between 1985 and February 1990 those two economic entities had the power to adopt a common market policy.

51 In the contested decision (point 112), the Commission thus identifies as connecting factors the applicant's shareholding in SDH, its representation on the boards of SDH and SDL, the policy-making structure of the companies and the communication process established to facilitate it, and the direct economic ties constituted by SDL's commitment to obtain its supplies exclusively from the applicant and the applicant's financing of all consumer promotions and rebates offered by SDL to its customers. Details thereof are set out in points 29, 30 and 111 of the contested decision.

52 The arguments whereby the applicant seeks to question the reality of those factors are both few in number and largely unfounded. It does not deny, for

example, that it held 51% of the shares of SDH, which in turn held all the shares in SDL; that half the board of SDH were its representatives; that its chief executive and several of its board members sat on the board of SDL; that from July 1982 to February 1990 it was responsible, on the basis of an allocation of tasks jointly determined in July 1982, for technical services and marketing, commercial strategy, consumer promotions and rebates; that SDL carried out the distribution of sugar produced by the applicant in Ireland; that SDL undertook, subject to the availability of supplies, to purchase its sugar requirements only from the applicant and not to become concerned or interested in the purchase, sale, resale or promotion of any products of a like or similar kind to those available from the applicant; that the applicant and SDL were required to communicate to each other certain information concerning marketing, sales, advertising, consumer promotions and financial matters; and, finally, that monthly meetings were held between representatives of SDL and of the applicant.

53 On the other hand, it claims that SDL's exclusive supply undertaking did not prevent it from trading in competing products, particularly in Northern Ireland through the intermediary of McKinney; that the management charges paid by SDL to the applicant arose from the performance of a contract, the amount varying each year and being calculated by the financial director of SDL (letter of 23 October 1991 addressed to the shareholders of Greencore); that those management charges did not constitute a financing of SDL's commercial policy; that the chairmanship of the monthly meetings between the two undertakings was assumed in turn by a representative of the applicant and a representative of SDL and not exclusively by the chief executive of the applicant's sugar division; and, finally, that the pricing of sugar was essentially a matter for SDL.

54 Those criticisms are, however, not capable of affecting the probative value of the documents used by the Commission to support its analysis of the relations

between the applicant and SDL. To demonstrate that, it is sufficient to examine the extract from the minutes of the SDL board meeting of 1 July 1982 which appears in Annex 3 to the statement of objections:

'PROPOSALS FOR MARKETING/SALES/DISTRIBUTION OF IRISH SUGAR

Currently sugar products are sold into three market areas:

Home Market

Northern Ireland Market

U.K. Market

The overall responsibility for the Irish Sugar industry rests with C.S.E.T. [the abbreviation of the name under which the applicant was founded by the Irish Government in 1933, "Comhlucht Siúcra Éireann Teoranta"] and the policies of the C.S.E.T. Board towards the overall interests of C.S.E.T. are fulfilled by the C.S.E.T. Organisation and the subsidiary and Associated Boards to whom certain of these functions have been allocated.

To improve the organisation and eliminate the areas where responsibilities are unclear, it is necessary to:

(a) clarify both the duties of the C.S.E.T. Sugar Division staff and the S.D.L. sales and distribution roles and the co-responsibilities of areas of mutual interest, with the clear recognition of the parent Company position of C.S.E.T. as a major State Company.

(b) clarify the co-operation and communications framework within which the two companies should operate.

(c) clarify the communications framework between the above functions and the production units.

To meet these objectives, it is proposed that S.D.L. would be responsible for sales, trade promotions, merchandising and distribution of all C.S.E.T. sugar products in the Home and Northern Ireland markets and, that C.S.E.T. would be

responsible for marketing and technical services in these markets. In detail, the duties of the staff in both companies will be broken down as follows:

C.S.E.T. RESPONSIBILITIES

(A) Home and Northern Ireland

1. Marketing strategy.

2. Advertising (Generic and Brand) (subject as outlined under co-responsibilities).

3. Packaging and presentation.

4. Product development.

5. New products.

6. Quality.

7. Dealing with all customer complaints re quality and packaging both received directly and advised by S.D.L., J.C. Cole Limited and William Mc Kinney (1975) Limited.

8. Consumer promotions.

9. Technical support (including R&D) and Services.

10. Product availability.

11. Rebating as required to ensure that we maximise the optimum levels of both price and volume in the Home and Northern Ireland markets.

(B) U.K. Market — Sales, Marketing and Distribution

S.D.L. RESPONSIBILITIES

1. Operation and funding of sales, trade promotions, merchandising and distribution in respect of C.S.E.T. sugar products in the South and Northern markets. The above responsibilities divided into the designated areas between S.D.L., J.C. Cole Limited and William Mc Kinney (1975) Limited.

2. S.D.L. to be responsible for sales decisions including pricing decision for all of the three sales and distribution Companies above. These decisions to be taken in accordance with policy as laid down by the Chief Executive of the Sugar Division.

3. Sugar Distributors Limited will, subject to availability of supplies purchase its sugar requirements only from C.S.E.T. and shall not be concerned or interested in the purchase, sale, re-sale or promotion of any products which are of a like or similar kind to those available from C.S.E.T..

4. S.D.L. and J.C. Cole Limited, to distribute sugar from the factory as designated by C.S.E.T.. The distribution costs to be borne as part of the sales margin.

5. Invoicing/administration of U.K. sugar sales at no additional administration costs to C.S.E.T.

Co-responsibilities — covering areas of mutual interest

(1) Advising and reviewing of pricing and promotion policies to ensure the maintenance of markets at optimum price and volume levels.

(2) Communicating information as necessary to each other on all aspects of sugar marketing, sales, trading, advertising, consumer promotions and financial.

(3) Brand and consumer advertising in respect of Northern Ireland in consultation with the Board of William Mc Kinney (1975) Limited.

(4) Agreeing market research and any other studies required to update market information.

To ensure that all aspects of sugar trading as outlined above are effectively communicated between C.S.E.T. and S.D.L. and that the areas of co-responsibility are properly covered, it is proposed that a monthly meeting should take place to discuss all aspects of sugar trading as outlined above between the C.S.E.T. Sugar Division and S.D.L. Those meetings to be attended by:

FOR C.S.E.T

Chief Executive — Sugar Division

General Manager, Marketing

Area General Manager, Carlow

Financial Controller — Sugar Division (?)

For S.D.L.

Managing Director

Sales Director

Financial Director

The meetings to be chaired by the Chief Executive of the Sugar Division.

Other persons to attend as required.'

55 Bearing in mind the contents of that document and the matters referred to in the contested decision, the applicant's claim that SDL traded competing products in Northern Ireland through the intermediary of McKinney does not in any way undermine the Commission's assessment of SDL's exclusive supply clause with the applicant. First, it is a claim not supported by any particular proof. Next, McKinney was not in principle legally bound by SDL's undertaking to the

applicant. The same applies to the explanations it put forward in its reply to a written question of the Court, concerning sales of German and French sugar through the intermediary of Trilby Trading Ltd, 51% of whose shares the applicant claims to have acquired in August 1987. Contrary to the applicant's claims, the only examples which it adduces in an attempt to minimise the importance of the exclusive supply clause concluded in 1982, namely McKinney's sales in Northern Ireland and the sales by Trilby Trading Ltd after August 1984, tend rather to demonstrate that SDL remained loyal to its undertaking. The minutes of the SDL board meeting of 1 July 1982 also mention McKinney where that company is concerned. McKinney is not expressly referred to by the exclusive supply clause, as drafted in those minutes. Finally, the example of McKinney concerns Northern Ireland, which is not part of the geographical market at issue in this case.

56 The applicant's presentation of the financing characteristics of the rebates granted by SDL to its customers is full of contradictions. For example, it acknowledges in the final subparagraph of paragraph 28 of its application that it accepted for its account all rebates granted by SDL, and advertising and promotion costs, only to deny in its reply that it financed rebates granted by SDL. In those circumstances, the Court can only find that the Commission correctly assessed the nature of the financial services organised between the applicant and SDL. The contents of the letter from the chairman of Greencore to shareholders of 23 October 1991 is of no use to the applicant in that respect, since it contains no details as to the actual allocation of roles between the applicant and SDL.

57 Similarly, the statement that the 'monthly communication meetings' between the applicant and SDL were chaired in turn by their respective representatives is not only unsupported by any probative document but is also irrelevant. Little purpose is served by stating who chaired the monthly meetings in turn, their existence alone being sufficient to demonstrate that such meetings constitute a connecting factor within the meaning of the case-law (see paragraph 46 above). The Court cannot but note, moreover, that the text of the minutes of the SDL board meeting of 1 July 1982 is quite unequivocal, since it states: 'The meetings are to be chaired by the Chief Executive of the Sugar Division'.

58 Nor do the applicant's criticisms concerning the price fixing policy, to the effect that this was essentially a matter for SDL, correspond to the minutes of the SDL board meeting of 1 July 1982, which state, in paragraph 2 of the section dealing with SDL's responsibilities: 'SDL to be responsible for sales decisions including pricing decisions for all of the three sales and distribution companies above. These decisions to be taken in accordance with policy as laid down by the Chief Executive of the Sugar Division'. Once again, moreover, these claims are not supported by any particular item of evidence. The letter from the chairman of Greencore to shareholders of 23 October 1991 makes no mention of the allocation of responsibilities in the fixing of prices.

59 The Court therefore finds that the applicant has not succeeded in demonstrating that the Commission committed an error of assessment in finding that the connecting factors mentioned in the contested decision showed that, between 1985 and February 1990, SDL and the applicant had the power to adopt a common market policy (see paragraph 46 above).

60 Furthermore, other market operators considered that the applicant and SDL formed one and the same economic entity. For example, ASI International Foods (formerly ASI International Trading Ltd), the importer of French sugar to the Irish market ('ASI'), sent a letter to the applicant on 18 July 1988 complaining about its market conduct and that of SDL. The author of that letter, which is addressed to the chief executive of the applicant, states: 'I write to draw your attention to the unfair practices which are the direct creation of your undertaking or of SDL which is controlled by you, as regards our efforts to retail our Eurolux sugar in one kilo packets in Ireland'.

61 The fact that the applicant and SDL are in a vertical commercial relationship does not affect that finding.

62 First, documents of the applicant show that the two companies were active in the same market from 1985 to 1990, so that there could not have been an exclusively vertical commercial relationship. At paragraph 27 of its application, for example, the applicant reproduces an extract from an agreement between SDH shareholders in 1975, which stipulates that 'SDL and the Sugar Company shall continue to trade as independent and competing enterprises...'. Moreover, in its reply to a written question of the Court, the applicant insists that SDL distributed the whole of the applicant's supply on the retail sugar market only as from 1988. It also supplies information showing that on the industrial sugar market SDL and the applicant shared the market with a third undertaking, Harcourt Agency Ltd, until the beginning of the 1980s. However, although it maintains that it was no longer present in the industrial sugar market from 1985 to 1989, it does not supply any evidence in support of that allegation. In those circumstances, the applicant's argument based on the absence of competition between itself and SDL may be rejected at the outset.

63 Nor does the case-law contain anything to support the conclusion that the concept of a joint dominant position is inapplicable to two or more undertakings in a vertical commercial relationship. As the Commission points out, unless one supposes there to be a lacuna in the application of Article 86 of the Treaty, it cannot be accepted that undertakings in a vertical relationship, without however being integrated to the extent of constituting one and the same undertaking, should be able abusively to exploit a joint dominant position.

64 Moreover, since all the factual elements relied on in the contested decision to demonstrate that the applicant and SDL held a joint dominant position were mentioned in the statement of objections, the applicant cannot now accuse the Commission of not considering the relations between the two undertakings in the light of the same market conduct in the statement of objections. As the Commission emphasises in the discussion concerning the amount of the fine, the applicant was perfectly aware of the nature of its links with SDL and of the use which might be made of them in the market. A memorandum headed 'Notes on meeting dealing with S.D.L. held on 21st November 1988 in Head Office'

(Annex 3 to the statement of objections) states at paragraph 6: 'Having 51% of S.D.L. should prevent any action being taken against us under Article 85. We would have to use our influential presence in S.D.L. to prevent any breaches of Article 86 occurring'.

65 Nor can the applicant derive an argument from the alleged absence of any collective nature in the abuses of a dominant position found in the contested decision.

66 Whilst the existence of a joint dominant position may be deduced from the position which the economic entities concerned together hold on the market in question, the abuse does not necessarily have to be the action of all the undertakings in question. It only has to be capable of being identified as one of the manifestations of such a joint dominant position being held. Therefore, undertakings occupying a joint dominant position may engage in joint or individual abusive conduct. It is enough for that abusive conduct to relate to the exploitation of the joint dominant position which the undertakings hold in the market. In this case, the Commission maintains that the exploitation of that joint dominant position formed part of a continuous overall policy of maintaining and strengthening that position, and that conduct adopted by both SDL and the applicant between 1985 and February 1990 fell within that policy. Point 117 of the contested decision states: 'The actions taken by Irish Sugar before 1990 with regard to the transport restriction, by both companies with respect to border rebates, export rebates and the fidelity rebate and by SDL with respect to the product swap and selective pricing, were undertaken from a position of joint dominance'. The Commission was therefore entitled to take the view that the individual conduct of one of the undertakings together holding a joint dominant position constituted the abusive exploitation of that position.

67 Nor can the applicant complain that there has been 'recycling' of certain facts in the contested decision within the meaning that the case-law gives to that concept (*SIV*, paragraph 360; *Compagnie Maritime Belge Transports*, paragraph 67). The Commission has not used the same facts to establish both the existence of a joint dominant position and its abusive exploitation. Thus, even if the applicant's

financing of rebates granted by SDL was held by the Commission to be one of the connecting factors between the two entities (see paragraph 51 above), it has not in any way been regarded as an abuse in itself. The abuse consists in having granted certain rebates in the particular circumstances of the market in question at that time. The applicant cannot therefore claim to have established infringement of its defence rights and of Article 4 of Regulation No 99/63.

68 It follows that the third limb of the first plea of the principal claim must be dismissed, as, in consequence, must that plea in its entirety.

2. *The existence of a dominant position of the applicant in the industrial sugar market*

69 The applicant argues in this second plea in law that, in so far as the contested decision found that it held a dominant position in the industrial sugar market, it is vitiated by manifest errors of assessment and of law.

70 The applicant has, however, nowhere denied that throughout the period in question (1985 to 1995) it held a market share of industrial sugar in Ireland of over 90% (point 108 of the contested decision). As the Commission has emphasised in the decision (point 100), a dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately consumers (*Hoffmann-La Roche*, paragraph 38). The existence of a dominant position may derive from several factors which, taken

separately, are not necessarily decisive. Amongst these factors, however, extremely large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position (*Hoffmann-La Roche*, paragraph 41; Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 60; Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 91; Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 109; *Compagnie Maritime Belge Transports*, paragraph 76). The case-law thus demonstrates that a market share of over 50% in itself constitutes evidence of the existence of a dominant position on the market in question (*AKZO*, paragraph 60).

71 In principle, therefore, the applicant's dominant position on the industrial sugar market in Ireland from 1985 to 1995 could be deduced simply from the finding that, during that period, it made more than 90% of the sales recorded on that market.

72 The applicant considers, nevertheless, that the Commission erred in not correctly taking into consideration four factors which, it submits, constitute exceptional circumstances within the meaning of the case-law cited above, and which relate, first, to its lack of independence in relation to competitors (alleged inaccessibility of the Irish market and failure to take potential competition into account) and, secondly, to its lack of independence in relation to customers (lack of independence in relation to its largest customers and financial losses).

The alleged lack of independence of the applicant in relation to its competitors

73 The applicant denies first that the Irish market was inaccessible to sugar producers established in other Member States (point 107 of the contested decision). It argues that the cost of transport did not in any way hinder imports of industrial sugar into Ireland during the period under consideration, and submits that a proper understanding of the common organisation of the market in sugar in general, and of sugar pricing in particular, demonstrates that allegation to be

unfounded. Recalling the objectives of that common organisation, it argues that the regionalisation of the intervention price no longer reflects the cost of transport as much as it did, and that the viability of exporting to Ireland depends *inter alia* on the sugar prices differential between Ireland and other Member States (footnote 11, point 22 of the contested decision).

74 The applicant also states that, in the contested decision, the Commission accepts that average ex-factory prices for granulated bulk sugar in Ireland are among the highest in the Community and have always been higher than average prices in the United Kingdom (point 108), and that there are no obstacles to sea transportation of sugar between Great Britain and Northern Ireland (point 96). It follows that the Commission does not seem to regard the cost of freight as a major impediment to imports to Northern Ireland, in spite of the relatively small size of the market. Accordingly, there is no reason why the impact on imports of transport costs to Ireland should be assessed differently.

75 It adds that imports of industrial sugar to Ireland have always taken place, in particular imports of bagged sugar from France (contested decision, point 102). Similarly, Gem Pack Ltd ('Gem Pack'), a packager of sugar competing with the applicant on the retail market, and Irish Biscuits Ltd ('Irish Biscuits'), one of its larger customers, now import 75% and 30% of their respective industrial sugar needs. The Commission has accepted that the need for special containers and the associated additional cost are no longer an obstacle to imports of bulk sugar (contested decision, point 95). Furthermore, the applicant maintains, there is also the threat of imports from the sugar surpluses generated by the common organisation of the market in sugar, having regard to the lower price of that surplus sugar. It refers in that regard to the Community surpluses for 1990/1991 and 1995, which amounted to 4 200 000 tonnes and 3 100 000 tonnes respectively.

76 The applicant concludes that, although the competition created by imports is relatively low in terms of volume, it has more than a marginal impact on the

applicant's competitive position, contrary to what the Commission alleges in the contested decision (point 105).

77 Secondly, the applicant argues that the Commission erred in law in not properly assessing potential competition. It points out that, under the case-law, for the purpose of establishing the existence or otherwise of potential competition on a market account must be taken of any unused manufacturing capacity capable of creating potential competition between manufacturers established on that market (*Hoffmann-La Roche*, paragraph 48). For the same reasons, in the present case there was potential competition on the industrial sugar market in Ireland, since it could be supplied many times over, without the applicant's competitors being placed in any economic or financial difficulties, owing to the overproduction on the Community market to which the common organisation of the market in sugar gave rise.

78 It adds that in the Commission's decision of 30 July 1991 relating to a concentration on the sugar market in Italy (Case No IV/M.062 — Eridania/ISI), in which it held a concentration to be compatible with the common market on the basis of Council Regulation (EEC) No 4064/89 (OJ 1991 C 204, p. 1), the Commission took a different view of the industrial sugar market and considered that the merged entity did not present the risk of occupying a dominant position on its market owing to the threat of imports of sugar at a lower price from neighbouring areas and the low cost of transport. The applicant maintains that the Commission errs in law in treating Ireland and the Republic of Italy in such different ways, whereas both Member States are considered deficit areas for the purposes of the common organisation of the market in sugar.

79 It considers that in any event the contested decision errs in law because it contains no assessment of potential competition on the industrial sugar market in Ireland. Even if, in the present proceedings, the Commission continues to avoid the issue of potential competition, what it has to say about peripheral factor allowances

('PFAs') shows that it recognises the existence and influence of potential competition resulting from the possibility of obtaining cheaper industrial sugar in other Member States.

80 The applicant's argument that the Commission failed to take account of potential competition on the industrial sugar market must be rejected. Amongst other things, the Commission identified the applicant's competitors on that market (point 102 of the contested decision) and took account of the existence of competition resulting from the importation of sugar (point 107). Moreover, the Commission emphasises in its pleadings that it recognised the existence of residual competition and potential competition from imports, but that it was led to conclude on the facts that only ASI had actually attempted to import industrial sugar to Ireland in competition with the applicant, which the applicant does not deny. Thus, far from invalidating the Commission's finding, the fact that, amongst its customers in the industrial market, only Gem Pack and British Biscuits imported industrial sugar confirms the weakness of the residual competition in the Irish market. Similarly, as the applicant has itself observed, the finding relating to PFAs in the contested decision (points 70 to 72 and 136 to 144) also shows that the Commission detected the residual and potential competition from imports.

81 Moreover, the applicant's arguments in these proceedings, both in its pleadings and in its reply to a written question of the Court, do not demonstrate that the Commission erred in its assessment of the effect of transport costs on imports of industrial sugar to Ireland.

82 In the contested decision (point 95), the Commission took into account the applicant's arguments that the particular features of the common organisation of the market in sugar and the existence of large surpluses in other Member States indicated the existence of potential competition through imports. Far from denying the applicant's statements, the Commission states that 'imports of sugar

into Ireland have hitherto made up only a small part of total granulated sugar consumption in Ireland'. The applicant has not challenged that statement.

83 The Commission goes on to state that 'a major barrier for importing sugar from the continent is the cost of freight, particularly in the absence of a load travelling in the opposite direction' (point 95 of the contested decision).

84 In the contested decision, therefore, the Commission assessed the impact of the cost of transport only in relation to imports from the continent, from Member States which, according to the applicant's own statements, had large surpluses, namely France, Germany, Denmark, Belgium and the Netherlands. The applicant cannot therefore rely in these proceedings on a comparison with transport costs between Great Britain and Northern Ireland in order to avoid the Commission's reply to its argument based on the existence of surpluses in the Member States referred to above. It should be remembered, moreover, that Great Britain and Northern Ireland are territorially parts of the same Member State.

85 In the contested decision (point 95), the Commission really based its reply on an extract from a June 1994 corporate plan of Greencore, the undertaking which had owned the applicant since 1991 (point 18), which stated that:

'... the vast majority of imports is in 50 kg bags, with bulk sugar transport being relatively expensive because of the need for dedicated containers. We encourage customers to move towards bulk sugar treatment installations as soon as possible, stressing the savings which may be made and shared by both sides. The proportion of bulk sugar in our industrial sales continues to rise and is currently 83%.'

86 That passage shows that, until 1994, imports of industrial sugar took place primarily in the form of 50 kg bags on account of the higher cost of transporting sugar in bulk form, and that the applicant successfully promoted with its customers the use of installations for treating sugar in bulk form.

87 The criticisms of the applicant, already put forward in its reply to the statement of objections (point 95 of the contested decision), thus concern only the assessment of the cost of transporting sugar in bulk form as from 1994. They do not, by contrast, in any way serve to call into question the Commission's findings for the period before 1994. The further information supplied by the applicant in reply to a written question of the Court even indicates that its argument is really concerned with the end of the period in which the infringements referred to in Article 1 of the contested decision were committed, or even a period later than that decision. In its reply, the applicant stated that 'up to 1995, and partly into 1996, the imports of sugar were almost exclusively in bags. From 1996, the emphasis switched to bulk because of less expensive and more sophisticated bag-in-box containers'. The Commission was therefore entitled to take the view that 'whatever the current situation, [the applicant's] own statement shows that the cost of freight was an impediment to raw sugar imports for virtually all of the period under consideration' (point 95 of the contested decision).

88 Moreover, the applicant has not denied that its customers in the industrial sugar market have over the years equipped themselves with silos for stocking their sugar, entailing a constant decline in transport in bags (point 95).

89 Although it criticises the Commission's assessment in the contested decision of the competitive structure of the market in question, the applicant has not demonstrated that, on the facts, industrial sugar imports to Ireland had anything more than a marginal influence on its market share and competitive position (point 105 of the contested decision). In that respect, the figures it submitted to

take account of the proportion of industrial sugar imports in the purchases of its customers Gem Pack and British Biscuits are not supported by any particular evidence.

90 Similarly, whilst the applicant argues that surplus production in other Member States could be exported to Ireland (also point 95), it does not deny that the small size of the Irish market constituted a hindrance to such imports, bearing in mind the particular requirements for profitability which importation of industrial sugar into that market implied (point 107).

91 Finally, the reference to *Eridania* v *ISI* is irrelevant, since the Commission's finding in that case rested on the low cost of transport and consequent threats of imports from neighbouring regions. In this case, the applicant has failed to demonstrate that transport costs were low and that there were credible threats of imports of that kind.

92 The applicant has therefore not succeeded in demonstrating that the Commission erred by not holding that its alleged lack of independence in relation to competitors constituted an exceptional circumstance within the meaning of the case-law cited in paragraph 70 above.

The alleged lack of independence of the applicant in relation to customers

93 The applicant emphasises its small share of the community market (1.4%) and the market strength of the international industrial groups to which some of its

customers belong, especially two of them,... .[1] Their membership of such groups made it easy for them to find other sources of supply in other Member States. In that respect, the applicant objects to the distinction apparently drawn by the Commission between, on the one hand, customers present in Northern Ireland and forming part of groups also established in Great Britain, which were capable of buying the sugar they needed from British producers (point 96 of the contested decision), and, on the other hand, the applicant's customers in Ireland.

94 That market strength, acknowledged by the Commission in the contested decision (point 107), thus limited the applicant's ability to influence industrial sugar prices. The applicant claims, moreover, that its two main customers can and actually do fix the price at which they purchase industrial sugar and thereby influence the price offered to other customers. In that respect, it cites numerous extracts from correspondence with its customers. The Commission was therefore wrong to state in the contested decision that the sales volume of its two main customers did not counterbalance its dominant position (point 108). The applicant argues that, to be able to conclude that it held a dominant position, the Commission should have compared the two groups of opposing forces (*SIV*, paragraph 366).

95 The applicant considers that its actual market position, which is not a dominant one, is most clearly demonstrated by comparing the average net prices of industrial sugar in Northern Ireland and Ireland. That comparison shows that average net prices are lower in Ireland than in Northern Ireland, whereas retail prices are higher in Ireland than in Northern Ireland.

96 In any event, the applicant maintains that it did not hold a dominant position in the industrial sugar market in Ireland before 1990, because of the financial difficulties it faced during the 1980s. Those difficulties made it extremely

1 — Confidential information removed.

dependent upon its industrial clients, which, being aware of those difficulties, imposed their own prices. The applicant even maintains that it sold industrial sugar at that time at a price below the intervention price guaranteed by the common organisation of the market in sugar. It accuses the Commission of regarding those difficulties as irrelevant (points 103 and 108), and maintains that the Commission should have considered whether its conduct might have been different had it not encountered such financial difficulties at that time.

97 Although in the contested decision the Commission recognised to some degree (point 107) the commercial strength of the two customers of the applicant to which the latter refers, it considered that that power was not capable of affecting the dominant position of the applicant, for two reasons. First, the applicant's other customers, representing...% of its sales volume, did not have such commercial strength. Secondly, it considered that the particular features of the community scheme applicable to sugar prevented those two customers of the applicant from finding other sources of supply in the short term (point 107).

98 The Court finds that the applicant's arguments do not vitiate the Commission's finding in the contested decision (point 107). First, the applicant does not deny that its other customers absorbed...% of its industrial sugar production, which also represented a share of the industrial sugar market in Ireland of over...%. The applicant can therefore hardly maintain that the Commission committed an error of assessment by stating that 'despite the presence of two large customers, the demand side is composed of a number of buyers which are not equally strong and which cannot be aggregated to conclude that they may constrain the market power of the supplier with over 90 % of the market' (point 108). The same is true of its statement that 'the share of sales of the two largest customers does not counterbalance the dominant position of Irish Sugar' (point 108). Points 107 and 108 of the contested decision show moreover that the Commission carried out an analysis of the relevant forces. Nor can the applicant rely in support of its argument on a contradiction between the Commission's analysis concerning

British customers in Northern Ireland and that concerning the applicant's customers in Ireland, since Northern Ireland is one of the components of the United Kingdom whereas Ireland, which is itself a Member State, is not.

99 Although the applicant has insisted several times on the minor importance of the Irish market compared with other national markets in the Community, drawing attention to the small share of the Community market which it held during the period in dispute (1.4%), it cannot deny that the geographical market in question constituted a substantial part of the common market (point 97), since it corresponds to the territory of a Member State, as indeed the applicant acknowledged at the hearing.

100 Moreover, even if the correspondence on which the applicant relies to show the commercial strength of its two main customers does show that the sale price they were charged was aligned with the sale price of industrial sugar which they obtained in the United Kingdom, that does not justify the conclusion that fixing such prices influenced the prices which it charged its other industrial customers.

101 Nor can the applicant rely on the comparison of average net prices between Ireland and the United Kingdom to deny that it held a dominant position on the industrial sugar market in Ireland. The fact that the prices charged by the applicant were no higher than those in force in Northern Ireland, or even lower, does not support the conclusion that the applicant did not hold a dominant position on the industrial sugar market in Ireland (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 59). In any event, such a comparison is not decisive, since these are averages which primarily reflect the prices granted to the applicant's two largest customers, whose commercial strength it emphasises. The presence of data relating to those two customers, representing...% of its sales, distorts the analysis of the average prices actually charged to its other customers.

102 Finally, apart from the fact that the applicant has failed to produce the slightest evidence that its customers took advantage of its difficult financial situation at that time in the matter of pricing, the Court finds that the Commission did not ignore the applicant's argument based on its financial losses. On the contrary, it stated in point 103 of the contested decision that 'the fact that [the applicant] made losses in the first half of the 1980s is not inconsistent with the existence of a dominant position', referring in that respect to the judgment in *Michelin*, in which the Court held that temporarily nil profitability and even losses are not incompatible with a dominant position (paragraph 59).

103 As the Commission rightly points out, losses recorded by an undertaking in a dominant position are not in themselves any more relevant than profits made by an undertaking which practises competition perfectly on an open market. The applicant has, moreover, neither alleged nor in any way demonstrated that those financial losses resulted from the existence of any particular competition on the industrial sugar market or any deterioration of its competitive position on the latter. As the Commission maintains, those losses could have arisen from the state-controlled way in which that undertaking was managed during the 1980s.

104 The applicant has therefore not succeeded in demonstrating that the Commission erred by not regarding its alleged lack of independence *vis-à-vis* its customers as an exceptional circumstance within the meaning of the case-law referred to in paragraph 70 above. It follows that the Commission has not committed the errors of assessment and of law complained of by the applicant by finding that it held a dominant position on the sugar market in Ireland between 1985 and 1995. The second plea in law must therefore be dismissed.

3. *The abuses by the applicant of its dominant position in the industrial and retail sugar markets*

105 In its third and fourth pleas in law, the applicant criticises the analysis of the six types of abusive conduct which it is accused of adopting both on the industrial sugar market in Ireland (selective low pricing to potential customers of ASI, PFAs and price discrimination against competing sugar packers) and on the retail sugar market (border rebates, product swaps and fidelity rebates, target rebates and selective prices).

106 The criticisms formulated by the applicant in its third plea concern the practices described in points 45 and 70 to 77 of the contested decision, analysed in points 123 and 136 to 150, and found in Article 1(1), (4) and (5) of the operative part; those formulated in its fourth plea concern the practices described in points 46 to 69 and 78 to 84, analysed in points 123 to 135 and 151 to 154, and found in Article 1(1), (2), (3) and (6)(i) and (ii) of the operative part.

107 In the contested decision, the Commission inferred the existence of abuses of dominant positions from the analysis of facts based on documentary evidence, which in its view demonstrate that 'a major element of [the applicant's] commercial policy has been the shielding of its home market in Ireland from, on the one hand, imports from other Member States and, on the other hand, competing sugar packers within Ireland. In addition, for a period of at least the last 10 years, [the applicant's] commercial policy has involved the imposition of a discriminatory pricing policy within its home market...' (point 114). The Commission thus accuses the applicant of having 'had recourse to methods different from those which condition normal competition in products or services based on traders' performance, the effect thereof being that the maintenance of the degree of competition still existing in the market or the growth of that competition has been hindered' (point 114). It also states that 'to defend its

market, [the applicant] resorted to various forms of abusive conduct which were used alternatively or in combination with one another whenever it was felt necessary, throughout the period from 1985 onwards' (point 116).

108 The Commission then examines each of those illegal practices, which were 'part of a sustained and comprehensive policy of protecting [the applicant's] home markets for both industrial and retail sugar' (point 118). First it examines 'measures to protect the home market against competition from imports from other Member States', drawing a distinction between those aimed at imports from France and those aimed at imports from Northern Ireland (points 119 to 135). Then it examines 'pricing behaviour that discriminates against particular categories of customer', drawing a distinction between sugar export rebates and active discrimination against competing packers (points 136 to 154). In Article 1 of the operative part of the contested decision, the Commission emphasises the fact that the conduct complained of was part of a sustained and comprehensive policy of protecting the applicant's position on the sugar market in Ireland.

109 The applicant denies infringing Article 86 of the Treaty by operating a sustained and comprehensive policy of protecting its position on the sugar market in Ireland. Its criticisms are intended to demonstrate either that it did not commit the abusive practices of which it is accused, or that those practices did not contravene Article 86.

110 Before examining the arguments of the parties concerning each of the practices referred to in Article 1 of the contested decision and penalised in Article 2, it will be useful to recall the criteria for establishing the abusive character of practices by an undertaking in a dominant position.

111 The case-law shows that an 'abuse' is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (*Hoffmann-La Roche*, paragraph 91; *AKZO*, paragraph 69). It follows that Article 86 of the Treaty prohibits a dominant undertaking from eliminating a competitor and thereby reinforcing its position by having recourse to means other than those within the scope of competition on the merits. From that point of view, not all competition on price can be regarded as legitimate (*AKZO*, paragraph 70). The prohibition laid down in Article 86 is also justified by the consideration that harm should not be caused to consumers (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 26; *Suiker Unie*, paragraphs 526 and 527).

112 Therefore, whilst the finding that a dominant position exists does not in itself imply any reproach to the undertaking concerned, it has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market (*Michelin*, paragraph 57). Similarly, whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is to strengthen that dominant position and thereby abuse it (*United Brands*, paragraph 189; *BPB Industries and British Gypsum*, paragraph 69; *Tetra Pak*, paragraph 147; *Compagnie Maritime Belge Transports*, paragraph 107).

113 In this case, the Commission accuses the applicant, as part of a sustained and comprehensive policy, of two different types of abusive conduct. First, it finds a

series of discriminatory practices by the applicant in relation to the fixing of prices on both the industrial sugar market (selective prices for potential customers of ASI, PFAs and price discrimination against competing sugar packers) and the retail sugar market (border rebates, fidelity rebates, target rebates and selective prices). Secondly, it identifies product swaps on the retail sugar market constituting abuse of a dominant position.

114 With particular reference to the applicant's practices in relation to price fixing, the case-law shows that, in determining whether a pricing policy is abusive, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition (*Hoffmann-La Roche*, paragraph 90; *Michelin*, paragraph 73). The distortion of competition arises from the fact that the financial advantage granted by the undertaking in a dominant position is not based on any economic consideration justifying it, but tends to prevent the customers of that dominant undertaking from obtaining their supplies from competitors (*Michelin*, paragraph 71). One of the circumstances may therefore consist in the fact that the practice in question takes place in the context of a plan by the dominant undertaking aimed at eliminating a competitor (*AKZO*, paragraph 72; *Compagnie Maritime Belge Transports*, paragraphs 147 and 148).

115 Finally, it should be noted that Article 86(c) expressly provides that abusive practices may consist of applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

116 It is in the light of those principles that the Court must assess the reality and the lawfulness of the practices found and penalised in the contested decision, and referred to in paragraph 113 above.

Practices in relation to the applicant's pricing

The industrial sugar market

— Application of selectively low prices to potential customers of ASI

117 According to the contested decision, a note of 8 March 1988 from SDL's sales director (point 45) setting out a policy of selective low pricing to potential customers of ASI (point 123) demonstrates that 'in the period 1986 to 1988, [the applicant granted] selectively low prices to customers of an importer of French sugar' (Article 1(1)).

118 The applicant denies having granted such prices, and in any event disputes that a pricing policy designed simply to defend its market position was abusive.

119 The Commission maintains that, in attempting to justify the lawfulness of such selective prices, the applicant acknowledges their reality. Furthermore, the note of 8 March 1988 sufficiently demonstrates the reality of the applicant's conduct on the industrial sugar market towards potential customers of ASI.

120 The evidence adduced by the Commission in the contested decision does not, however, prove the reality of the infringement as found in Article 1(1) thereof.

121 Apart from the fact that the applicant denies having applied such prices to potential ASI customers on the industrial sugar market, the note from SDL's sales director does not indicate that the applicant actually adopted such conduct between 1986 and 1988. Whilst that note certainly reveals the pricing policy that SDL's sales director intended to pursue, it gives no account of the application of such a policy between 1986 and 1988, precisely because it was intended to outline future policy.

122 Moreover, the passage concerning SDL's attitude before that note was written does not in any way refer to selective prices being charged to ASI customers, since the note says: 'In the meantime we have initiated increased vigilance at industrial customers level with a view to establishing the extent of any increased activity by ASI' (point 45). The applicant and SDL cannot be accused on that basis alone of abusing their joint dominant position on the industrial sugar market by charging selectively low prices to ASI customers before 8 March 1988. Such words merely refer to the analysis by the undertakings in a dominant position of the activity of one of their competitors, which does not in itself constitute an abuse within the meaning of Article 86 of the Treaty.

123 Furthermore, as the applicant points out, the analysis of the SDL sales director's note of 8 March 1988 occurs in the contested decision (points 45 and 123) in the paragraphs dealing with practices concerning the retail sugar market.

124 In those circumstances, Article 1(1) of the contested decision must be annulled in so far as it finds that the applicant infringed Article 86 of the Treaty by granting selectively low prices to ASI customers between 1986 and 1988.

— PFAs

125 The contested decision states that 'since (at least) 1985, [the applicant has been] practising a system of "sugar export rebates", that is rebates granted on sugar exported in processed form to other Member States, which discriminate against customers of industrial sugar supplying the domestic Irish market' (Article 1(4)). The Commission states that throughout the period in question the applicant granted a rebate to its industrial customers intending to export their final product, primarily to other Member States. Those customers accordingly informed the applicant of the volume of their exports in order to obtain the rebate (point 70). The level of the rebate varied, moreover, according to the customer concerned, the period in question or the Member State to which export was made, without however corresponding to the volume exported (points 71 and 72). The Commission concluded that the applicant applied dissimilar conditions to equivalent transactions within the meaning of Article 86(c), both between exporting customers (point 137) and between them and customers who reserved their production for the Irish market (point 138), thereby placing certain customers at a competitive disadvantage (point 136). The disadvantage thus inflicted on non-exporting customers was all the more significant since, as the applicant itself maintained, the degree of competition on the Irish food market had significantly increased (point 139). The system of PFAs also placed other sugar packagers on an unequal footing *vis-à-vis* the applicant on the retail sugar market (point 143). Finally, 'the discriminatory nature of the export rebate scheme [was] emphasised by the fact that it [was] not in line with the objectives of the common sugar regime' (point 144).

126 The applicant disputes the analysis in the contested decision, and attempts to defend the lawfulness of the PFAs.

127 First, it points out that the purpose of those PFAs was to subsidise exports of processed sugar-based products in accordance with the wish of the Irish Government to maintain the economically important food and drink manufacturing industry (points 20 and 97 of the contested decision). By reason of the Irish Government's choice of a policy of green pound devaluation, resulting in higher agricultural prices in Ireland than the United Kingdom, it became extremely difficult for Irish producers of processed products containing sugar to compete in the United Kingdom and other export markets. Despite the granting of the PFAs, a number of the customers concerned did not survive or were forced to move their production outside Ireland. The applicant thus argues that the cost of the price reduction borne by the processing industry was partially compensated for by an increase in retail prices which, during the 1970s and a large part of the 1980s, was controlled by statutory provisions. It considers that the official encouragement given to granting the PFAs partially or wholly exonerates it.

128 The Court notes, first, that the applicant does not challenge the Commission's findings of fact in points 70 to 72 of the contested decision, establishing that the PFAs were actually granted between 1985 and 1995 and the particular conditions on which they were granted. Its argument seeks solely to demonstrate their lawfulness in relation to Article 86. It is, moreover, largely identical to that put forward in the administrative proceedings and to which the Commission has replied in detail in the contested decision (points 140 to 142).

129 Next, in the circumstances of this case the argument based on the Irish Government's encouragement to subsidise exports of Irish sugar does not serve the applicant's defence at all. As the Commission has rightly pointed out, the applicant has not been able to demonstrate that that alleged encouragement was of such a kind as to deprive it, on the facts, of all independent choice in its commercial policy.

130 In Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265 (paragraphs 33 and 34), the Court of Justice held that Articles 85 and 86 of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative (see to that effect, as regards Article 86, Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraphs 18 to 20; Case C-202/88 *France* v *Commission* [1991] ECR I-1223, '*Telecommunications terminals*', paragraph 55; and Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 20). If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings (see also *Suiker Unie*, paragraphs 36 to 72, and more particularly paragraphs 65, 66, 71 and 72). Articles 85 and 86 may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831; and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411).

131 In this case, as the applicant has not cited any legislation or measure of the Irish Government requiring it to adopt export subsidy measures, or creating a legal framework requiring it to adopt them, the Court finds that, whatever the opinion of the Irish Government may have been in this respect, the applicant retained all its autonomy of conduct. It follows that Article 86 could be applied to it.

132 Secondly, the applicant maintains that the Commission's analysis of the PFAs rests on the false premiss that they were not in line with the objectives of the common organisation of the market in sugar (point 144) and the common market (point 167, second paragraph, third indent). The granting of the PFAs had a dual aim: to enable its customers to continue exporting by alleviating the structural

difficulty engendered by the common organisation of the market in sugar, and to encourage them to continue obtaining their supplies in Ireland and support the local industry despite higher production costs.

133 The Commission's assessment of the lawfulness of the PFAs does not, however, rest on a false premiss. First, the Commission does not indicate in the contested decision that the compatibility of the PFAs with the common organisation of the market in sugar is a condition of their lawfulness: its assessment of their compatibility with the common organisation of the market in sugar (point 144) is independent of the finding that they were discriminatory. Any error in that assessment does not therefore affect the reasoning which led the Commission to find infringement of Article 86.

134 The applicant cannot claim, moreover, that the PFA system is compatible with the principles governing the common market. As stated in point 157 of the contested decision, '[the applicant's] practice of granting export rebates on sugar exported, in processed form, to other Member States is likely to distort trade in both industrial sugar and processed food products containing a significant proportion of sugar, and thereby to affect trade between Member States'. The Commission was therefore entitled to take the view that such a practice, applied without interruption from 1985 to 1995, had the effect of distorting competition and trade within the common market (point 167, second paragraph, third indent).

135 Thirdly, the applicant argues that the PFAs comply with Protocol No 30 on Ireland ('Protocol No 30') annexed to the Act concerning the Conditions of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Communities and the Adjustments to the Treaties (OJ, English Special Edition of 27 March 1972, p. 14, at p. 182), and, since the entry into force of the Single European Act, fall within the Treaty provisions on economic and social cohesion, in this case Article 130a of the EC Treaty (now, after amendment, Article 158 EC). It adds that the PFAs lie at the

interface between the Treaty provisions on economic and social cohesion and Article 90(2) of the EC Treaty (now Article 86(2) EC).

136 However, the PFAs are measures adopted by an undertaking active in the sugar industry and do not arise from the initiative of a Member State acting in that capacity. Moreover, as the Commission emphasises, Article 1 of Council Regulation (EEC) No 26 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129) provides that Article 86 of the Treaty applies to the production of and trade in the agricultural products listed in Annex II to the EC Treaty (point 115 of the contested decision). Finally, the applicant has never claimed to be an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, within the meaning of Article 90(2) of the Treaty. Its argument must therefore be rejected.

137 Fourthly, the applicant argues that the PFAs did not discriminate against its industrial sugar customers supplying only the domestic Irish market, their situation not being the same as that of the exporting manufacturing industry. Far from constituting a hindrance to imports, the PFAs strengthened the integration of the market by facilitating exports. In reality, the Commission's reasoning rested on the false premiss that the Irish market was already isolated. The applicant also accuses the Commission of failing to take account of the reality of the market on which it operated and the constraints it was under. In fact, the Commission took account of the PFAs only in relation to their effects on competition in Ireland, without assessing their beneficial effect on exports outside Ireland.

138 In the contested decision, the Commission emphasised that the applicant's rules for applying the PFAs between 1985 and 1995 constituted a twofold discrimination (see paragraph 125 above), both between customers of the applicant on the industrial sugar market in Ireland who exported some of their processed products outside Ireland, and between the latter and the applicant's customers on the Irish industrial sugar market who reserved their production for Irish territory only. The

Commission also found that application of those rebates to exports imposed an economically unjustified competitive disadvantage on competitors of the applicant established outside Ireland and on competing sugar packers on the retail sugar market in Ireland, in so far as the latter carried out that activity on the Irish market only.

139 The applicant has not disputed the double discriminatory effect impugned in the contested decision, but merely attempted to establish its economic justification. Nor has it denied that those rebates were intended to prevent its customers exposed to foreign competition from obtaining supplies from the latter. On the contrary, it has emphasised that the grant of those PFAs did not prevent part of the Irish industry concerned from transferring its activities outside Ireland. It has also claimed that such rebates encouraged exports and were therefore compatible with the principles governing the common market (see paragraphs 132 and 134 above). Moreover, in challenging the legality of Article 1(5) of the contested decision (paragraphs 150 to 172 below), the applicant has denied that there was unjustified discrimination against competing sugar packers on the retail sugar market.

140 By granting such export rebates in accordance with the rules described in points 71 and 72 of the contested decision, the applicant did, in fact, apply dissimilar conditions to equivalent transactions, contrary to Article 86(c) of the Treaty, thereby placing its customers at a competitive disadvantage. Such conduct, which has many discriminatory effects, constitutes an abuse of a dominant position within the meaning of Article 86.

141 Market mechanisms were distorted in so far as the applicant priced industrial sugar not by reference to supply and demand on the industrial sugar market in Ireland, but by reference to current and potential buyers from its customers according to their location (see to that effect *United Brands*, paragraphs 229 and 230).

142 The discrimination thus practised by the applicant between its customers, according to whether or not they exported their own production, cannot be justified, as the applicant claims, by the difference in their respective competitive positions.

143 In the first place, that justification does not match the scope of the discrimination impugned in the contested decision. The Commission has emphasised, without being contradicted on the point, that because in certain cases the PFAs were applied to all a customer's purchases without the applicant checking the volume of sugar incorporated in the processed products finally exported by that customer, the latter also enjoyed that rebate for its sales on the Irish market (point 141 of the contested decision).

144 Moreover, as the Commission states in point 140 of the contested decision, a non-exporting customer of the applicant also faces competition from traders established in other Member States, bearing in mind the growing presence of foreign products on the Irish market for products in the manufacture of which sugar is used.

145 Even if the applicant overlooked the point in its application, the Court would also point out that the Commission did not simply rely on the discriminatory character of the PFAs in order to find them contrary to Article 86: it has also demonstrated that granting them placed the applicant's competitors on the industrial sugar market who were based outside Ireland at a competitive disadvantage. It thus rightly stated that that 'practice of granting export rebates on sugar exported in processed form to other Member States [was] likely to distort trade in both industrial sugar and processed food products containing a significant proportion of sugar, and thereby to affect trade between Member States' (point 157 of the contested decision).

146 Nor can the applicant accuse the Commission of misjudging the effect of the PFAs on the isolation of the Irish market, or claim that its analysis presupposes the absence, at the price level, of barriers to the importation of sugar into Ireland.

147 In the first place, with less than 5% of industrial sugar being imported onto the Irish market, the Commission can hardly be accused of misjudging the structure of that market by declaring it isolated. It should be remembered in that respect that the applicant has not in any way challenged the Commission's account of the market shares of the various traders active on the industrial sugar market in Ireland during the period under consideration. By securing the loyalty of its exporting customers for their supplies of industrial sugar, the applicant prevented those of them who were the most open to inter-State trade from seeking supplies from competitors established in other Member States. One of the effects of granting the PFAs was thus to maintain, and even reinforce, the isolation of the industrial sugar market in Ireland.

148 Moreover, since the Commission was right to take account of the PFAs' effect on competition in Ireland, that being the market on which the applicant held a dominant position, the applicant cannot rely on any beneficial effect of the PFAs on competition in the common market by reason of the exports outside Ireland to which they gave rise. In relation both to customers of the applicant who did not export processed sugar-based products outside Ireland and to other potential suppliers of industrial sugar for exporting customers of the applicant, granting the PFAs distorts normal competition (point 157 of the contested decision). In relation to the latter, granting such PFAs prevents other potential suppliers from competing, on a fair basis, with the services offered by the applicant to its exporting customers. In any event, the Commission has shown that the PFAs constituted a hindrance to importations of industrial sugar into Ireland, inasmuch as they reinforced the isolation of the Irish market (point 144).

149 The applicant has therefore not succeeded in identifying the slightest error in the contested decision affecting the assessment of the legality of the PFAs. Its arguments disputing the legality of Article 1(4) of the contested decision must therefore be rejected.

— Price discrimination against competing sugar packers

150 The contested decision states that 'in the period since 1993, [the applicant practised] price discrimination against competing sugar packers which sourced [...] their industrial sugar from [it]' (Article 1(5)). In point 73, the Commission refers to the launching of new brands of sugar on the retail market by four sugar packers, the two most important of which were Gem Pack and Burcom Ltd ('Burcom'). The applicant's industrial bulk sugar price list as at 30 June 1994 shows that only those customers who were also rival sugar packers did not enjoy any rebate on the price of industrial sugar for their business in Ireland (point 74), whereas Gem Pack did receive a rebate in 1993 when it was not yet competing (point 75). The Commission also stresses the lack of transparency of those 'national' rebates, inasmuch as the rules for granting them are determined by reference neither to the volume of the purchases nor to the distance between the customer and the applicant (point 77). In point 143, the Commission refers to the anti-competitive effect of the PFAs on competing sugar packers to the extent that they obtained their supplies of industrial sugar from the applicant. The Commission concludes from those findings as a whole that 'while [the applicant's] system of export rebates might not have as its primary object discrimination against competing sugar packagers, the system of additional rebates reveals a more active bias against them. [The applicant] is not only applying dissimilar conditions to equivalent transactions, but is also unable to provide any reason that does not seem like an *ex post* attempt to justify its discrimination against sugar packagers. The explanations that [the applicant] has given for "start-up" and "fast-growth" rebates would be equally applicable to at least two of the sugar packers' (point 145). The Commission also stresses the lack of transparency of such a rebate system and its discriminatory nature (point 150).

151 Although the applicant has not specifically denied the discriminatory effect of the grant of PFAs in relation to competing sugar packers referred to in point 143 of the contested decision (see paragraph 139 above), it argues that its pricing system on the industrial sugar market was not designed to discriminate against packers which competed with it on the retail market and obtained their supplies of industrial sugar from it.

152 In the first place, the Commission was wrong to compare in point 147 of the contested decision the fixing of industrial sugar prices with conduct such as that referred to in Commission Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty (Case No IV/30.178 — Napier Brown — British Sugar) (OJ 1988 L 284, p. 41; 'Napier Brown/British Sugar'), since it did not lead to a policy designed to precipitate the removal of competing packers from the retail sugar market (point 158). Nor, the applicant submits, has the Commission established that such a policy genuinely existed in this case.

153 The applicant also accuses the Commission of basing its reasoning solely upon Irish Sugar's industrial bulk sugar price list as at 30 June 1994 (point 74 of the contested decision). It explains that the number of packers on the retail sugar market grew from 1993 onwards. Their market share rose from 5% in 1993 to 12% in 1996. It adds that it granted rebates to competing packers, especially two of them, Gem Pack and Burcom, and that those rebates did not depend on the quantities bought.

154 The applicant also argues that, even if its pricing practices were designed to discriminate against competing sugar packers on the retail market which obtained their industrial sugar from the applicant, such discrimination was justified by the fundamental difference between sugar packers on the one hand and the processing industry on the other, in their capacity as buyers of industrial sugar. Only the latter's consumption reduced the applicant's structural over-

supply, thus rendering it a service not rendered by the packers. In that regard, the applicant maintains that, for the purposes of applying Article 86, the equivalent nature of the transaction is not determined solely by the nature of the product sold or the supply costs borne by the supplier.

155 Secondly, the applicant does not accept that the prohibition on any form of discrimination under Article 86(c) applies to cases such as the present, in which the trading partners of the allegedly dominant undertaking conclude transactions of a different nature and operate on different product markets. Packers were not placed at a competitive disadvantage in relation to the processing industry producing foodstuffs and drinks. If the contracting party not favoured is not placed at a competitive disadvantage, differentiated treatment of trading partners does not hinder competition and is irrelevant in that respect.

156 Thirdly, the applicant accuses the Commission of altering the content of the complaints against it upheld in the contested decision. To begin with, having held that sugar packers were placed in an unfavourable competitive position *vis-à-vis* the applicant, the Commission now considers them to be so placed *vis-à-vis* other customers. Moreover, the Commission assessed the applicant's conduct in relation to its purpose and no longer in relation to its effects. Since the purpose and the effect of conduct are not cumulative conditions for applying Article 86 (Case 56/65 *Société Technique Minière (LTM)* v *Maschinenbau Ulm* [1966] ECR 235), the grounds for a decision attaching to their examination cannot be either identical or interchangeable. The applicant concludes that, even if the Commission's fresh allegations were established (which it denies), they would in any event be new pleas and therefore inadmissible.

157 Contrary to the applicant's allegations, the Commission has proved, not only on the basis of its industrial bulk sugar price list as at 30 June 1994 (point 74 of the contested decision) but also on the strength of documents of the applicant indicating its change of attitude towards two of its customers, Gem Pack and Burcom, before and after they marketed their own brand of sugar on the retail

market (point 75), that the applicant charged sugar packers who competed with it on the retail market discriminatory prices for industrial sugar, and has also proved that the applicant granted PFAs to its customers who exported their processed sugar-based products outside Ireland.

158 In any event, the applicant has not demonstrated that its price list of 30 June 1994 did not accurately reflect prices actually charged on the industrial sugar market (point 75). The arguments and examples which it has submitted in these proceedings are not, as such, capable of affecting the probative value of that price list.

159 The reference to the growth of competing sugar packers' share of the retail market between 1993 and 1996 is of no possible relevance to proof of the reality of the findings derived from the price list of 30 June 1994. It is of little importance to know whether or not their market share grew after 1993, the question being whether the Commission has effectively established that the applicant charged them discriminatory prices for industrial sugar.

160 Moreover, information supplied by the applicant in reply to a written question of the Court shows that it is not able to establish the growth of competing sugar packers' market share which it refers to in this action. The applicant provided a table drawn up by the company Nielsen showing the respective market shares of Gem Pack and Gold Seal for 1995, 1996, 1997 and 1998. The table is undated, however, and does not state to which market it relates. The cover sheet of that table, which is also undated and is headed 'To whom it may concern', states only: 'AC Nielsen is the world's largest market research company with turnover of USD 1.4 billion and offices in more than 100 countries. The attached market share data are extracted from AC Nielsen audits of the... grocery trade [in Ireland]. These audits were conducted at the times specified on the attached page.' The

applicant also refers in that reply to its own sales figures, but without submitting the slightest proof in that respect. Apart from the weak probative value that must be given to the information submitted by the applicant, the Court notes that the figures in the table drawn up by AC Nielsen do not correspond to those which the applicant submitted in its application and according to which the market share of competing sugar packers on the retail market rose from 3% in 1993 to 11% in 1996. Not only does that table not refer to the market share for 1993, but it shows a market share for 1996 of 9.4%.

161 Nor are the rebates which the applicant claims it granted to Gem Pack and Burcom confirmed by the documents which it produces in that respect. Those are letters of a similar nature exchanged between the applicant and SDL before Gem Pack and Burcom started business as sugar packers, which in no way confirm the granting of rebates comparable to those granted to other customers of the applicant on the industrial sugar market since they refer only to the amount of the rebate in question, or simply refer to negotiations, or contain confused explanations in which the applicant states that rebates classified as PFAs in SDL's client list are not PFAs (application, points 94 to 96).

162 In those circumstances, the Court finds that the grant of discriminatory price rebates to the applicant's customers on the industrial sugar market as from 1993, depending on whether or not those customers competed with the applicant on the retail sugar market, has been sufficiently established in fact and in law in the contested decision (points 74 to 76, 143, 145 to 150 and 158, and Article 1(5) of the operative part).

163 Nor can the applicant claim that such pricing is not an abuse within the meaning of Article 86 and, more particularly, Article 86(c).

164 First, the Court must reject the distinction which the applicant draws between the services offered to its customers by reference to the effect which they produce on its own market position. Such reasoning effectively implies that services which are identical at the commercial level, all conditions being taken into account, are not equivalent within the meaning of Article 86(c), depending on whether or not, for whatever reason, they share in the economic objectives which the undertaking which holds a dominant position has determined for itself. Such a definition is not compatible with that adopted by the case-law in dealing with equivalent transactions within the meaning of Article 86(c), in that two buyers of the same quantity of the same product pay a different price according to whether or not they are competitors of their supplier on another market (see to that effect *Hoffmann-La Roche*, paragraph 90). In any event, the applicant has not shown that the purchases of customers who were not sugar packers were more capable of reducing its structural overcapacity, unless one takes into account the consideration that purchases from competing sugar packers prevent it from itself discharging those quantities of sugar on the retail market, which would show that it exploited its dominant position on the industrial sugar market to place competitors on a derivative market at a disadvantage. It should be stressed that the applicant does not deny that the services offered to its sugar packer customers and its other customers are otherwise perfectly comparable at the commercial level, all conditions being taken into account.

165 Moreover, whilst there is no doubt that the original feature of the practice in question was that it was committed on the industrial sugar market whilst having its anti-competitive effects on the retail sugar market, on which the applicant and its sugar packer customers are competitors, that particularity does not exclude the application of Article 86(c).

166 The Court of Justice has held that an undertaking in a dominant position on a raw materials market could not abuse that dominant position on that market to facilitate its entry to a derivative products market incorporating those raw materials, affecting the competitive position of other operators on the latter market, for example by refusing to supply them with the raw materials necessary for their activities on the second market (Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, '*Commercial Solvents*', paragraph 25). Even if failure to grant similar

rebates to other industrial sugar purchasers is not tantamount to a refusal to supply, the principle of the abusive exploitation of a dominant position on a market to affect competition on another market has already been established. In this case, it is further apparent that the undertaking in question held a dominant position on both markets concerned.

167 The case-law holds that for an undertaking with a dominant position on a given market to reserve for itself, without objective need, an auxiliary or derivative activity on a neighbouring but distinct market on which it does not occupy a dominant position, at the risk of eliminating all competition on that market, falls within Article 86 (*Tetra Pak*, cited above, paragraphs 115 and 186; Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 24 et seq.). Two factors justify the application of that case-law to this case. First, there is an undeniable connection between the industrial and retail sugar markets. Secondly, the applicant also holds a dominant position on the retail sugar market, which it has not even denied in these proceedings. The possible absence of competition between the applicant's customers enjoying rebates and competing sugar packers does not preclude the application of Article 86(c), since the discriminatory practice complained of restricts competition by rival sugar packers on the retail sugar market.

168 Nor can the applicant claim that the Commission is now altering the complaints made against it in the contested decision, by indicating that the sugar packers were in competition with the applicant on the retail sugar market. As stated in paragraph 125 above, in its assessment of the legality of the PFAs, the Commission highlighted the discriminatory effect of price rebates on the industrial sugar market in relation to the competitive position of sugar packers in competition with the applicant on the retail sugar market, by referring directly to the relationship of competition existing between the applicant and the latter (point 143 of the contested decision). Consequently, it cannot be said that it altered the complaints referred to in the contested decision.

169 Nothing is changed by the fact that that relationship of competition is expressly referred to only in point 143 of the contested decision, concerning the PFAs. Indeed, that finding applies equally to the national rebates from which competing sugar packers did not benefit which are discussed in point 145 et seq. of the contested decision. Moreover, the Commission expressly states in point 145 that 'while [the applicant's] system of export rebates [that is, the PFAs] might not have as its primary object discrimination against competing sugar packagers, the system of additional rebates reveals a more active bias against them'. Similarly, the reference in point 147 of the decision to the case which led to the Napier Brown/British Sugar decision, in which the Commission condemned the same type of abuse committed on one market and having its anti-competitive effect on another, also gave an indication to the applicant as to the unfavourable competitive position of competing sugar packers engendered by that practice of price discrimination on the industrial sugar market. Finally, point 158 of the decision states that '[the applicant's] efforts to restrict competition from competing sugar packers have also had an effect on trade between Member States. Of the sugar packers which started competing with [the applicant] in mid-1993, one (ASI) used only imported sugar, one (Burcom) used both imported and Irish sugar and the others used only Irish sugar. [The applicant's] cumulative efforts to hinder the growth of competition on the retail market in Ireland, which have (as in Napier Brown/British Sugar) the intention or foreseeable result of precipitating the removal of competitors from the market, therefore have a potential effect on the structure of competition and trade within the common market, and thus on trade between Member States within the meaning of Article 86.'

170 Moreover, the arguments which the applicant draws from the confusion between the object and the effect of the practice in question must be rejected, since, as the Commission emphasises, Article 86 does not distinguish between the object and the effect and reference is made both to the anti-competitive object and to the anti-competitive effect of that practice in the contested decision (point 158). It should also be remembered that, to be capable of affecting trade between Member States, it is not necessary to demonstrate that the conduct complained of actually affected trade between Member States in a discernible way; it is sufficient

to establish that the conduct is capable of having that effect. As regards abusive practices envisaged by Article 86, in order to assess whether trade between Member States is capable of being discernibly affected by the abuse of a dominant position, account must be taken of the consequences which result for the actual structure of competition in the common market (*Compagnie Maritime Belge*, paragraphs 201 and 203 and the case-law cited therein). That is precisely the approach taken by the Commission in point 158 of the contested decision (see paragraph 169 above).

171 The Commission was therefore entitled to compare the discriminatory practice of the applicant in relation to competing sugar packers with the practice of British Sugar penalised by the Commission in the Napier Brown/British Sugar decision.

172 The applicant's arguments to the effect that Article 1(5) of the contested decision was unlawful must therefore be rejected.

The retail sugar market

— Border rebates

173 The contested decision states that between 1986 and 1988 the applicant granted a special rebate to certain retailers established in the border area between Ireland and Northern Ireland (Article 1(1)). The Commission thus states, under the heading 'Imports from Northern Ireland,' that, in order to meet competition from imports of sugar from Northern Ireland or from its own reimported sugar (point 54 of the contested decision), the applicant restricted its supply in the border area (points 55 and 56) and granted rebates to retailers established along the border (points 57 to 69). The Commission refers in that respect to various documents dated 1986, 1987, 1988 and 1990. It concludes: '[The applicant] and SDL took measures to restrict imports from Northern Ireland, particularly in the

period 1985 to 1988, by pursuing a policy of selective or discriminatory pricing on the Irish sugar market. This policy included the grant of special allowances to selected customers. In particular a special rebate was granted to certain customers established in the border area with Northern Ireland ("border rebate"). This rebate was openly discussed between [the applicant] and SDL and was funded by [the applicant]. The purpose of this rebate was to reduce the imports of cheaper retail packets from Northern Ireland into Ireland. The border rebate was unrelated to objective economic factors like the sales volume of the customers. It was used and modulated whenever it was considered that the price difference between Northern Ireland and Ireland might have induced cross-border sales' (point 128). The Commission also concludes from those documents that: 'The application of the border rebate is an abuse of [the applicant's] and SDL's joint dominant position within the meaning of Article 86. In fact, it means that [the applicant]/SDL have been applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing those who did not qualify for the rebate at a competitive disadvantage. Moreover, this rebate was intended to and did deter imports of sugar from Northern Ireland, whether imports of sugar from [the applicant's] competitors or reimports of its own sugar, thus limiting markets to the prejudice of customers. The border rebate therefore forms part of a policy of dividing markets and excluding competitors. The rebate was not based on an objective economic justification, such as the quantities purchased by the customer, marketing and transport costs or any promotional, warehousing, servicing or other functions which the relevant customer might have performed. It was granted on the sole basis of the retailer's place of business, in particular whether or not the relevant customer is established in the border area with Northern Ireland. Such a practice of selective or discriminatory pricing has been condemned by the Commission and the Court of Justice in earlier cases' (point 129).

174 The applicant accuses the Commission of only cursorily taking into account the fact that the border rebates were removed in July 1987 (point 66 of the contested decision), that price competition in the United Kingdom had considerably widened the gap between prices charged in Northern Ireland and those charged in Ireland (point 130), that part of the border trade was illegal, and that, at that time, the applicant was incurring considerable losses.

175 It then explains that, being threatened with the loss of part of its customer base and its turnover, it decided to face the competition where it manifested itself, using the limited means which its financial difficulties left it with at the time. It thus claims that it was financially unable to cut prices on a national scale. It indicates, moreover, that the prices in question were not predatory. Its pricing system was therefore no different from that approved by the Commission in 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), referred to in the contested decision (point 132). It argues that the legality of such a system cannot depend on the percentage reduction made on prices. It is necessary to determine whether the prices are predatory or not. Automatic condemnation of selective pricing by an undertaking in a dominant position, even where those prices are not predatory, shows a lack of flexibility in applying Article 86 that is contrary to the spirit of that provision, as elaborated in the case-law.

176 The applicant considers it contradictory, moreover, to claim on the one hand that an undertaking in a dominant position undoubtedly has the right to defend its position by competing with other undertakings on its market (point 134) and at the same time to regard it as an abuse for an undertaking in a dominant position to defend that position successfully. In that respect, the applicant argues that the particular responsibility of each undertaking holding a dominant position on a market not to reduce the degree of competition on the market or engage in conduct intended to reinforce and abuse its dominant position implies that that undertaking must confront competition from others. The fact that a competitor withdraws from the market following a legitimate reaction by the undertaking in a dominant position, carried out in a manner favourable to competition, cannot constitute an abuse. It is simply the result of the competitive process.

177 Finally, the applicant challenges the statement by the Commission in its defence that it held in point 55 of the contested decision that the applicant had decided to

pursue a policy of border rebates. In fact point 55 concerned the applicant's decision to remove the border area rebate in force. The restriction of supplies, also referred to in point 55, is not to be confused with the border rebates and is, moreover, not the subject of any formal finding of abuse in the operative part of the contested decision.

178 As the applicant points out, no mention of the restriction of supply referred to in points 55 and 56 of the contested decision appears in the operative part. At the hearing, the Commission confirmed that it did not hold that practice to be an infringement of Article 86, adding that it had also not been the subject-matter of its legal assessment. There is therefore no need to examine the arguments of the parties concerning the matters set out in points 55 and 56 of the contested decision. Any irregularities vitiating those points cannot lead to the annulment, or even partial annulment, of an element in the operative part of the contested decision (*Compagnie Maritime Belge Transports*, paragraph 150 and the case-law cited therein).

179 Moreover, the applicant does not deny, as indeed the Commission points out in the contested decision (point 130), that it granted a special rebate to certain retailers established along the border with Northern Ireland, at least until July 1987, to compete with cheap imports of sugar from Northern Ireland intended for retail sale. It has not denied that the border rebate, the existence of which is demonstrated by the documents referred to in points 57 to 69 of the contested decision, was granted solely by reference to the geographical location of the retailers. Apart from the dispute as to the date when those rebates ended, the applicant is in reality attempting to justify their legality under Article 86.

180 First, the applicant maintains that border rebates were finally removed in July 1987. However, the minutes of the board meeting of SDH of 18 November 1987, partially reproduced in point 66 of the contested decision, record that: 'Border

rebates had been removed in July 1987 but might have to be reintroduced in early 1988. Round Tower appeared to have adopted a more rational policy in recent times [...].' The Commission's interpretation, according to which the rebates were removed in July 1987 because of the success of the policy thus pursued, without however ruling out the possibility of using them again if necessary, therefore accords with those minutes. It is, moreover, confirmed by the statements of SDL's sales director, Mr Keleghan, at a management meeting of 27 June 1990 between the applicant and SDL: 'Mr T.G. Keleghan said there was a potential threat to the home market from cross-border imports from the north. He said that if this threat materialised it was important to react speedily with appropriate counter measures. These would include price marking on McKinney sugar and appropriate promotional activity on the home market...' (point 69 of the contested decision).

181 Secondly, it is necessary to assess whether such border rebates constitute an abuse for the purposes of Article 86. In the administrative procedure, in its written pleadings and at the hearing, the applicant has sought to justify the legality of that practice by stating that it was simply a case of responding in the particular context of its market to attacks it had been subjected to by competitors, particularly foreigners. Nowhere, however, has it denied that between 1985 and 1995 it held a dominant position on the retail sugar market, on which it carried out more than 88% of sales throughout the whole of that period (point 159 of the contested decision).

182 Whilst there is no dispute between the parties that an undertaking holding a dominant position has a particular responsibility with regard to competition on its market (see the case-law cited in paragraph 112 above), they differ as to whether or not special rebates to customers facing competition constitute a reaction that is compatible with that responsibility, in so far as the prices in question are not predatory within the meaning of the case-law (*AKZO*, paragraph 70 et seq.; Case C-333/94 P *Tetra Pak*, paragraphs 41 to 44).

183 As the Commission stated in the contested decision, by granting such a border rebate, the applicant applied dissimilar conditions to equivalent transactions with other trading parties, thereby placing the latter at a competitive disadvantage (point 129). It is, moreover, clear from the documents cited in points 57 to 69 of the contested decision that the applicant not only deliberately chose to offer a special rebate selectively to certain retailers but suspected that such a practice was illegal. Thus, an undated handwritten note concerning the marketing of a competing brand of sugar which was found in the office of Mr Keleghan states the following: 'Recommendations and implications re Gold Seal Sugars: 1R [recommendation] continue as we are, i.e. rebating as the necessity arises. Presently we rebate to:... . Through... we rebate to many independent outlets the largest being... Imp. [implication]. This method is exceedingly dangerous both legally and commercially. Legally on the basis of selective pricing. Commercially on the same basis except that the selectivity is in favour of our smaller customers...' (point 58). Such a practice constitutes abuse of a dominant position within the meaning of Article 86(c).

184 In the particular circumstances of the case, the applicant cannot rely, in order to show that the special rebates granted between 1986 and 1988 to certain retailers established in the border area with Northern Ireland were lawful, either on the pricing policy of operators on the British market, or on its financial situation, or on the defensive nature of its conduct, or on the alleged existence of an illegal trade.

185 First of all, the influence of the pricing policy of operators active principally on a neighbouring market, in this case the British and Northern Ireland market, on that of operators active on another national market is of the very essence of a common market. Anything which restricts that influence must therefore be regarded as an obstacle to the achievement of that common market and prejudicial to the outcome of effective and undistorted competition, especially with regard to the interests of consumers. Therefore, where such obstacles are brought about by an undertaking holding a dominant position as extensive as

that enjoyed by the applicant, that is an abuse incompatible with Article 86. The applicant has, moreover, nowhere argued that the prices charged by its competitors along the border with Northern Ireland were below the cost price of the product, or supplied any evidence to that effect.

186 Secondly, the applicant cannot rely on the insufficiency of the financial resources at its disposal at the time to justify the selective and discriminatory granting of those border rebates and thereby escape the application of Article 86, without making a dead letter of the prohibition contained in that article. The circumstances in which an undertaking in a dominant position may be led to react to the limited competition which exists on the market, especially where that undertaking holds more than 88% of the market as in this case, form part of the competitive process which Article 86 is precisely designed to protect. Moreover, the applicant has several times underlined the high level of retail sale prices in Ireland, explaining it by the influence of the high level of the guaranteed intervention price in the context of the common organisation of the market in sugar.

187 Finally, the defensive nature of the practice complained of in this case cannot alter the fact that it constitutes an abuse for the purposes of Article 86(c).

188 In this case, the applicant has been unable to establish an objective economic justification for the rebates. They were given to certain customers in the retail sugar market by reference solely to their exposure to competition resulting from cheap imports from another Member State and, in this case, by reference to their being established along the border with Northern Ireland. It also appears, according to the applicant's own statements, that it was able to practise such price rebates owing to the particular position it held on the Irish market. Thus it states that it was unable to practice such rebates over the whole of Irish territory owing to the financial losses it was making at the time. It follows that, by the applicant's own admission, its economic capacity to offer rebates in the region along the border with Northern Ireland depended on the stability of its prices in other

regions, which amounts to recognition that it financed those rebates by means of its sales in the rest of Irish territory. By conducting itself in that way, the applicant abused its dominant position in the retail sugar market in Ireland, by preventing the development of free competition on that market and distorting its structures, in relation to both purchasers and consumers. The latter were not able to benefit, outside the region along the border with Northern Ireland, from the price reductions caused by the imports of sugar from Northern Ireland.

189 Thus, even if the existence of a dominant position does not deprive an undertaking placed in that position of the right to protect its own commercial interests when they are threatened (see paragraph 112 above), the protection of the commercial position of an undertaking in a dominant position with the characteristics of that of the applicant at the time in question must, at the very least, in order to be lawful, be based on criteria of economic efficiency and consistent with the interests of consumers. In this case, the applicant has not shown that those conditions were fulfilled.

190 Nor can the applicant claim that its selective rebates policy was similar to that authorised by the Commission in Decision 89/22/EEC, referred to above. Apart from the fact that the rebates in question in that case were half as much as in the present case, which is a notable difference, those rebates did not form part of a scheme of systematic alignment (points 132 and 133 of the contested decision). On the other hand, the documents gathered by the Commission in this case (points 57 to 59) show that the reductions in question were aimed at discouraging imports of sugar from Northern Ireland and restricting competition on the retail sugar market. Similarly, in Decision 89/22/EEC the Commission found that some of the rebates were objectively justified (point 132). It is important to note that the applicant does not dispute either the amount of the rebates or the fact that they were aimed at 'confronting' competition from sugar imported from Northern Ireland. In view of the circumstances of this case, that amounts to acknowledging that the rebates were aimed at preventing such competition from developing on its market.

191 It should be added that, contrary to what the applicant suggests, the Commission did not rely on the mere withdrawal of a competitor from the market as proof of the abusive nature of the border rebates. Moreover, where an undertaking in a dominant position actually implements a practice aimed at ousting a competitor, the fact that the result hoped for is not achieved is not sufficient to prevent that being an abuse of a dominant position within the meaning of Article 86 (*Compagnie Maritime Belge Transports*, paragraph 149). In so far as the border rebates were aimed at securing the loyalty of purchasers exposed to offers from competitors, without enabling all the applicant's customers to benefit from the impact of competition on the sale prices of its products, the removal of a competitor following such a practice illustrates all the better the fact that it was an abuse within the meaning of Article 86.

192 Moreover, the applicant cannot derive any argument from evidence, even if established, that the competition it was obliged to face in that region was in some way incompatible with the Treaty or otherwise illegal. It should be remembered in that respect that it is for the public authorities and not private undertakings and associations to ensure compliance with legal requirements (*Hilti*, paragraph 118; *SCK and FNK*, paragraph 194).

193 It follows that the Court must reject those arguments of the applicant which challenge the legality of Article 1(1) of the operative part of the contested decision, in so far as it finds that the border rebates granted between 1986 and 1988 were an infringement.

— Fidelity rebate

194 The contested decision states that in 1988 the applicant granted 'the potential customer of a competitor a fidelity rebate, that is, a rebate that was conditional on the customer's purchasing all or a large proportion of its retail sugar requirements from [the applicant]' (Article 1(3)). The Commission explains that

'the agreement between SDL and ADM whereby ADM secured an advantageous price if it met a given target purchase level (that is, the price for [3x] tonnes if it bought [x] tonnes) was evidently not a normal quantity discount and represented a target or fidelity rebate that had the effect of tying a customer to the dominant supplier. This was therefore an infringement of Article 86 agreed by SDL and funded by [the applicant]' (point 127).

195 The applicant denies that the fidelity rebate granted to Allied Distribution Merchants ('ADM') in any way had the effect of tying that group to its supplier. It points out that ADM took its supplies from SDL before being canvassed by ASI (point 49 of the contested decision). It therefore considers that that fidelity rebate did not hinder French imports or affect the volume of imports of French sugar (point 156), that volume having been determined by factors beyond its control.

196 However, the applicant does not deny that in April 1988 a special rebate was granted to ADM which was not justified by the volume of ADM's sales but was determined by reference to sales objectives. It merely denies that this was a fidelity rebate intended to tie ADM to SDL. Nor has the applicant denied that it financed that rebate to ADM.

197 The Court has consistently held that fidelity rebates granted by an undertaking in a dominant position are an abuse within the meaning of Article 86 where their aim is, by granting financial advantages, to prevent customers from obtaining their supplies from competing producers (*Michelin*, paragraph 71, and the case-law cited therein; *BPB Industries and British Gypsum*, paragraph 120). In accordance with the case-law cited in paragraph 111 above, the Court must therefore appraise all the circumstances, and in particular the criteria and detailed rules for granting rebates, and determine whether there is a tendency, through an

advantage not justified by any economic service, to remove or restrict the buyer's choice as to his sources of supply, to block competitors' access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, or to reinforce the dominant position by distorting competition.

198 In this case, the evidence assembled by the Commission and set out in the contested decision shows that SDL's approach to ADM took place in the context of a strategy devised jointly by the applicant and SDL to prevent the expansion of the Eurolux brand on the Irish retail market (points 125 and 126) by ensuring the fidelity of its customers, if necessary by exchanging competing products which they had acquired (see paragraphs 226 to 234 below). Far from demonstrating that the rebate in question had no effect in securing customer loyalty, as the applicant claims, the fact that ADM previously obtained its supplies from SDL before being canvassed by ASI confirms that the granting of that rebate, not contested on the facts, had the effect of tying the customer to the supplier in a dominant position (point 127) or, in other words, of recovering a customer who was inclined to switch to the competition. Such a practice is therefore contrary to Article 86.

199 The joint nature of the practice in question is shown, first, by ASI's letter of 18 July 1988 to the applicant's management (point 52), which was sent shortly after the product exchanges examined elsewhere in the contested decision, and, secondly, from the passage in the minutes of the SDH board meeting of 28 June 1988 (point 47), in which the applicant's managing director declared himself very satisfied with the response hitherto to the challenge posed by the arrival of a new brand of sugar on the Irish market.

200 Nor can the applicant rely on the volume of sugar concerned by the fidelity rebate in question in order to maintain that such a rebate could not have constituted an obstacle to trade between Member States.

201 According to the settled case-law cited in paragraph 170 above, a practice constitutes such an obstacle where it is 'possible to foresee with a sufficient degree of probability on the basis of a set of objective [elements] of law or of fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the aim of a single market in all the Member States' (point 155 of the contested decision). Moreover, the fidelity rebate formed part of a strategy of the applicant to protect its domestic market and its position on that market from competition from imported sugar (point 156), as is shown in particular by the statement of the applicant's managing director at the SDH board meeting of 28 June 1988.

202 It follows from all the above considerations that the applicant's arguments that Article 1(2) of the contested decision is unlawful must be rejected.

— Target rebates and selective pricing

203 The contested decision states that 'in the period since 1993, [the applicant has practised] a policy which adversely affects the competitive position of other Irish sugar packers in the retail sugar market, in particular by: (i) granting, at certain periods in 1994, rebates to wholesale groups in Ireland which were dependent on increases in their purchases of retail sugar from [the applicant], and had the effect of tying them to [the applicant] to the detriment of competing sugar packers; and (ii) granting, in December 1994 and February 1995, selective rebates to certain customers of competing sugar packers which were dependent on those customers increasing their purchases of retail sugar from [the applicant] over a period of 12 months and were thus intended to restrict competition from the competing sugar packers' (Article 1(6)(i) and (ii)). In points 78 to 84 of the contested decision, the Commission explains that in the spring of 1994 and in October 1994, alongside quantity discounts, the applicant offered its customers on the retail market target rebates, taking the period between April and September 1993 as the reference period (points 78 to 81). It adds, on the basis of documents and statements

emanating from the applicant, that those target rebates were moreover offered selectively, in particular in December 1994 to a major retail chain which obtained its supplies partly from a sugar packer which competed with the applicant, Burcom (points 82 and 83) and in February 1995 to a wholesale group which obtained its supplies partly from another sugar packer in competition with the applicant, Gem Pack (point 84). The Commission maintains that the applicant thereby intended to tie its customers. It states that 'there is no evidence to suggest that [the applicant] has since ceased the practice of offering target rebates' (point 151). The Commission then comments that 'given that five domestic competitors all launched new retail brands in the summer of 1993 (i.e. after the start of the reference period for the 1994 promotions for wholesalers), the volume-related discounts that [the applicant] granted in the spring of 1994 and October 1994 based on purchases during the preceding summer must have been closely related to the customer's total requirements for retail sugar' (point 152). Thus, the building up of major stocks by its customers following the granting of those rebates, referred to by the applicant (point 80), 'must have adversely affected purchases from competing sugar packers' (point 152). The Commission further emphasises that those target rebates are distinct from simple quantity discounts and reveal conduct contrary to Article 86 (point 153). They constituted not only price discrimination between the applicant's customers, in that they were dependent on percentage increases in purchases rather than absolute purchase volumes, but also selective and discriminatory prices in relation to certain customers of competing sugar packers (point 154).

204 Firstly, concerning the target rebates granted in the spring of 1994 and October 1994, the applicant acknowledges that the wholesalers were offered a target rebate of...% (point 79 of the contested decision), but it denies that several customers obtained a higher rebate, claiming that none of the evidence cited by the Commission proves it. The contested decision mentioned only two customers, National Wholesalers Grocers Alliance Ltd ('NWGA') and the Musgraves group ('Musgraves'). The...% rebate given to NWGA consisted of a target rebate of...% and a promotional rebate which accounted for the remaining...%. Moreover, the complaint in paragraph 79 of the contested decision is not found either in points 151 to 154 or in the operative part of the contested decision.

205 The applicant also accuses the Commission of ignoring the explanations stating that the promotions in question were compatible with the Irish legislation in force and were known to the competent authorities, who had made no objection. Without denying the primacy of Community law, the applicant accuses the Commission of failing to familiarise itself with the customs and expectations of local trade, especially the regulations concerning grocery items. One of the aims of those provisions was precisely to reduce the purchasing power of wholesalers, in order to avoid profits resulting from promotions being retained by them in the form of an increased profit margin and not being passed on to consumers.

206 Similarly, the applicant considers that the Commission errs in assuming, without producing any proof in that respect, that the conditions and duration of the promotions in question had the effect of tying its customers and adversely affecting the purchases of competing sugar packers.

207 The Court notes first that, whilst the applicant disputes the amount of the target rebates in question, it does at least recognise their existence at the level of...% . In Article 1(6)(i) and (ii) of the operative part of the contested decision, the Commission accuses the applicant of granting such rebates, but without stating their precise amount. The determination of that amount is therefore irrelevant in assessing the legality of the findings made in the operative part.

208 The Commission has stated, moreover, in reply to a written question from the Court, that it determined the amount of the target rebates referred to in points 81 and 84 of the decision on the basis of the applicant's written reply to a request for information of 6 February 1995, reproduced in Annex 9 to the statement of objections, together with a letter sent to it by... on 29 June 1995, the minutes of an interview between representatives of the Commission and of the applicant on 20 October 1995, reproduced in Annex 10 to the statement of objections, and the applicant's reply of 8 August 1995 to another request for information.

209 The Court therefore considers that the Commission has submitted sufficient evidence to demonstrate that the target rebates granted to NWGA and Musgraves (point 79 of the contested decision) were above...% of the price.

210 In any event, it is not sufficient for the applicant merely to allege that a promotional rebate accounted for...% of the...% rebate given to NWGA, without any other form of demonstration and proof. Merely to describe part of the rebate granted in the course of a discussion in which it was agreed that NWGA would increase its sugar purchases from the applicant (point 79) as a promotional rebate is not sufficient, without further proof, to substantiate the alleged distinction and thus justify the granting of such a rebate for the purposes of Article 86.

211 It is immaterial in the present context whether granting those target rebates was compatible with Irish law, given the primacy of Community law on the matter and the direct effectiveness of Article 86 (Case 127/73 *BRT* v *SABAM* [1974] ECR 51, paragraphs 15 and 16; Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, paragraph 23). Nor can the applicant rely on the failure to take Irish legislation concerning grocery items into account. In the first place, the Commission expressly mentions that legislation in the contested decision (point 83). Moreover, the fact that a practice of an undertaking complies with national legislation does not remove its character as an infringement where that undertaking enjoyed full autonomy at the time of the facts. The applicant cannot therefore rely on the alleged compliance of those rebates with national law, in the absence of provisions of the latter requiring it to act in that way (*Commission and France* v *Ladbroke Racing*, paragraphs 33 and 34).

212 Contrary to the applicant's submissions, the facts set out in point 79 of the contested decision are examined in points 151 to 154 of the decision and penalised in the operative part. In point 79, the Commission explains that the applicant offered wholesalers target rebates in the spring of 1994, stating the

reference period chosen for calculating the purchase targets to be achieved in order to obtain them, and granted higher rebates, as confirmed by two customers of the applicant questioned on that point. In point 151, the Commission states: 'In spring 1994, [the applicant] offered the major food wholesalers in Ireland discounts that were based on their achieving certain increases in their purchases of its 1 kg Siúcra brand over three months. The reference period used to calculate the increase was April-September 1993...'. Similarly, Article 1(6)(i) states that 'in the period since 1993, [the applicant has practised] a policy which adversely affects the competitive position of other Irish sugar packers in the retail sugar market, in particular by: (i) granting, at certain periods in 1994, rebates to wholesale groups in Ireland which were dependent on increases in their purchases of retail sugar from [the applicant], and had the effect of tying them to [the applicant] to the detriment of competing sugar packers'. Moreover, if the applicant's argument sought to demonstrate that the Commission did not take the higher amount of the rebates granted to NWGA and Musgraves as a factor constituting the infringement referred to in Article 1(6), it would thereby confirm the validity of the interpretation of the contested decision to the effect that it is the granting of those target rebates which constitutes an infringement, whatever the amount, and would in such circumstances lose all relevance in assessing the legality of the contested decision (see paragraph 207 above).

213 Finally, the Commission has not committed an error of assessment in taking the view that a rebate granted by an undertaking in a dominant position by reference to an increase in purchases made over a certain period, without that rebate being capable of being regarded as a normal quantity discount (point 153), as the applicant does not deny, constitutes an abuse of that dominant position, since such a practice can only be intended to tie the customers to which it is granted and place competitors in an unfavourable competitive position. The Court would also observe that the reference period used to calculate the target rebates in question, namely the period from April to September 1993, began before the launching, during the summer of 1993, of new brands of sugar by sugar packers competing with the applicant (point 152). As the Commission states, the choice of such a reference period implied that 'the volume-related discounts that [the applicant] granted in spring 1994 and October 1994... must have been closely related to the customer's total requirements for retail sugar' (point 152).

214 In such circumstances, the granting of target rebates by an undertaking in a dominant position, one of the immediate effects of which has been, on its own analysis, to result in a build-up of stocks and a concomitant reduction in purchases (point 80), amounts to restricting the normal development of competition (point 152 and Article 1(6)(i)) and is incompatible with the objective of undistorted competition in the common market. It is not based on any economic service justifying that advantage, but seeks to remove or restrict the purchaser's freedom of choice concerning his sources of supply and to block the access of other suppliers to the market (see the case-law cited in paragraph 114 above).

215 Secondly, concerning the selectively-granted target rebates, the applicant explains that the rebate offered to the large retail chain... comprised a growth incentive in the form of a...% discount on purchases in 1995, conditional upon an increase of 300 tonnes in annual purchases (point 82 of the contested decision). It claims that that rebate did not have the effect of tying... to the applicant or of reducing the amount of... which... purchased from Burcom. The Greencore document of June 1994 used in the contested decision as evidence in that regard does not show that the rebate granted to... had the effect of reducing purchases of... from Burcom. Indeed, the rebate could have no effect on Burcom's sales to..., since Burcom ceased trading before the applicant implemented the rebate. The applicant adds that... did not change its policy of obtaining equal proportions of Siúcra and...; it chose to pursue a strategy of increasing overall sales of sugar while maintaining its policy of obtaining equal quantities of Siúcra and... .

216 The applicant further maintains that no evidence is adduced to support the allegation that... is a major customer of Gem Pack (point 151). Thus the assertion that the target rebates offered to particular customers of competing sugar packers in 1994 and 1995 were part of a policy of restricting the growth of competition from domestic sugar packers (point 154) is irrelevant as regards Gem Pack. The same applies to Article 1(6)(ii) of the contested decision.

217 The Court notes that the applicant does not in any way deny the discriminatory and selective nature of the target rebates granted in the spring and in October of 1994 to wholesalers who bought sugar from it on the retail market, as the Commission points out in points 82 and 154 of the contested decision.

218 Next, as regards the discriminatory and selective nature of the target rebates granted to certain customers of competing sugar packers, it appears, first, that the applicant also does not deny granting in December 1994 a rebate of...% to... in 1995 by reference to the volume of its purchases. It denies that it thereby wished to tie..., and it draws attention to the fact that the latter sought to increase overall sales of sugar while maintaining its policy of obtaining equal quantities of Siúcra and.... In so doing, the applicant fails to show that there is an objective economic justification for the rebate. It is in effect trying to provide justification for its initiative by reference to the alleged particularities of its customer's strategy.

219 The Greencore corporate plan of June 1994, cited in point 82 of the contested decision, shows that... bought from the applicant both sugar of the Siúcra brand and unmarked sugar which it then displayed on its shelves under the... label. However, one half of the packets of... sold by... was composed of the applicant's sugar and the other half of sugar supplied by Burcom. The document further indicates that, at the time it was written,... allocated the same space to Siúcra sugar and to... on its shelves. It is thus stated (p. 19 of the document appearing in Annex 4 to the statement of objections):

'In November 1993,... launched a... label supplied by Burcom, but withdrew it within a week. In April they relaunched..., supplied 50% by Burcom and 50% by ourselves..... are determined to establish...; the others appear to be only reacting to... .... are giving equal shelf space to... and Siúcra and are currently monitoring a price differential of... per kg...'.

220 The applicant has not specified the documents on which it based its allegation that the policy of... was to increase overall sales of sugar while maintaining apportionment of its supplies between Burcom and the applicant. The allegation is not borne out by the Greencore corporate plan of June 1994, the most significant extract from which is reproduced in the preceding paragraph. Moreover, that document pre-dates the December 1994 rebate, referred to in the applicant's internal note of 15 December 1994 (point 82).

221 In those circumstances, the applicant cannot accuse the Commission of misjudging or misinterpreting the evidence cited in the contested decision where it stated that 'any increases in Siúcra volumes purchased by... were likely to lead to a reduction in 1 kg... purchases, which was the product for which Burcom was competing as supplier' (end of point 82), and that 'the likely effect of the rebate was to tie... to [the applicant]' (end of point 151). The case-law shows (see paragraph 114 above) that such a practice is an abuse within the meaning of Article 86 in so far as it seeks, through the granting of a financial advantage, to prevent customers from obtaining their supplies from competitors.

222 The fact that Burcom ceased trading before the...% rebate was granted to... in December 1994, which is not disputed by the parties, does not alter that conclusion. The Commission has demonstrated, on the basis of the applicant's own rebates register, that the rebate had been decided upon by 8 December 1994 at the latest, prior to Burcom ceasing to trade on 14 December 1994 (point 83 and end of point 151), and when Burcom and the applicant were still in competition. Moreover, the applicant has not in any way challenged the reference to its rebates register in the contested decision.

223 Nor does the applicant deny that a target rebate was granted to... in 1995, as described in the contested decision (points 84 and 151). It merely queries the

evidence which enabled the Commission to affirm that... is a major customer of Gem Pack (end of point 151), a sugar packer competing with the applicant.

224 In reply to a written question from the Court, the Commission lodged a copy of a letter sent to it by Gem Pack's lawyers on 16 March 1995, repeatedly emphasising the importance to Gem Pack of... as a customer. The applicant has not made any objection to that document being lodged or challenged its content at the hearing. The Commission was therefore right to state in the contested decision that... was an important customer of Gem Pack and to conclude that the applicant's grant of a target rebate to... had the effect of placing its other suppliers of sugar, including Gem Pack, at a disadvantage, constituting an abuse within the meaning of Article 86 (see the case-law cited in paragraph 114 above).

225 It follows that the applicant's arguments concerning the target rebates and selective prices referred to in Article 1(6)(i) and (ii) of the contested decision must be rejected.

The product swaps on the retail sugar market

226 According to the contested decision, the applicant agreed 'in 1988 with one wholesaler and one retailer to swap competing retail sugar products, i.e. Eurolux 1 kilogram packet sugar of Compagnie française de sucrerie, for its own product' (Article 1(2)). The Commission states that, following the launching by ASI in 1988 of 1 kilogramme 'Eurolux' sugar packets on the Irish retail market, SDL reacted by proposing to ADM, under threat of a withdrawal of the preferential discounts hitherto granted to it by the applicant, that SDL should buy the quantities of Eurolux sugar as yet unsold only a few days after becoming available on ADM's network in April 1988 (points 46 to 49). Identical actions took place with regard to the retailer Kelly's Spar Supermarket, over a still shorter period, in May 1988 (points 46, 47, 48, 50 and 51). The Commission states that

'although the actions relating to the product swap were taken by SDL, [the applicant] was duly informed by ASI of the difficulties it encountered' (point 52), referring in that respect to the contents of a letter which the chief executive of ASI sent to the applicant's chief executive on 18 July 1988. The Commission also states that those practices were brought before the Irish High Court by the Director of Consumer Affairs and Fair Trade (points 48 and 53). The Commission concludes:

'Product- swapping by a dominant undertaking constitutes an abuse pursuant to Article 86 whenever it has as its object or effect the restriction or elimination of competition from a new entrant in the market. This is the case here. In fact, the product swap resulted in a consolidation of [the applicant's] and SDL's joint position as an almost monopoly supplier of sugar in the market' (point 126).

227 The applicant claims that the lack of success in marketing Eurolux sugar in Ireland arises from its rejection by consumers. The retailer Kelly reported that in spite of its price advantage Eurolux sugar sold badly. Similarly, the applicant argues that it took ASI more than a year to sell its stock of 500 tonnes of retail packet sugar. It denies threatening its customers with financial sanctions in the event of sale of Eurolux sugar, and further observes that the volume of sugar concerned by those swaps implies that they had no impact on trade between States.

228 The applicant's explanation of the failure of Eurolux sugar on the Irish market cannot be accepted, as the Commission has pointed out in the contested decision (point 125). Particularly relevant in that respect is the conversation between SDL's sales director and ADM's managing director, reported in the affidavit of the official of the Irish administration for consumer affairs and trade before the Irish High Court, referred to in point 49 of the contested decision. SDL indicated to ADM that it would withdraw its preferential discounts if the quantities purchased diminished and proposed to buy the quantities of Eurolux sugar still in ADM's

possession, having been informed that a large quantity remained unsold in its warehouses. Also noteworthy are the extremely short times it took for the Eurolux sugar to be swapped in the two specific instances referred to in the contested decision, whether the initiative for the swap came from SDL (in the case of ADM) or from the retailer itself, according to the applicant (in the case of Kelly), namely less than seven days in the first case (between 15 and 22 April 1988) and less than two hours in the second. It is of little importance in that respect to determine whether the applicant or SDL actually took the initiative in the product swap with the retailer Kelly, the Commission merely accusing the applicant of having 'agreed with one wholesaler and one retailer to exchange its own sugar for Eurolux sugar' (point 124) and not of having taken the initiative in those two exchanges.

229 Nor, for reasons identical to those set out in paragraphs 200 and 201 above, can the applicant rely on the volume of sugar involved in the two exchanges mentioned in the contested decision in order to maintain that such exchanges could not have constituted an obstacle to trade between Member States.

230 Moreover, the Commission took the small volume of the sugar involved in the exchanges into account when fixing the amount of the fine (point 167, second paragraph, first indent).

231 In addition, the applicant has not in any way challenged the reference to Commission Decision 92/163/EEC of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31.043 — Tetra Pak II) (OJ 1992 L 72, p. 1, point 165) in footnote 88 at point 126 of the contested decision, to the effect that product-swapping by a dominant undertaking constitutes an abuse under Article 86 whenever it has as its object or effect the restriction or elimination of competition from a new entrant in the market.

232 The Court has also held that, by prohibiting the abuse of a dominant position within the market in so far as it may affect trade between Member States, Article 86 covers not only practices that are capable of harming consumers directly but also those which harm them indirectly by undermining effective competition (*Hoffmann-La Roche*, paragraph 125).

233 In this case, the applicant undermined the competition structure which the Irish retail sugar market might have acquired through the entry of a new product, sugar of the Eurolux brand, by carrying out an exchange of products, in the circumstances referred to above, on a market in which it held more than 80% of the sales volume.

234 It follows that the applicant's arguments concerning the exchanges of sugar of the Eurolux brand referred to in Article 1(2) of the contested decision must be rejected.

235 The Court must therefore dismiss the third and fourth pleas of the main claim, together with the latter as a whole, save in so far as they seek the annulment of Article 1(1) of the contested decision inasmuch as it finds that the applicant infringed Article 86 of the Treaty by granting selectively low prices to ASI customers between 1986 and 1988 (see paragraph 124 above).

The forms of order sought in the alternative

236 In support of its alternative pleas seeking, first, a reduction of the fine imposed upon it by Article 2 of the contested decision and, secondly, the annulment of the third and fourth paragraphs of Article 3 of the decision, the applicant makes two

pleas in law, the first alleging infringement of Article 15(2) of Regulation No 17 and the second alleging infringement of Article 3(1) of Regulation No 17.

1. *The first plea, alleging infringement of Article 15(2) of Regulation No 17*

237 In its first plea, alleging infringement of Article 15(2) of Regulation No 17, the applicant argues, first, that the fine imposed by Article 2 of the operative part of the decision is excessive; second, that it penalises offences which are not properly established; third, that the applicant did not pursue a sustained and comprehensive policy of abuse from 1985; fourth, that the Commission failed to employ reasonable diligence in dealing with the present case; and, finally, fifth, that the Commission failed to take account of the novelty of the concept of abuse of a joint dominant position at the material time.

The plea that the fine is excessive

238 Article 2 of the contested decision imposes a fine of ECU 8 800 000 for the infringements referred to in Article 1. In points 163 to 167 of the decision, the Commission sets out the criteria used to determine the amount of the fine, in accordance with the rules in Article 15(2) of Regulation No 17.

239 The applicant considers that the fine imposed on it, amounting to 6.8% of its turnover on sales in Ireland, is not consistent with practice in either the agricultural sphere or the industrial sector.

240 It first claims that Commission decisions imposing fines in the agricultural sphere generally reveal a certain restraint (see Decision 86/596/EEC of 26 November 1986, relating to a proceeding under Article 85 of the EEC Treaty (IV/31.204 — MELDOC) (OJ 1986 L 348, p. 50), the Napier Brown-British Sugar decision, cited above, and Decision 88/587/EEC of 28 October 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/B-2/31.424, Hudson's Bay-Dansk Pelsdyravlerforening) (OJ 1988 L 316, p. 43)). This restraint was based on, and confirmed by, the case-law, which states that the Commission is required, in fixing the amount of the fines, to have particular regard to the legislative background and economic context of the conduct to which exception is taken and not to evaluate as rigorously as usual the conduct of undertakings owing to the common organisation of the market in sugar (*Suiker Unie*, paragraphs 612, 613, 619 and 620). In the present case the applicant notes that the Commission failed to include the common organisation of the market in sugar among the matters which it took into account when determining the amount of the fine (point 167 of the contested decision). In its reply the applicant further states that if the Commission wished to depart from that case-law it should have given its precise reasons for doing so. It also states that the *Suiker Unie* interpretation is still applicable, since it was followed in *Commission and France* v *Ladbroke Racing* (paragraph 32 et seq.). Nor was it called in question by Advocate General Cosmas in his Opinion of 15 July 1997 of 8 July 1999 in Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, I-4544).

241 Secondly, the applicant states that in the industrial sector the Commission generally sees structural oversupply as a mitigating factor which leads it to fix the level of the fine at approximately 2.5% of relevant turnover (Commission Decision 89/191/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866, LdPE) (OJ 1989 L 74, p. 21); Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.553, Welded Steel Mesh) (OJ 1989 L 260, p. 1); Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865, PVC) (OJ 1994 L 239, p. 14); Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraphs 180 and 185).

242 In its reply, the applicant argues that to avoid arbitrariness the best yardstick for assessing the legality of the latitude to determine fines which the Commission enjoys under the relevant rules is previous practice or a general tariff. It argues that the Commission is ignoring the guidelines for calculating fines under Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3), which it recently presented to the public.

243 Pursuant to Article 15(2) of Regulation No 17, the Commission may impose fines of between ECU 1 000 and ECU 1 000 000, and the latter figure may be increased to a maximum of 10% of the turnover achieved during the previous year by each of the undertakings that participated in the infringement. To determine the amount of the fine within those limits, that provision requires account to be taken of the gravity and duration of the infringement (*Tréfileurope*, paragraph 183). In assessing the gravity of an infringement, particular account must be taken of the legislative background and economic context of the conduct at issue, the nature of the restrictions of competition and the size of the undertaking concerned (*Suiker Unie*, paragraph 612).

244 In this case, the applicant is challenging not the Commission's compliance with the limits laid down by Article 15(2) of Regulation No 17, but its assessment of the gravity of the infringements, as set out in particular in the first to fourth indents of the second paragraph of point 167 of the decision. The Commission there cites the four factors taken into account in assessing the gravity of the infringements: the fact that these were abuses designed to damage severely or to eliminate any form of competition, the fact that sugar is an important ingredient both in industry and in household consumption, the fact that the applicant vigorously protected its home market, and the fact that the applicant was able to maintain particularly high ex-factory and retail prices.

245 The fact that in the past the Commission applied fines of a particular level to certain types of infringement does not mean that it is estopped from raising that

level, within the limits set out in Regulation No 17, if that is necessary in order to ensure the implementation of Community competition policy (*Musique Diffusion Française*, paragraph 109). The power to impose fines is conferred on the Commission as a means to carry out the task of supervision conferred on it by Community law. The Court has held that while that task clearly includes the duty to investigate and punish individual infringements, it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles. It follows that, in assessing the gravity of an infringement for the purpose of fixing the amount of the fine, the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurs, and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community (*Musique Diffusion Française*, paragraphs 105 and 106).

246 Finally, as fines constitute an instrument of the Commission's competition policy, it must be allowed a margin of discretion when fixing their amount, in order that it may direct the conduct of undertakings towards compliance with the competition rules (Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 53).

247 The arguments which the applicant draws from its analysis of the Commission's practice in decisions are not therefore capable, as such, of affecting the legality of Article 2 of the contested decision.

248 Moreover, contrary to what the applicant maintains, the case-law does not show that, in this case, the common organisation of the market in sugar constitutes a special legislative and economic context which must be taken into account as a mitigating circumstance in fixing the amount of the fine.

249 Whilst the common organisation of the market in sugar does undoubtedly colour the legislative and economic context in which the infringements complained of were committed, the applicant's abusive practices do not in this case, unlike the situation in *Suiker Unie*, paragraphs 613 to 621, constitute practically inevitable consequences of that common organisation of the sugar market.

250 In the contested decision, the Commission draws attention both to practices that were designed to react to imports or attempted imports onto the market dominated by the applicant, and to practices whereby the applicant used its position as the only sugar producer in Ireland to reduce competition from other operators with a view to maintaining a high final sale price. By so doing, the applicant thus took pains to reduce the small amount of residual competition still existing in the markets concerned. It should be added that the applicant profited from its status as the only sugar producer in Ireland and from the fact that it benefited from the whole of the sugar production quota allocated to Ireland under the common organisation of the market in sugar. However, that special status does not arise from the common organisation of the market in sugar but from the particular situation in Ireland. All those facts distinguish the applicant's situation from that of the undertakings in question in *Suiker Unie*. The common organisation of the market in sugar cannot therefore have the same impact in this case on the assessment of the severity of the applicant's infringements.

251 Moreover, the Commission rightly points out that Ireland's privileged status under the common organisation of the market in sugar is designed to facilitate transfers of sugar to Ireland, which is regarded, rightly or wrongly, as a deficit area (point 144 of the contested decision). The applicant's conduct therefore constitutes an obstacle to the achievement of the aims of that common organisation of the market in sugar, in which sugar producers already enjoy certain advantages, such as the grant of a guaranteed intervention price or export refunds where they export outside the Community at prices below that guaranteed intervention price.

252 Since, in the Commission's view, the common organisation of the market in sugar does not come into consideration in assessing the severity of the infringements, the fact that it is not referred to amongst the factors cited in that respect in the second paragraph of point 167 of the decision cannot be presented as an illustration of a lack of reasoning in the decision on that point. The applicant has nowhere shown that, where the Commission imposes a fine for infringement of the competition rules in the sugar market, it is required to give reasons for its assessment of the gravity of the situation in the light of the approach sanctioned in *Suiker Unie*.

253 The Court further notes that the Commission expressly referred to the fact that the applicant's conduct in its market had the effect of distorting the common market (third indent of the second paragraph of point 167). It also referred, in the passage dealing with the gravity of the infringement, to the various characteristics of the market and the product in question, thereby placing the applicant's infringements in their economic and legal context, holding their consequences to be clearly contrary to the aims of the common market and taking account of the fact that sugar is an important industrial ingredient and a major consumer product (see *United Brands*, paragraph 290).

254 Moreover, contrary to what the applicant suggests, the passages in the *Tréfileurope* judgment which it cites in order to establish that fines are less severe on undertakings in the agricultural sector do not in any way establish such a rule. No mitigating circumstance may therefore be attributed to the mere fact that the applicant's activities belonged to the agricultural sector.

255 Finally, the applicant can no longer claim, as it did at the hearing, that it has been discriminated against in the determination of the amount of the fine by comparison with the addressee of Commission Decision 98/538/EC of 17 June 1998 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/36.010-F3 — Amministrazione Autonoma dei Monopoli di Stato) (OJ 1998 L 252, p. 47). It cites the fixing of the basic amount of the fine in that case at the minimum rate on account of the allegedly minor gravity of the infringement in

question and its scope being confined to the market of a single Member State. However, it is clear from the grounds of that decision dealing with the assessment of the gravity of the infringement (points 63 to 71) that, since the nature and purpose of the infringement were particularly anti-competitive, even if its actual impact on the market was relatively small and limited to a single Member State, it was nevertheless necessary to conclude that this was a serious infringement. On the basis of the assessment of the gravity of the infringement alone, the amount of the fine was fixed in that case at ECU 3 000 000. The amount was then doubled to ECU 6 000 000 on account of the duration of the infringement, which was seven years. It should also be noted that the information given in that decision does not enable the percentage of the turnover of the undertaking in question to which the fine imposed upon it related to be determined. In the absence of such information, no comparison can be made between the amount of the fines in that case and the amount in this one.

256 The first branch of the first plea in the alternative must therefore be dismissed.

The alleged penalisation of infringements not properly established

257 In the second part of its first plea, the applicant again disputes the existence of a number of infringements, namely the selectively low prices, the border rebates, the product swap and the fidelity rebate, and accordingly considers their penalisation unjustified.

258 It argues first that, unlike the operative part of the contested decision (Article 1), neither the statement of objections nor the statement of reasons in the contested decision mentions the granting of selectively low prices to the customers of a French importer in 1986 as one of the practices in respect of which a fine was to be imposed. The possibility of a fine for selective pricing referred only to the period after 1993; the applicant took cognisance of this in its response to the

statement of objections and the Commission did not advise it otherwise in the course of the administrative proceeding.

259 It should be remembered (paragraph 124 above) that the Commission has not established that between 1986 and 1988 the applicant granted selectively low prices to the customers of an importer of French sugar (Article 1(1) of the contested decision).

260 The Court of First Instance has unlimited jurisdiction within the meaning of Article 172 of the EC Treaty (now Article 229 EC) to review decisions whereby the Commission has imposed a fine, and may in particular cancel or reduce the fine pursuant to Article 17 of Regulation No 17 (Case T-83/91 *Tetra Pak*, paragraph 235; *Compagnie Maritime Belge Transports*, paragraph 230).

261 Accordingly, the amount of the fine imposed on the applicant must be reduced.

262 Secondly, the applicant maintains that the contested decision fines it for border rebates which it was alleged to have granted between 1986 and 1988, although proof in the statement of objections relates to the period from April 1986 to July 1987. According to the contested decision, those rebates were all applied at particular periods between 1986 and 1988 (point 167 of the contested decision). Thus, with the exception of those granted during the few weeks between 23 May 1987 and July 1987, they were all time-barred, pursuant to Article 2(3) of Council Regulation No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

263 The Court has already held that the evidence cited in the contested decision establishes that border rebates were granted until July 1987, and that their use was always envisaged for the future should that prove necessary (points 173 to 193). The applicant's argument must in any case be rejected in so far as the border rebates in question constitute a continuing infringement from 1986 to 1988. The applicant may not seek to distinguish between border rebates granted before and those granted after 23 May 1987 for the purposes of limitation. The date to be taken into consideration for the purposes of applying the provisions of Regulation No 2988/74 is 27 September 1985. It is, in fact, the starting date of the five-year period preceding the Commission's first measure of inquiry in this matter (point 165 of the contested decision). The Commission has not called into question any act of the applicant prior to that date in Article 1(1) of the contested decision.

264 Thirdly, the applicant reproduces the argument set out in the fourth main plea in order to challenge the fine imposed for the product swap and the fidelity rebates.

265 In that respect, it has already been held that the applicant's arguments are not capable of affecting the legality of Article 1(2) and (3) of the contested decision, so that they cannot as such affect the legality of Article 2.

The implementation by the applicant of a sustained and comprehensive policy of abuse from 1985

266 The applicant begins by arguing that if all its operations in Ireland may be regarded as designed to protect its position (point 156 and Article 1 of the contested decision), having regard to its position in the context of the common organisation of the market in sugar, those operations cannot be presented as forming part of a policy designed to damage severely or to eliminate any form of

competition on the markets concerned (point 167). In thus assessing the applicant's conduct the Commission also failed to take account of the effect of the applicant's privatisation in 1991, in particular following the thoroughgoing investigations of which it was the subject, the domestic court proceedings brought against it and the reconstitution of its senior management. The interruption in its management thereby caused would appear to preclude the alleged sustained and comprehensive intention to abuse a dominant position throughout the relevant period.

267 It also points out that a number of corrective decisions were adopted in 1991, even before the Commission formulated its initial objections in administrative proceeding IV/33.705, and the decisions were set out *inter alia* in a prospectus dated 6 April 1991. The applicant further criticises the Commission for stating in the contested decision (point 167) that publication of that document did not prevent the price abuses, when the Commission had been aware of the export rebate system ever since it carried out an inspection in Dublin in 1991, and did not state at the time that it had to be terminated.

268 Finally, it rejects the Commission's allegation that it only learnt of the existence of the PFAs in the summer of 1994. The applicant refers in that regard to a number of documents which the Commission seized from its premises during the administrative proceeding and which are annexed to the statement of objections of 22 April 1993 (documents IV/33705/1221, 1335, 1410, 1459, 1757 and 1762). Moreover, oral explanations were requested by the Commission's inspectors.

269 The alleged effects of the applicant's privatisation in 1991 are not capable of demonstrating that the Commission was wrong in holding that the various abuses found to have been committed in Article 1 of the contested decision formed part of a sustained and comprehensive policy of abuse by the applicant for the whole of the infringement period.

270 Apart from the fact that many of those abuses, which were committed after the applicant's privatisation in 1991, had the same purpose as those prior to the privatisation, namely to protect its domestic market and reduce the existing competition thereon, the Court finds that the applicant continued to apply its system of PFAs throughout the period in question until the adoption of the contested decision (see paragraphs 125 to 149 above). It cannot claim in that respect that the continuity is partially justified by the lack of reaction by the Commission after it became aware of the existence of the system in 1991. In spite of the condemnation of those practices in the statement of objections of 25 March 1996, the applicant had still not terminated them by the date the contested decision was adopted. Little purpose would be served, accordingly, by determining the exact date on which the Commission actually became aware of the existence of the PFAs.

271 Moreover, as the Commission has pointed out, the corrective decisions adopted by the applicant in 1991 following its privatisation did not prevent it from subsequently infringing Article 86 several times, not only in continuing to apply its system of PFAs but also by imposing discriminatory prices for industrial sugar supplied to competing sugar packers (Article 1(5) of the contested decision) and by granting target rebates and selective discounts to certain customers on the retail sugar market (Article 1(6) of the contested decision).

272 This third part of the first alternative plea must therefore be dismissed.

The Commission's lack of diligence in dealing with the case

273 The applicant considers that the Commission's decision to split the administrative proceedings, the number of officials entrusted with the case and the considerable length of the administrative proceeding should be considered a mitigating factor for the purpose of determining the amount of the fine, since they are indicative of the lack of diligence with which the Commission pursued its investigations

(*Commercial Solvents*, paragraph 51). In particular, it criticises the Commission for unduly concentrating its investigations on the objections relating to Article 85, which by the hearings in October 1992 and September 1993 at the latest proved groundless, and for waiting too long before communicating the objections relating to Article 86, although it had been aware of the relevant facts since February 1991, the date of the second inspection.

274 The applicant emphasises that in accordance with a general principle of Community law the Commission is required to act within a reasonable time when adopting decisions following administrative proceedings relating to competition policy. In this instance neither the complexity of the case nor the applicant's conduct made such a lengthy proceeding necessary. At the hearing, the applicant also referred to the principles laid down in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417.

275 The applicant also rejects the Commission's allegation that it contributed during the administrative proceeding to the adoption of a decision pursuant to Article 11(5) of Regulation No 17 (Decision C(95)1837 final of 19 July 1995). That decision formally repeated earlier questions which the applicant claims to have answered by letter of 18 May 1995 (annex 5 to the application). The inadequacy of that first answer, resulting from the inaccuracy of certain information from third parties of which the applicant was unaware at the time, was not the fault of the applicant. Instead of checking the reliability of its sources, the Commission blindly relied on the information and requested the applicant, inevitably without success, to complete its answer of 18 May 1995, which the applicant claims to have attempted to do on 8 August and 20 October 1995.

276 It is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy (*SCK and FNK*, paragraph 56). It is therefore necessary to examine whether in this case the Commission infringed the general principle that it should act within a reasonable time in the procedure prior to the adoption of the contested decision.

277 In order to ascertain the total duration of the administrative proceeding which led to the adoption of the contested decision, it is necessary first to determine which periods need to be taken into account since the Commission's first investigation. The Commission brought several proceedings against the applicant, of which only the third and last (see paragraphs 3 to 7 above) led to the adoption of a decision finding certain infringements. The Commission's first inspection of the applicant's Dublin head office was on 25 September 1990 (point 165 of the contested decision). The administrative proceeding in this case thus took place between 25 September 1990 and 14 May 1997, the date on which the contested decision was adopted, thus giving a duration of approximately 80 months.

278 However, the question whether the duration of an administrative proceeding is reasonable must be determined in relation to the particular circumstances of each case and, in particular, its context, the various procedural stages followed by the Commission, the conduct of the parties in the course of the procedure and the complexity of the case (*SCK and FNK*, paragraph 57).

279 In this case, the proceeding comprised many stages which were punctuated by the lodging of complaints (see, in that respect, paragraphs 1 to 5 of the application) and the examination of the arguments in defence put forward by the applicant. The first inspections carried out by the Commission at the applicant's head office and at the head office of its subsidiary, McKinney, in 1990 and 1991, in the context of a wider inquiry concerning conduct contrary to Article 85 on the part of several refineries, led the Commission to send the applicant a first statement of objections on 4 May 1992. That first proceeding was closed on 2 August 1995 (see paragraph 3 above). The second proceeding commenced on 22 April 1993 with the despatch of a second statement of objections concerning conduct contrary to Articles 85 and 86. On 28 June 1995, the Commission notified the applicant of the closure of the part of that second proceeding concerning Article 85 (see paragraph 4 above). On 19 July 1995, the Commission adopted a decision under Article 11 of Regulation No 17 (see paragraph 4 above). In January 1995, the Commission pursued its on-the-spot investigations (see paragraph 5 above). On 25 March 1996, finally, it sent the statement of objections.

280 Therefore, although many months elapsed between the commencement and the closure of the administrative proceeding, it is clear that the Commission adopted a series of measures during that period. Moreover, the applicant does not accuse the Commission of taking no action during that period, but rather of devoting too much time to the objections concerning Article 85. In that respect, however, the two proceedings concerning the conduct contrary to Article 86 (the second and third proceedings) began at the earliest on 22 April 1993, the date on which the second statement of objections was sent. Less than half the total duration of the administrative proceeding was therefore devoted exclusively to Article 85.

281 Moreover, as the Commission points out, the applicant cannot claim to have been harmed by the attention with which the Commission examined the objections based on infringement of Article 85, since all those objections were abandoned. The applicant also had the opportunity on each occasion to state its views on the objections under Article 85 that were sent to it. In reply to a question from the Court, it stated that it had replied to the first two statements of objections on 11 September 1992 and 1 September 1993, and that it had taken part in hearings on 6 October 1992 and 21 and 22 September 1993.

282 As regards the objections under Article 86, the first period to be taken into consideration is therefore that which elapsed between the despatch of the second statement of objections on 22 April 1993 and the despatch of the third statement of objections on 25 March 1996, a period of 35 months. It should be noted, however, that during that period the applicant had the opportunity to reply to the second statement of objections on 1 September 1993. After hearing the applicant's arguments in reply to the second statement of objections, the Commission informed the applicant that it was abandoning the two proceedings commenced under Article 85 on 28 June and 2 August 1995, and ordered it to reply to a request for information under Article 11 of Regulation No 17 on 19 July 1995. Although the parties differ as to the significance of that instruction, the explanations put forward by the applicant in the present proceedings do not support the conclusion that its adoption was the result of an error by the Commission in dealing with the case. This was, moreover, a factually complex case in which the Commission had to deal with various complaints, as the applicant has not denied. The period of 35 months which elapsed between the

second and the third statements of objections does not therefore appear unreasonable.

283 The final period to be taken into consideration is that which elapsed between the adoption of the third statement of objections on 25 March 1996 and the adoption of the contested decision on 14 May 1997. During that period, on 12 July 1996, the applicant sent its reply to the statement of objections (see paragraph 6 above). The passage of a period of about 10 months for the drafting of a final decision in all the official languages of the Community does not constitute an infringement of the principle that the Commission should act within a reasonable time in an administrative proceeding concerning competition policy (*SCK and FNK*, paragraph 66).

284 Nor can the applicant rely on its own conduct during the administrative proceeding in order to increase the significance of the proceeding's duration. Even if it took care on each occasion to respond within the time-limits specified, it had not yet put an end to a number of the abuses already identified in the statement of objections (those referred to in Article 1(4), (5) and (6)) at the time the contested decision was adopted.

285 Therefore, despite the total duration of the administrative proceeding prior to the adoption of the contested decision, the decision is not, bearing in mind the particular circumstances of the case, vitiated by an infringement of the principle requiring that the Commission must act within a reasonable time. In any event, the applicant cannot rely on the judgment in *Baustahlgewebe*, since the periods at issue in that case concerned the duration of the procedure before the Community judicature and not just that of the administrative proceeding.

286 It follows from the above that the fourth branch of this first alternative plea must be dismissed.

The novelty of the concept of the abuse of a joint dominant position

287 The applicant argues that the concept of joint dominance had as yet had no practical implementation when the conduct at issue in the present case occurred. The abuses referred to in Article 1(1) to (3) of the contested decision all took place before Commission Decision 89/93/EEC of 7 December 1988 (IV/31.906 Italian Flat Glass) relating to a proceeding under Articles 85 and 86 of the EEC Treaty (OJ 1989 L 33, p. 44) was adopted. The novelty of the concept of joint dominance should have been taken into account when the amount of the fine was determined (*AKZO*, paragraph 163).

288 The applicant further states that the only relevant information to be drawn from *Compagnie Maritime Belge Transports* is that an argument based on novelty cannot be upheld in the absence of novelty. In the draft communication of 10 December 1996 (COM(96)649 final) from the Commission on the application of the competition rules to access agreements in the telecommunications sector, the Commission itself observes that 'the circumstances in which a joint dominant position exists, and in which it is abused, have not yet been fully clarified by the case-law of the Community courts or the practice of the Commission, and the law is still developing'.

289 The Commission rejects the applicant's argument, maintaining that the contested decision is based primarily on a finding that the applicant held an individual dominant position, while the finding of joint dominance was made purely in the alternative.

290 As a preliminary observation, it should be noted that the reading of the contested decision proposed by the Commission in its defence cannot be accepted (see paragraphs 25 to 31 above).

291 Although it is well established in case-law that, in fixing the amount of the fine, account may be taken of the fact that the infringements fall within an area of the law in which the competition rules have never been clearly stated (*AKZO*, paragraph 163), there are many factors to show that, in this case, the applicant is not entitled to rely on the alleged novelty of the concept of a joint dominant position.

292 Even if, at the time the applicant and SDL adopted the various types of conduct which constituted abuse of their joint dominant position, that is to say between 1986 and 1988 (Article 1(1) to (3)), that concept had not yet been established in competition law — Decision 89/93/EEC, cited above, is dated 7 December 1988 and the draft Commission communication (COM(96)649 final), of which the applicant cites an extract, is dated 10 December 1996 —, the aim of the abusive practices of which the applicant and SDL were accused for the period before February 1990, namely the protection of its market position and the prevention of sugar imports into Ireland, is nothing new in competition law (*Compagnie Maritime Belge Transports*, paragraph 248).

293 Moreover, as the Commission observes, the note of 21 November 1988 (see paragraph 64 above) clearly shows that, in addition to the fact that the applicant knew the extent of its position and SDL's position on the two markets concerned, both the applicant and SDL were aware of the closeness of the economic links between them and the possibility of coordinating their conduct on the market.

294 In those circumstances, the Court finds that the Commission did not infringe Article 15(2) of Regulation No 17 by not taking the alleged novelty of the concept of a joint dominant position as a mitigating circumstance at the time the fine was fixed. This fifth branch of the first alternative plea must therefore be dismissed.

2. The second plea, alleging infringement of Article 3(1) of Regulation No 17

295 In Article 3 of the contested decision, the Commission orders the applicant to bring to an end the infringements referred to in Article 1(4), (5) and (6) in so far as it has not already done so, and to refrain from repeating any such act or conduct.

296 The applicant claims, first, that the order to refrain from granting target rebates to retail sugar customers, as set out in the third paragraph of Article 3 of the contested decision, infringes Article 3(1) of Regulation No 17, in so far as the order is wider in scope than the infringement to which it relates and which is found in Article 1(6)(i) of the contested decision. The Commission made no reference to the tying effect of the rebates in question, whereas Article 1(6)(i) refers only to the target rebates which allegedly had the effect of tying groups of wholesalers to the applicant. The Commission's explanations were based on a misinterpretation of the second paragraph of Article 3 of the contested decision.

297 Moreover, the applicant claims that the order to cease the other rebates, as set out in the second part of the third paragraph of Article 3 of the contested decision, also infringes Article 3(1) of Regulation No 17, in so far as it really concerns the system of additional rebates which was not formally found to be abusive in the relevant part of the operative part, Article 1(5), which only condemns active price discrimination against competing sugar packers on the retail sugar market. In that regard, it is irrelevant whether this passage from the operative part is based on point 145 or point 149 of the contested decision. The Commission required the applicant to refrain from granting all other rebates, even if they were not discriminatory, because they were not in any way dependent on the quantity of sugar or the cost of the operation, which went beyond the scope of Article 1(5) of the contested decision.

298 It should be remembered that Article 3(1) of Regulation No 17 is to be applied according to the nature of the infringement found and may include an order to do certain acts or things which, unlawfully, have not been done as well as an order to bring an end to certain acts, practices or situations which are contrary to the Treaty (*Commercial Solvents*, paragraph 45). The prohibition may cover only practices which are incompatible with the EC Treaty (Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraph 159).

299 In this case, Article 3 of the contested decision contains a logical series of orders designed to prevent the repetition of actions incompatible with Article 86, moving from the general to the particular and from the present to the future.

300 Thus, the first paragraph requires the applicant immediately to terminate all the infringements still current at the time of the adoption of the contested decision, namely those found in Article 1(4), (5) and (6). It is perfectly in accordance with the requirements of the case-law in that respect, as the applicant does not deny.

301 The second paragraph prohibits the applicant from continuing any of those infringements in the future or adopting any measure having equivalent effect. It also complies with the requirements of the case-law, in so far as it covers only conduct that is incompatible with the Treaty.

302 The third paragraph spells out for the future the order given in the second paragraph, more particularly concerning the discriminatory discounts, namely the export rebates and the rebates discriminating against competing sugar packers. The explanation of the general prohibition for the future formulated in the second paragraph thus covers specifically the infringements found in Article 1(4) and (5). It also relates only to the industrial market.

303 The fourth paragraph spells out for the future the general order given in the second paragraph, more particularly concerning the selective rebates to customers of competing sugar packers and the granting of target rebates to purchasers of retail sugar. That further elaboration of the general order for the future thus specifically covers the infringement found in Article 1(6), of which subparagraphs (i) and (ii) refer to the concrete cases examined in the contested decision. It relates only to the retail sugar market, unlike the elaboration given in the third paragraph.

304 The logical sequence of the second, third and fourth paragraphs of Article 3 of the contested decision is indicated by the use of the expressions 'in particular' at the beginning of the third paragraph and 'also' at the beginning of the fourth paragraph. The compliance of the second paragraph with the case-law logically extends to the third and fourth paragraphs, inasmuch as the latter merely elaborate that general order.

305 It follows that the lack of consistency which the applicant finds between Article 1(4), (5) and (6) and Article 3 of the contested decision is not borne out by the facts. No infringement of Article 3(1) of Regulation No 17 can therefore be found.

306 It follows from the above that the second alternative plea must also be dismissed.

307 Since, in this case, only the second part of the first alternative plea must be partially upheld (see paragraphs 258 to 261 above), the Court in the exercise of its unlimited jurisdiction will reduce the amount of the fine, expressed in euros pursuant to Article 2(1) of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1), to EUR 7 883 326.

Costs

308 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may, where each party succeeds on some and fails on other grounds, order costs to be shared or order each party to bear its own costs. As the action has been only partially successful, the Court considers it fair in the circumstances of the case to order the applicant to bear its own costs and to pay two thirds of the Commission's costs and to order the Commission to bear the remaining third of its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Annuls Article 1(1) of the contested decision in so far as it finds that between 1986 and 1988 the applicant granted selectively low prices to the customers of a French sugar importer;**

2. **Reduces the fine imposed on the applicant by Article 2 of the contested decision to EUR 7 883 326;**

3. **Dismisses the remainder of the action;**

4. **Orders the applicant to pay its own costs and two thirds of the Commission's costs;**

5. **Orders the Commission to pay one third of its own costs.**

Jaeger Lenaerts Azizi

Delivered in open court in Luxembourg on 7 October 1999.

H. Jung K. Lenaerts

Registrar President

Summary