Course Outline

Course number | RMJ138  
---|---
Course title | Competition Law  
Credit points | 3 ECTS  
Total hours | 24 Contact Hours  
Lecture hours | 24  
Course level | Masters  
Prerequisites

COURSE RESPONSIBLE

<table>
<thead>
<tr>
<th>Name</th>
<th>Academic degree</th>
<th>Academic position</th>
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<tbody>
<tr>
<td>Robert Lane</td>
<td>Ph.D.</td>
<td>Visiting Docent</td>
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</tbody>
</table>

COURSE TEACHERS

<table>
<thead>
<tr>
<th>Name</th>
<th>Academic degree</th>
<th>Academic position</th>
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COURSE ABSTRACT

The course analyses at an advanced level the competition law of the European Union: the justification for regulation in a free market economy, the applicable rules and their operation. Throughout there will be comparative consideration of equivalent rules in national law (Konkurences Likums) and how the two layers (seek to) coexist.

COURSE OBJECTIVES

Students should acquire an easy familiarity with the language, principles and concepts of competition and its legal regulation, and a firm understanding how the relevant EU rules operate.

ASSESSMENT

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Weighting</th>
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<tbody>
<tr>
<td>Exam</td>
<td>100%</td>
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COURSE PLAN – MAIN SUBJECTS

<table>
<thead>
<tr>
<th>No.</th>
<th>Main subjects</th>
<th>Planned hours</th>
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<tbody>
<tr>
<td>1</td>
<td>Introduction</td>
<td>2</td>
</tr>
<tr>
<td>2</td>
<td>Article 101: cartels, vertical restraints</td>
<td>6</td>
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</tbody>
</table>
COURSE PLAN – SESSIONS

<table>
<thead>
<tr>
<th>Session</th>
<th>Session subjects and readings</th>
<th>Lecture/seminar</th>
</tr>
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<tbody>
<tr>
<td>1</td>
<td>Introduction to the economics of competition and competition law; general concepts and principles</td>
<td>Seminar</td>
</tr>
<tr>
<td></td>
<td>W &amp; B, Chapter 1</td>
<td></td>
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<tr>
<td></td>
<td>Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C372/5 (in course materials)</td>
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<tr>
<td>2</td>
<td>Structure of Article 101; undertakings; agreements; concerted practice</td>
<td>Seminar</td>
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<td></td>
<td>W &amp; B, pp 82-119</td>
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<td>Case T-41/96 Bayer v Commission [2000] ECR II-3383 (course materials)</td>
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<td>Case C-8/08 T-Mobile Netherlands v Raad van Bestuur van de Nederlandse Mededingingsautoriteit [2009] ECR I-4529 (course materials)</td>
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<tr>
<td>3</td>
<td>Object/effect; appreciability; cartels; hardcore restraints; vertical agreements</td>
<td>Seminar</td>
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<td></td>
<td>Cases 56 &amp; 58/64 Consten &amp; Grundig v EEC Commission [1966] ECR 299 (course materials)</td>
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<td>Case C-226/11 Expedia v Autorité de la concurrence, EU:C:2012:795 (course materials)</td>
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<td>4</td>
<td>'Rule of reason'; Wouters; exemption (Article 101(3))</td>
<td>Seminar</td>
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<td></td>
<td>W &amp; B, pp 138-144 and perusal of Chapter 4</td>
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<td>Regulation 330/2010 OJ 2010 L102/1 (course materials)</td>
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<td>5</td>
<td>Article 102: dominance; abuse</td>
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<td></td>
<td>W &amp; B, Chapters 5 and 17</td>
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<td></td>
<td>Case 27/76 United Brands v Commission [1978] ECR 207 (course materials)</td>
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<td>6</td>
<td>Market power and the new technologies</td>
<td>Seminar</td>
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<td></td>
<td>W &amp; B, perusal of Chapter 19</td>
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<tr>
<td></td>
<td>Case C-418/01 IMS Health v NDC Health [2004] ECR I-5039 (course materials)</td>
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<td></td>
<td>Students should be aware of (but cannot possibly read in so short a time) the Microsoft case (Case T-201/04 [2007] II-3601); it will be discussed in class.</td>
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<thead>
<tr>
<th>Session</th>
<th>Session subjects and readings</th>
<th>Lecture/seminar</th>
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<tbody>
<tr>
<td>7</td>
<td>Enforcement 1: the Commission</td>
<td>Seminar</td>
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<tr>
<td></td>
<td>W &amp; B, Chapter 7</td>
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<td></td>
<td>Regulation 1/2002 OJ 2003 L1/1 (course materials)</td>
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<td></td>
<td>Case C-583/13 Deutsche Bahn v Commission, EU:C:2015:404</td>
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<td>8</td>
<td>Enforcement 2: national competition authorities and national courts</td>
<td>Seminar</td>
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<tr>
<td></td>
<td>W &amp; B, Chapter 8</td>
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<tr>
<td></td>
<td>Regulation 1/2003, articles 1, 3, 5, 6, 11, 15, 16, 35</td>
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</table>
Session | Session subjects and readings | Lecture/seminar
---|---|---
| 9 | Oligopolies and mergers; the Merger Regulation W & B, Chapter 21 Regulation 139/2004 OJ 2004 L24/1 (course materials) | Seminar |
| 10 | State aid 1: what is an (unlawful) state aid Hancher, Chapter 3 | Seminar |
| 12 | Public undertakings (Article 106); extraterritoriality; intellectual property; recapitulation and review Brexit? | Seminar |

COURSE LITERATURE

<table>
<thead>
<tr>
<th>No.</th>
<th>Author, title, publisher</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Dougan (ed), UK and EC Competition Documents. OUP. 8th ed (2015) This is a very handy collection of most of the primary materials (legislation) we shall consider.</td>
</tr>
<tr>
<td>2</td>
<td>Whish and Bailey, Competition Law. OUP. 9th ed (2018)</td>
</tr>
<tr>
<td>3</td>
<td>Hancher, Ottervanger &amp; Slot, EU State Aids, Thomson Reuters. 4th ed (2012)</td>
</tr>
<tr>
<td>4</td>
<td>Vogelaar, The European Competition Rules: Landmark Cases. Europa. 2004 A useful collection of excerpts from judgments of the Court of Justice</td>
</tr>
</tbody>
</table>

Some Initial Thoughts on Competition

The following well-known quotes and materials from the past, addressing issues of competition regulation through the years. They are useful to ponder, and may be considered in discussion during Week 1.

De Dardanariis  (Corp. Jur. Civ. Dig. XLVII-XI-6 ; de extraordinariis criminibus)

Annonam adeptore et vexare vel maxime dardanarii solent. Quorum avaritia obviam itum est tam mandatis, quam constitutionibus. Mandatis denique ita caventur. 'Præterea debebis custodire, ne dardanarii ullius mercis sint, ne aut ab his, qui coeptas mercos suppressint, aut a locupletoribus, qui fructus suos aequis pretiis vendere nollet, dum minus uberes proventus expectant, [ne] annona oneretur’. Poena autem in hos varie statuitur; nam plerunque, si negotiantes sunt, negotiatione eis tantum interdicitur, interdum et relegari solent, humiliores ad opus publicum dari.
Edictum Diocletiani De Pretiis Rerum Venalium (AD 301)

For who is so hard and so devoid of human feeling that he cannot, or rather has not perceived, that in the commerce carried on in the markets or involved in the daily life of cities immoderate prices are so widespread that the unbridled passion for gain is lessened neither by abundant supplies nor by fruitful years; so that without a doubt men who are busied in these affairs constantly plan to control the very winds and weather from the movements of the stars, and, evil that they are, they cannot endure the watering of the fertile fields by the rains from above which bring the hope of future harvests, since they reckon it their own loss if abundance comes through the moderation of the weather.... And a concern for the general interest in mankind bids us, our peoples, to set bounds to the avarice of these men, who are always eager to turn every gift from the heavens to a pecuniary gain .... For who does not know how in their boldness, which undermines the public good, ... the profiteer takes it in his heart to price his goods not just four times or eight times the norm, but such that the human tongue scarcely has words for their prices and their deeds .... Since we were justly and properly aroused by these things and since humanity itself seemed to be crying out for help, we have decided ....

And it is our will that if any person struggles against the provision of this law, he shall be put to death for his boldness.

The Anglo-Saxon Chronicle (1125)

In this year sent the King Henry, before Christmas, from Normandy to England, and bade that all the mint-men that were in England should be mutilated in their limbs; that was, that they should lose each of them the right hand, and their testicles beneath. This was because the man that had a pound could not lay out a penny at a market. And the Bishop Roger of Salisbury sent over all England, and bade them all that they should come to Winchester at Christmas. When they came thither, then were they taken one by one, and deprived each of the right hand and the testicles beneath. All this was done within the twelfth night. And that was all in perfect justice, because that they had undone all the land with the great quantity of base coin that they all bought.

Las Siete Partidas (1265) de Alfonso X, el Sabio (1221-1284)

Quinta Partida, Título VII, Ley II

Cómo los mercadores non deben poner cotos entre sí sobre la cosas que vendieren

Concerning the combinations and agreements which merchants enter into with one another, by making oaths and forming brotherhoods

Merchants enter into combinations and agreements amongst themselves taking oaths, and forming brotherhoods for the purpose of aiding one another, establishing prices as to how much a yard they shall pay for every kind of cloth, and also how much they will give according to the weight and measure of other articles, and no less. Moreover, artisans enter into combinations amongst themselves as to the price they will pay for each of the articles which they make use of in their trades.... and for the reasons that many wrongs have resulted therefrom, we decree that any brotherhoods, contracts, or combinations, such as those aforesaid or any similar to them shall be established with the knowledge and consent of the king, and that if this is done without said knowledge and consent, they shall not be valid; and also that all those who establish any in this way from this time forward, shall forfeit all their property to the king, and that in addition to this they shall be banished forever from the country.

Adam Smith, The Wealth of Nations (1776)

The price of monopoly is upon every occasion the highest which can be got.

The monopolists, by keeping the market constantly under-stocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural rate.

It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest.
The interest of the dealers ... in any particular branch of trade or manufactures, is always in some respect different from, and even opposite to, that of the public. To widen the market and to narrow the competition, is always in the interest of the dealers. To widen the market may frequently be agreeable enough to the interest of the public; but to narrow the competition must always be against it, and can serve only to enable the dealers, by raising their profits above what they naturally would be, to levy, for their own benefit, an absurd tax upon the rest of their fellow citizens.

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.

**Cartels**

[W]e can infer that overcharges imposed on EU consumers by cartels in the 2002-2007 period are way larger than penalties imposed on the detected cartels. Assuming a 30% detection rate and the most—generous estimate of the ratio between penalties and overcharges (70%), the total overcharge from EU-wide (detected and undetected) cartels would reach €29.7 billion; if the deadweight loss is calculated under textbook assumptions of linear demand, constant unit costs and unitary elasticity (i.e. 50% of the overcharge), the total impact of EU-wide cartels over the period 2002-2007 would reach €44.6 billion, of which approximately €14.9 billion is the net loss to society from reduced output (allocative inefficiency), whereas €29.7 billion is the transfer from buyers to sellers (cartelists). Based on this calculation, the lower-bound estimate yearly impact of EU-wide cartels would be €8.9 billion, of which €5.95 billion would represent the net transfer from sellers to buyers, and €2.97 billion the deadweight loss. This, as recalled, is a very conservative estimate. If we assume that the detection rate of cartels per given year is in line with the majority of estimates, i.e. around 15%, and the ratio between penalties and overcharges is 30%, then the estimated (upper-bound) yearly impact of EU-wide cartels would reach €138.7 billion.

- Centre for European Policy Studies, Making antitrust damages actions more effective in the EU (2007)

Such agreements [cartels] can lead to a more ordered organisation of production and can check wasteful and excessive competition…. They can lead to a rapid improvement in techniques and a reduction in cost, which, in turn, with enlightened administration of industry, can provide a basis of lower prices to consumers. They can spread the benefits of inventions from one country to another by exchanging research results, by the cross-licensing of patents, and by the provision of important ‘know-how’ to the working of these patents.

- Lord McGowan, Chairman of ICI (House of Lords Debates, 1944)

I hope ... that the 1980s will bring to light that Adam Smith’s *Homo Economicus*, who has stood as the example for anti-cartel law, is a degrading reduction of man ... and that it is unethical to take him as an example for the purpose of legislation. For any one unscrupulous businessman who tries to undo the working of the invisible hand in order to deviate wealth into his own pockets, I can show you three, maybe more, managers whose first care is not profit at the expense of the community at large but the continuation of their enterprise, the protection of loss of investment, which is nothing else than blood, sweat and tears, and the preservation of their employment ....

And now I expect, but I sincerely do not hope, that this second time that Western civilisation is seriously endangered since the eighth century when Rome crumbled under the victorious Islam, that the second time will bring to light that the Sherman Act and Article 85 are luxuries, the fundamental errors of which are not felt in a fast-growing economy but that they are an obstacle to a society which should be based on solidarity and regard for others.

In my country, before the [101] men on horseback came galloping in, we did not speak about competitors; we spoke about ‘colleagues’. I feel we shall have to face the oncoming economic war not with competitor competitori lupus, but with the concepts I just evoked - solidarity and regard for others.

- (anonymous) Dutch businessman (1979)

‘The competitor is our friend, the customer our enemy.’

- Dwayne (sic) Andreas of Archer Daniels Midland, Lysine cartel (1995)

‘Die Kartelle sind die Krebsgeschwüre der offenen Marktwirtschaft.’

- Commissioner Mario Monti (2000)

‘… the supreme evil of antitrust.’
‘Cartels involve substantial theft and economic harm’.  
- John Fingleton, head of the OFT (2006)

There are certain offences in respect of which an appropriate degree of denunciation can only be achieved through a sentence that communicates society’s ‘abhorrence’ of the crime in question ….

Price fixing agreements, like other forms of hard core cartel agreements, are analogous to fraud and theft. They represent nothing less than an assault on our open market economy….

Indeed, such agreements have a greater adverse economic impact on society than do theft and fraud. This is because, in addition to leading to a transfer of wealth from victims of the agreement to the participants in the agreement, they also generally result in further detrimental effects on the economy…. 

Price fixing and other hard core cartel agreements therefore ought to be treated at least as severely as fraud and theft, if not even more severely than those offences.

- Crampton J in R v Maxzone Auto Parts (Canada) 2012 FC 1117

**Modern Legislation**

**Sherman Act 1890** (15 USC §§ 1-2)

**Section 1**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

**Section 2**

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

‘... la législation antitrust que les États-Unis appliquaient chez eux aussi rigoureusement que les règles morales …’.
- Jean Monnet, Mémoires (1976)

**National competition laws modelled upon the Treaty**

<table>
<thead>
<tr>
<th>Country</th>
<th>Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Code de droit économique/Wetboek van economisch recht, Livre/Boek IV</td>
</tr>
<tr>
<td>Denmark</td>
<td>LBK nr. 155 af 1. marts 2018 om Konkurrenceloven</td>
</tr>
<tr>
<td>Ireland</td>
<td>Competition Act, 2002 (No 14 of 2002)</td>
</tr>
<tr>
<td>Italy</td>
<td>Legge N° 287 of 10 October 1990, GURI of 13 October 1990, N° 240</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Loi du 17 mai 2004 relative à la concurrence, JO du G-DL du 26 mai 2004</td>
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<tr>
<td>Netherlands</td>
<td>Wet van 22 Mai 1997, stb. 1997, 242 (Mededingingswet)</td>
</tr>
<tr>
<td>Portugal</td>
<td>Lei n.º 19/2012 de 8 de maio 2012 aprova o novo regime jurídico da concorrência</td>
</tr>
<tr>
<td>Sweden</td>
<td>(Ny) Konkurrenslaget, SFS 2008:579</td>
</tr>
<tr>
<td>UK</td>
<td>Competition Act 1998</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Закон за защита на конкуренцията, Обн., ДВ, бр. 102 от 28.11.2008 г.</td>
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<tr>
<td>Czech Republic</td>
<td>Зákon o ochraně hospodářské soutěže, č. 143/2001 Sb.</td>
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<tr>
<td>Estonia</td>
<td>Konkurrenceidus, RT I 2001, 56, 332</td>
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<tr>
<td>Croatia</td>
<td>(Novi) Zakon o zaštiti tržišnog natjecanja (OG79/2009)</td>
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<tr>
<td>Cyprus</td>
<td>Παρ. της Προστασίας του Ανταγωνισμού Νόμος 207/89</td>
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<tr>
<td>Latvia</td>
<td>Konkurences Likurns (04.10.2001)</td>
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</tbody>
</table>
Note the (new) Treaty context and basis:

EC Treaty, Preamble, 4th indent:

‘RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition [loyauté dans la concurrence; einen redlichen Wettbewerb; eerlijkheid in de mededinging; un godīgu konkurenci].

National competition laws not modelled upon the Treaty
Article 3
[now gone]

‘For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
(f) ‘the institution of a system ensuring that competition in the internal market is not distorted [faussée; verfälscht; izkropļota].

Constitution for Europe, Article 1(3)(2)
[never in force]

‘The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted’.

TFEU, Article 3

2. ‘The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

TFEU, Protocol (No 27) on the internal market and competition

‘THE HIGH CONTRACTING PARTIES,

CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,

HAVE AGREED that:
to this end the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.’

Does it change anything? See, finally, the General Court in Case T-456/10 Timab Industries and anor v Commission, EU:T:2015:296, paras 211-212. :

[T]he applicants submit that competition is no longer one of the objectives of the European Union, but is only mentioned in Protocol 27 on the internal market and competition ... as a component of the internal market. According to them, that change, more than ever, calls on the Commission to take account, in its assessment of anti-competitive practices and associated penalties, of the situation of the individual undertakings concerned and their specificities, both financial but also economic and social, in the light of the EU objectives as defined in Article 3 TEU.
In that regard, it is sufficient to state that Article 3 TEU, read in conjunction with Protocol No 27 on the internal market and competition, has changed neither the purpose of Article 101 TFEU nor the rules for the imposition of fines.

The Basics

Article 101 TFEU

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   - any agreement or category of agreements between undertakings,
   - any decision or category of decisions by associations of undertakings,
   - any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Konkurences Likums

II. pants. Aizliegtas vienošanās un par spēkā esošām atzītas vienošanās

(1) Ir aizliegtas un kopš noslēgšanas brīža spēkā neesošas tirgus dalībnieku vienošanās, kuru mērķis vai sekas ir konkurences kavēšana, ierobežošana vai deformēšana Latvijas teritorijā, to skaitā vienošanās par:

1) tiešu vai netiešu cenu vai tirdzības noteikšanu jebkādā veidā vai to veidošanas noteikumiem, kā arī par tādas informācijas apmaiņu, kura attiecas uz cenām vai realizācijas noteikumiem;

2) ražošanas vai realizācijas apjomu, tirdzību, tehniskās attīstības vai investīciju ierobežošanu vai kontroli;

3) tirdzību sadāli,ņemot vērā teritoriju, pircējus, piegādātājus vai citus nosacījumus;

4) noteikumiem, kuri darījumu slēgšanu, grozīšanu vai izbeigšanu ar tās personu padara atkarīgu no tā, vai šī trešā persona uzņemas sadalījumus, kuru komerciālais lietojums neattiecas uz konkrēto darījumu;

5) piedalīšanos vai nepiedalīšanos konkursos vai izsolēs vai par šīs darbības (bezdarbības) noteikumiem, izņemot gadījumus, kad konkurenti publiši darījuši zināmu kopīgu piedāvājumu un šā piedāvājuma mērķis nav kavēt, ierobežot vai deformēt konkurenci;

6) nevienādu noteikumu piemērošanu ekvivalentos darījumos ar trešajām personām, radot tām konkurences ziņā nelabvēlīgākus apstākļus;

7) darbībām (bezdarbībā), kuru dēļ cits tirgus dalīnieks ir spiedis atstāt kādu konkrēto tirgu vai tiek apgrūtināta potenciāla tirgus dalībnieka iekļaušana kādā konkretajā tirgū.

(2) Par spēkā esošām tiek atzītas tādas vienošanās, kuras veicina preču ražošanas vai realizācijas uzlabošanu vai ekonomisko attīstību, radot tām šā panta pirmajā daļā noteiktu aizliegumu nepiemēro, turklāt šīs vienošanās:

1) neuzliek attiecīgajiem tirgus dalīnīkiem ierobežojumus, kuri nav nepieciešami minēto mērķu sasniegšanai;

2) nedod iespēju likvidēt konkurenci ievērojamā konkrētā tirgus daļā.
(21) Tirgus dalībniekam, kurš norāda, ka vienošanās atbilst šā panta otrās daļas prasībām, ir pienākums to pierādīt.

(3) Tirgus dalībnieki pirms vienošanās noslēgšanas, kā arī pirms vienošanas spēkā stāšanās, ja par šo vienošanos nav ierosināta lieta, ir tiesīgi iesniegt Konkurences padomei ziņojumu par attiecīgo vienošanos. Konkurences padome ir tiesīga atļaut vai atļaut ar nosacījumiem uz noteiktu termiņu paziņoto vienošanos, ja tā atbilst šā panta otrajai vai kritērijiem, saskaņā ar kuriem atsevišķas tirgus dalībnieku vienošanās netiek pakļautas šā panta pirmajā daļā minētajam vienošanās aizliegumam.

(4) Ministru kabinets nosaka:

1) atsevišķas tirgus dalībnieku vienošanās, kurš būtiski neietekmē konkurenci;

2) kritērijus, saskaņā ar kuriem atsevišķas tirgus dalībnieku vienošanās netiek pakļautas šā panta pirmajā daļā minētajam vienošanās aizliegumam.

Article 102 TFEU

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
13.pants. Dominējošā stāvokļa ļaunprātīgas izmantošanas aizliegums

(1) Jebkuram tirgus dalībniekam, kas atrodas dominējošā stāvoklī, ir aizliegts jebkādā veidā ļaunprātīgi to izmantot Latvijas teritorijā. Dominējošā stāvokļa ļaunprātīga izmantošana var izpausties arī kā:

1) atteikšanās slēgt darījumu ar citu tirgus dalībnieku vai grozīt darījuma noteikumus bez objektīvi attaisnojoša iemesla, tajā skaitā netaisnīga un nepamatota atteikšanās piegādāt preces vai sniegt pakalpojumus;

2) preču ražošanas vai realizācijas apjomu, tirgu vai tehniskās attīstības ierobežošana bez objektīvi attaisnojoša iemesla par sliktu patērētājam;

3) tādu noteikumu izvirzišana, kuri darījuma slēgšanu, grozīšanu vai izbeigšanu ar citu tirgus dalībnieku padara atkarīgu no tā, vai šis tirgus dalībnieks uzņemas papildu saistības, kurus pēc būtības un pēc komerciālā lietojuma neattiecas uz konkrēto darījumu;

4) netaisnīgu pirkšanas vai pārdošanas cenu vai citu netaisnīgu tirzniecības noteikumu tieša vai netieša uzspiešana vai piemērošana;

5) nevienādu noteikumu piemērošana ekvivalentos darījumos ar citu tirgus dalībnieku, radot tam konkurences ziņā nelabvēlīgākus apstākļus.

COMMISSION NOTICE

on the definition of relevant market for the purposes of Community competition law

(97/C 372/03)

(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law, in particular the application of Council Regulation No 17 and (EEC) No
4064/89, their equivalents in other sectoral applications such as transport, coal and steel, and agriculture, and the relevant provisions of the EEA Agreement (1). Throughout this notice, references to Articles 85 and 86 of the Treaty and to merger control are to be understood as referring to the equivalent provisions in the EEA Agreement and the ECSC Treaty.

2. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved (2) face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible inter alia to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.

3. It follows from point 2 that the concept of ‘relevant market’ is different from other definitions of market often used in other contexts. For instance, companies often use the term ‘market’ to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs.

4. The definition of the relevant market in both its product and its geographic dimensions often has a decisive influence on the assessment of a competition case. By rendering public the procedures which the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision, the Commission expects to increase the transparency of its policy and decision-making in the area of competition policy.

5. Increased transparency will also result in companies and their advisers being able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, acquisitions, the creation of joint ventures, or the establishment of certain agreements. It is also intended that companies should be in a better position to understand what sort of information the Commission considers relevant for the purposes of market definition.

6. The Commission’s interpretation of ‘relevant market’ is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II. DEFINITION OF RELEVANT MARKET

Definition of relevant product market and relevant geographic market

7. The Regulations based on Article 85 and 86 of the Treaty, in particular in section 6 of Form A/B with respect to Regulation No 17, as well as in section 6 of Form CO with respect to Regulation (EEC) No 4064/89 on the control of concentrations having a Community dimension have laid
down the following definitions, ‘Relevant product markets’ are defined as follows:

‘A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use’.

8. ‘Relevant geographic markets’ are defined as follows:

‘The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area’.

9. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. The Commission interprets the definitions in paragraphs 7 and 8 (which reflect the case-law of the Court of Justice and the Court of First Instance as well as its own decision-making practice) according to the orientations defined in this notice.

Concept of relevant market and objectives of Community competition policy

10. The concept of relevant market is closely related to the objectives pursued under Community competition policy. For example, under the Community’s merger control, the objective in controlling structural changes in the supply of a product/service is to prevent the creation or reinforcement of a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market. Under the Community’s competition rules, a dominant position is such that a firm or group of firms would be in a position to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (3). Such a position would usually arise when a firm or group of firms accounted for a large share of the supply in any given market, provided that other factors analysed in the assessment (such as entry barriers, customers’ capacity to react, etc.) point in the same direction.

11. The same approach is followed by the Commission in its application of Article 86 of the Treaty to firms that enjoy a single or collective dominant position. Within the meaning of Regulation No 17, the Commission has the power to investigate and bring to an end abuses of such a dominant position, which must also be defined by reference to the relevant market. Markets may also need to be defined in the application of Article 85 of the Treaty, in particular, in determining whether an appreciable restriction of competition exists or in establishing if the condition pursuant to Article 85 (3) (b) for an exemption from the application of Article 85 (1) is met.

12. The criteria for defining the relevant market are applied generally for the analysis of certain types of behaviour in the market and for the analysis of structural changes in the supply of products. This methodology, though, might lead to different results depending on the nature of the competition issue being examined. For instance, the scope of the geographic market might be different when analysing a concentration, where the analysis is essentially
prospective, from an analysis of past behaviour. The different time horizon considered in each case might lead to the result that different geographic markets are defined for the same products depending on whether the Commission is examining a change in the structure of supply, such as a concentration or a cooperative joint venture, or examining issues relating to certain past behaviour.

**Basic principles for market definition**

**Competitive constraints**

13. Firms are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.

14. The competitive constraints arising from supply side substitutability other than those described in paragraphs 20 to 23 and from potential competition are in general less immediate and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis.

**Demand substitution**

15. The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets.

16. Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties’ products in the short term.

17. The question to be answered is whether the parties’ customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5% to 10%) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market.
This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable. The equivalent analysis is applicable in cases concerning the concentration of buying power, where the starting point would then be the supplier and the price test serves to identify the alternative distribution channels or outlets for the supplier’s products. In the application of these principles, careful account should be taken of certain particular situations as described within paragraphs 56 and 58.

18. A practical example of this test can be provided by its application to a merger of, for instance, soft-drink bottlers. An issue to examine in such a case would be to decide whether different flavours of soft drinks belong to the same market. In practice, the question to address would be whether consumers of flavour A would switch to other flavours when confronted with a permanent price increase of 5 % to 10 % for flavour A. If a sufficient number of consumers would switch to, say, flavour B, to such an extent that the price increase for flavour A would not be profitable owing to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.

19. Generally, and in particular for the analysis of merger cases, the price to take into account will be the prevailing market price. This may not be the case where the prevailing price has been determined in the absence of sufficient competition. In particular for the investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially increased will be taken into account.

Supply substitution

20. Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term (4) without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.

21. These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.

22. A practical example of the approach to supply-side substitutability when defining product
markets is to be found in the case of paper. Paper is usually supplied in a range of different qualities, from standard writing paper to high quality papers to be used, for instance, to publish art books. From a demand point of view, different qualities of paper cannot be used for any given use, i.e. an art book or a high quality publication cannot be based on lower quality papers. However, paper plants are prepared to manufacture the different qualities, and production can be adjusted with negligible costs and in a short time-frame. In the absence of particular difficulties in distribution, paper manufacturers are able therefore, to compete for orders of the various qualities, in particular if orders are placed with sufficient lead time to allow for modification of production plans. Under such circumstances, the Commission would not define a separate market for each quality of paper and its respective use. The various qualities of paper are included in the relevant market, and their sales added up to estimate total market value and volume.

23. When supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition. Examples where supply-side substitution did not induce the Commission to enlarge the market are offered in the area of consumer products, in particular for branded beverages. Although bottling plants may in principle bottle different beverages, there are costs and lead times involved (in terms of advertising, product testing and distribution) before the products can actually be sold. In these cases, the effects of supply-side substitutability and other forms of potential competition would then be examined at a later stage.

Potential competition

24. The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view.

III. EVIDENCE RELIED ON TO DEFINE RELEVANT MARKETS

The process of defining the relevant market in practice

Product dimension

25. There is a range of evidence permitting an assessment of the extent to which substitution would take place. In individual cases, certain types of evidence will be determinant, depending very much on the characteristics and specificity of the industry and products or services that are being examined. The same type of evidence may be of no importance in other cases. In most cases, a decision will have to be based on the consideration of a number of criteria and different items of evidence. The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in
individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence.

26. The process of defining relevant markets may be summarized as follows: on the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed. In general, and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets. For instance, with respect to the product market, the issue will often be to establish whether product A and product B belong or do not belong to the same product market. It is often the case that the inclusion of product B would be enough to remove any competition concerns.

27. In such situations it is not necessary to consider whether the market includes additional products, or to reach a definitive conclusion on the precise product market. If under the conceivable alternative market definitions the operation in question does not raise competition concerns, the question of market definition will be left open, reducing thereby the burden on companies to supply information.

**Geographic dimension**

28. The Commission's approach to geographic market definition might be summarized as follows: it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.

29. The reasons behind any particular configuration of prices and market shares need to be explored. Companies might enjoy high market shares in their domestic markets just because of the weight of the past, and conversely, a homogeneous presence of companies throughout the EEA might be consistent with national or regional geographic markets. The initial working hypothesis will therefore be checked against an analysis of demand characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, other) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers. The theoretical experiment is again based on substitution arising from changes in relative prices, and the question to answer is again whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.

30. If necessary, a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price
regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.

31. The actual pattern and evolution of trade flows offers useful supplementary indications as to the economic importance of each demand or supply factor mentioned above, and the extent to which they may or may not constitute actual barriers creating different geographic markets. The analysis of trade flows will generally address the question of transport costs and the extent to which these may hinder trade between different areas, having regard to plant location, costs of production and relative price levels.

**Market integration in the Community**

32. Finally, the Commission also takes into account the continuing process of market integration, in particular in the Community, when defining geographic markets, especially in the area of concentrations and structural joint ventures. The measures adopted and implemented in the internal market programme to remove barriers to trade and further integrate the Community markets cannot be ignored when assessing the effects on competition of a concentration or a structural joint venture. A situation where national markets have been artifically isolated from each other because of the existence of legislative barriers that have now been removed will generally lead to a cautious assessment of past evidence regarding prices, market shares or trade patterns. A process of market integration that would, in the short term, lead to wider geographic markets may therefore be taken into consideration when defining the geographic market for the purposes of assessing concentrations and joint ventures.

**The process of gathering evidence**

33. When a precise market definition is deemed necessary, the Commission will often contact the main customers and the main companies in the industry to enquire into their views about the boundaries of product and geographic markets and to obtain the necessary factual evidence to reach a conclusion. The Commission might also contact the relevant professional associations, and companies active in upstream markets, so as to be able to define, in so far as necessary, separate product and geographic markets, for different levels of production or distribution of the products/services in question. It might also request additional information to the undertakings involved.

34. Where appropriate, the Commission will address written requests for information to the market players mentioned above. These requests will usually include questions relating to the perceptions of companies about reactions to hypothetical price increases and their views of the boundaries of the relevant market. They will also ask for provision of the factual information the Commission deems necessary to reach a conclusion on the extent of the relevant market. The Commission might also discuss with marketing directors or other officers of those companies to gain a better understanding on how negotiations between suppliers
and customers take place and better understand issues relating to the definition of the relevant market. Where appropriate, they might also carry out visits or inspections to the premises of the parties, their customers and/or their competitors, in order to better understand how products are manufactured and sold.

35. The type of evidence relevant to reach a conclusion as to the product market can be categorized as follows:

**Evidence to define markets — product dimension**

36. An analysis of the product characteristics and its intended use allows the Commission, as a first step, to limit the field of investigation of possible substitutes. However, product characteristics and intended use are insufficient to show whether two products are demand substitutes. Functional inter-changeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well. For example, there may be different competitive constraints in the original equipment market for car components and in spare parts, thereby leading to a separate delineation of two relevant markets. Conversely, differences in product characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value different characteristics.

37. The type of evidence the Commission considers relevant to assess whether two products are demand substitutes can be categorized as follows:

38. **Evidence of substitution in the recent past.** In certain cases, it is possible to analyse evidence relating to recent past events or shocks in the market that offer actual examples of substitution between two products. When available, this sort of information will normally be fundamental for market definition. If there have been changes in relative prices in the past (all else being equal), the reactions in terms of quantities demanded will be determinant in establishing substitutability. Launches of new products in the past can also offer useful information, when it is possible to precisely analyse which products have lost sales to the new product.

39. There are a number of **quantitative tests** that have specifically been designed for the purpose of delineating markets. These tests consist of various econometric and statistical approaches estimates of elasticities and cross-price elasticities (1) for the demand of a product, tests based on similarity of price movements over time, the analysis of causality between price series and similarity of price levels and/or their convergence. The Commission takes into account the available quantitative evidence capable of withstanding rigorous scrutiny for the purposes of establishing patterns of substitution in the past.

40. **Views of customers and competitors.** The Commission often contacts the main customers and competitors of the companies involved in its enquiries, to gather their views on the boundaries of the product market as well as most of the factual information it requires to reach a conclusion on the scope of the market. Reasoned answers of customers and competitors as to what would happen if relative prices for the candidate products were to increase in the candidate geographic area by a small amount (for instance of 5% to 10%) are
taken into account when they are sufficiently backed by factual evidence.

41. **Consumer preferences.** In the case of consumer goods, it may be difficult for the Commission to gather the direct views of end consumers about substitute products. *Marketing studies* that companies have commissioned in the past and that are used by companies in their own decision-making as to pricing of their products and/or marketing actions may provide useful information for the Commission’s delineation of the relevant market. Consumer surveys on usage patterns and attitudes, data from consumer’s purchasing patterns, the views expressed by retailers and more generally, market research studies submitted by the parties and their competitors are taken into account to establish whether an economically significant proportion of consumers consider two products as substitutable, also taking into account the importance of brands for the products in question. The methodology followed in consumer surveys carried out *ad hoc* by the undertakings involved or their competitors for the purposes of a merger procedure or a procedure pursuant to Regulation No 17 will usually be scrutinized with utmost care. Unlike pre-existing studies, they have not been prepared in the normal course of business for the adoption of business decisions.

42. **Barriers and costs associated with switching demand to potential substitutes.** There are a number of barriers and costs that might prevent the Commission from considering two *prima facie* demand substitutes as belonging to one single product market. It is not possible to provide an exhaustive list of all the possible barriers to substitution and of switching costs. These barriers or obstacles might have a wide range of origins, and in its decisions, the Commission has been confronted with regulatory barriers or other forms of State intervention, constraints arising in downstream markets, need to incur specific capital investment or loss in current output in order to switch to alternative inputs, the location of customers, specific investment in production process, learning and human capital investment, retooling costs or other investments, uncertainty about quality and reputation of unknown suppliers, and others.

43. **Different categories of customers and price discrimination.** The extent of the product market might be narrowed in the presence of distinct groups of customers. A distinct group of customers for the relevant product may constitute a narrower, distinct market when such a group could be subject to price discrimination. This will usually be the case when two conditions are met: (a) it is possible to identify clearly which group an individual customer belongs to at the moment of selling the relevant products to him, and (b) trade among customers or arbitrage by third parties should not be feasible.

**Evidence for defining markets — geographic dimension**

44. The type of evidence the Commission considers relevant to reach a conclusion as to the geographic market can be categorized as follows:

45. **Past evidence of diversion of orders to other areas.** In certain cases, evidence on changes in prices between different areas and consequent reactions by customers might be available. Generally, the same quantitative tests used for product market definition might as well be used in geographic market definition, bearing in mind that international comparisons of prices might be more complex due to a number of factors such as exchange rate movements,
taxation and product differentiation.

46. **Basic demand characteristics.** The nature of demand for the relevant product may in itself determine the scope of the geographical market. Factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local presence have a strong potential to limit the geographic scope of competition.

47. **Views of customers and competitors.** Where appropriate, the Commission will contact the main customers and competitors of the parties in its enquiries, to gather their views on the boundaries of the geographic market as well as most of the factual information it requires to reach a conclusion on the scope of the market when they are sufficiently backed by factual evidence.

48. **Current geographic pattern of purchases.** An examination of the customers' current geographic pattern of purchases provides useful evidence as to the possible scope of the geographic market. When customers purchase from companies located anywhere in the Community or the EEA on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the Community or the EEA submit bids, usually the geographic market will be considered to be Community-wide.

49. **Trade flows/pattern of shipments.** When the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns, information on trade flows might be used alternatively, provided that the trade statistics are available with a sufficient degree of detail for the relevant products. Trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive.

50. **Barriers and switching costs associated to divert orders to companies located in other areas.** The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, barriers isolating the national market have to identified before it is concluded that the relevant geographic market in such a case is national. Perhaps the clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products. The impact of transport costs will usually limit the scope of the geographic market for bulky, low-value products, bearing in mind that a transport disadvantage might also be compensated by a comparative advantage in other costs (labour costs or raw materials). Access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers isolating a geographic area from the competitive pressure of companies located outside that area. Significant switching costs in procuring supplies from companies located in other countries constitute additional sources of such barriers.

51. On the basis of the evidence gathered, the Commission will then define a geographic market that could range from a local dimension to a global one, and there are examples of both local and global markets in past decisions of the Commission.

52. The paragraphs above describe the different factors which might be relevant to define
markets. This does not imply that in each individual case it will be necessary to obtain evidence and assess each of these factors. Often in practice the evidence provided by a subset of these factors will be sufficient to reach a conclusion, as shown in the past decisional practice of the Commission.

IV. CALCULATION OF MARKET SHARE

53. The definition of the relevant market in both its product and geographic dimensions allows the identification the suppliers and the customers/consumers active on that market. On that basis, a total market size and market shares for each supplier can be calculated on the basis of their sales of the relevant products in the relevant area. In practice, the total market size and market shares are often available from market sources, i.e. companies' estimates, studies commissioned from industry consultants and/or trade associations. When this is not the case, or when available estimates are not reliable, the Commission will usually ask each supplier in the relevant market to provide its own sales in order to calculate total market size and market shares.

54. If sales are usually the reference to calculate market shares, there are nevertheless other indications that, depending on the specific products or industry in question, can offer useful information such as, in particular, capacity, the number of players in bidding markets, units of fleet as in aerospace, or the reserves held in the case of sectors such as mining.

55. As a rule of thumb, both volume sales and value sales provide useful information. In cases of differentiated products, sales in value and their associated market share will usually be considered to better reflect the relative position and strength of each supplier.

V. ADDITIONAL CONSIDERATIONS

56. There are certain areas where the application of the principles above has to be undertaken with care. This is the case when considering primary and secondary markets, in particular, when the behaviour of undertakings at a point in time has to be analysed pursuant to Article 86. The method of defining markets in these cases is the same, i.e. assessing the responses of customers based on their purchasing decisions to relative price changes, but taking into account as well, constraints on substitution imposed by conditions in the connected markets. A narrow definition of market for secondary products, for instance, spare parts, may result when compatibility with the primary product is important. Problems of finding compatible secondary products together with the existence of high prices and a long lifetime of the primary products may render relative price increases of secondary products profitable. A different market definition may result if significant substitution between secondary products is possible or if the characteristics of the primary products make quick and direct consumer responses to relative price increases of the secondary products feasible.

57. In certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extreme of the market are not directly substitutable. An example might be provided by the geographic dimension of a product with significant transport costs. In such cases, deliveries from a given plant are limited to a certain
area around each plant by the impact of transport costs. In principle, such an area could constitute the relevant geographic market. However, if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market. The same reasoning may apply if product B is a demand substitute for products A and C. Even if products A and C are not direct demand substitutes, they might be found to be in the same relevant product market since their respective pricing might be constrained by substitution to B.

58. From a practical perspective, the concept of chains of substitution has to be corroborated by actual evidence, for instance related to price interdependence at the extremes of the chains of substitution, in order to lead to an extension of the relevant market in an individual case. Price levels at the extremes of the chains would have to be of the same magnitude as well.

(1) The focus of assessment in State aid cases is the aid recipient and the industry/sector concerned rather than identification of competitive constraints faced by the aid recipient. When consideration of market power and therefore of the relevant market are raised in any particular case, elements of the approach outlined here might serve as a basis for the assessment of State aid cases.

(2) For the purposes of this notice, the undertakings involved will be, in the case of a concentration, the parties to the concentration; in investigations within the meaning of Article 86 of the Treaty, the undertaking being investigated or the complainants; for investigations within the meaning of Article 85, the parties to the Agreement.

(3) Definition given by the Court of Justice in its judgment of 13 February 1979 in Case 85/76, Hoffmann-La Roche [1979] ECR 461, and confirmed in subsequent judgments.

(4) That is such a period that does not entail a significant adjustment of existing tangible and intangible assets (see paragraph 23).

(5) Own-price elasticity of demand for product X is a measure of the responsiveness of demand for X to percentage change in its own price. Cross-prise elasticity between products X and Y is the responsiveness of demand for product X to percentage change in the price of product Y.
In Case T-41/96,

Bayer AG, established in Leverkusen (Germany), represented by J. Sedemund, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of A. May, 398 Route d’Esch,

applicant,

v

Commission of the European Communities, represented by W. Wils and K. Wiedner, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the offices of C. Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 96/478/EC of 10 January 1996 relating to a proceeding under Article 85 of the EC Treaty (Case IV/34.279/F3 - Adalat) (OJ 1996 L 201, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of: J.D. Cooke, President, R. García-Valdecasas, P. Lindh, J. Pirrung and M. Vilaras, Judges,

Registrar: J. Palacio González, Administrator,
having regard to the written procedure and further to the hearing on 28 October 1999,
gives the following

Judgment

Background

1. The applicant, Bayer AG (hereinafter 'Bayer' or 'the Bayer Group'), is the parent company of one of the main European chemical and pharmaceutical groups and has a presence through its national subsidiaries in all the Member States of the Community. For many years, it has manufactured and marketed under the trade name 'Adalat' or 'Adalate' a range of medicinal preparations whose active ingredient is nifedipine, designed to treat cardio-vascular disease.

2. In most Member States, the price of Adalat is directly or indirectly fixed by the national health authorities. Between 1989 and 1993, the prices fixed by the Spanish and French health services were, on average, 40% lower than prices in the United Kingdom.


4. Faced with that situation, the Bayer Group changed its delivery policy, and began to cease fulfilling all of the increasingly large orders placed by wholesalers in Spain and France with its Spanish and French subsidiaries. That change took place in 1989 for orders received by Bayer Spain and in the fourth quarter of 1991 for those received by Bayer France.

5. Following complaints by some of the wholesalers concerned, the Commission started an administrative investigation procedure concerning alleged infringements of Article 85(1) of the EC Treaty (now Article 81(1) EC) by the Bayer Group in France and Spain.

6. On 10 January 1996, the Commission adopted Decision 96/478/EC, which forms the subject-matter of this action, relating to a proceeding under Article 85 of the EC Treaty (now Article 81(1) EC) by the Bayer Group in France and Spain.

7. In the words of Article 1 of the Decision, 'the prohibition on the exportation to other Member States of the products Adalate and Adalate 20 mg LP from France and on that of the products Adalat and Adalat-Retard from Spain, as has been agreed as part of their ongoing business relations, between Bayer France and its wholesalers since 1991, and between Bayer Spain and its wholesalers since at least 1989, constitutes an infringement of Article 85(1) of the Treaty on the part of Bayer AG'.

8. Under Article 2 of the Decision:

'Bayer AG shall bring the infringement to an end and shall in particular:

- send, within two months of notification of this Decision, a circular to the wholesalers in France and in Spain stating that exports are allowed within the Community and are not penalised,

- include this clarification, within two months of notification of this Decision, in the general terms and conditions of sale for France and Spain.'

9. Article 3 of the Decision imposes a fine of ECU 3 million on Bayer.

10.
Article 4 fixes a periodic penalty of ECU 1 000 for each day's delay in performing the specific obligations set out in Article 2.

**Procedure and forms of order sought by the parties**

11. By application lodged at the Registry of the Court of First Instance on 22 March 1996, Bayer brought an action for the annulment of the Decision.

12. By separate document lodged at the Court Registry on the same day, the applicant also applied for suspension of the operation of Article 2 of the Decision. By order of the President of the Court of First Instance of 3 June 1996, suspension of the operation of Article 2 of the Decision was granted and costs were reserved.

13. On 1 August 1996, a German association of importers of medicinal products, the Bundesverband der Arzneimittel-Importeure eV (‘the BAI’) applied for leave to intervene in support of the form of order sought by the Commission.

14. On 26 August 1996, the European Federation of Pharmaceutical Industries' Associations (‘the EFPIA’), a professional association representing the interests of 16 national professional associations in relation to the medicinal products industry, applied for leave to intervene in support of the form of order sought by the applicant.

15. By orders of 8 November 1996, the President of the Fifth Chamber (Extended Composition) of the Court of First Instance granted the two associations leave to intervene. The interveners lodged their statements in intervention on 12 February 1997. The main parties lodged their observations on the statements in intervention on 11 April 1997.

16. On hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral proceedings and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure, to put a series of questions in writing to the applicant and the Commission, requesting them to reply to those questions at the hearing.

17. The parties presented oral argument and replied to the written and oral questions of the Court of First Instance at the hearing on 28 October 1999. At the hearing, in support of some of its replies to questions by the Court, the Commission requested leave to place on the Court's file some of the annexes to the statement of objections sent to the applicant during the administrative procedure. Since the applicant made no objection, and stated that the documents in question did not contain any confidential information concerning it, all the parties, including the interveners, received copies of those annexes and had the opportunity to express an opinion on them during the hearing.

18. The applicant claims that the Court of First Instance should:

   - annul the Decision;

   - in the alternative, annul the fine of ECU 3 000 000 imposed upon it;

   - further in the alternative, reduce the fine;

   - order the Commission to pay the costs.

19. EFPIA, the intervener in support of the applicant, claims that the Court of First Instance should:

   - annul the Decision;

   - order the Commission to pay the costs of its intervention.
20. The Commission contends that the Court of First Instance should:

- dismiss the application;
- order the applicant to pay the costs.

21. BAI, the intervener in support of the Commission, contends that the Court of First Instance should dismiss the application.

The Decision

22. The Decision concerns Adalat, a product belonging to a category of medicinal products known as 'calcium antagonists', suitable for treating certain cardiovascular diseases (coronary heart disease, arterial hypertension and congestive heart failure) (eighth recital). However, the scope of the Decision is limited to two products in the Adalat range, namely the 10 mg capsule (marketed in the United Kingdom and Spain under the name 'Adalat' and in France under the name 'Adalate') and the 20 mg modified-release tablet (marketed in the United Kingdom and Spain under the name Adalat-Retard and in France under the name 'Adalate 20 mg LP') (fourth recital).

23. As regards the geographical market, the Decision held that the relevant markets in this case were the national markets (recitals 150 to 152), taking account of the fact that, at the time of the activities penalised, the business of the pharmaceutical industry took place in an essentially national context, marketing authorisation for a medicinal product falling exclusively within the competence of the Member States. Moreover, the sale of medicines was influenced by the administrative, and particularly purchasing, policies adopted in Member States, especially in France and Spain, where prices were directly set by the competent national authority. Finally, the Decision states that differences in price-fixing methods and refund arrangements meant that there were wide disparities in the prices of medicinal products in Member States.

24. As regards the product market, the Decision states (recital 153) that it is defined by reference to the criterion of identical therapeutic uses for the various competing products.

25. As regards, finally, the relevant market in relation to the conduct examined in the Decision, it may be seen from recital 154 that the United Kingdom was taken to be the major relevant market 'since the agreements directly affect this market by protecting it from parallel imports', and that, 'secondarily, ..., the markets from which the parallel imports originate, France and Spain' were deemed to be relevant markets 'since they are artificially closed through the hindering of parallel exports'.

26. With regard to the market shares held by Bayer with the marketing of Adalat, the Decision (recital 23) states that they are indicated by reference to the major therapeutic uses of the product. The Commission considered that, in France, Adalate represented a market share of 5.1% on the coronary heart disease market and 4.1% on the hypertension market. In Spain, Adalat represented 7.4% on the coronary heart disease market and 8.7% on the hypertension market. In the United Kingdom, the market shares were 19.6% on the coronary heart disease market and 16.6% on the hypertension market. Finally, in the Community (of 12), Adalat represented 7.6% of the coronary heart disease market and 5.8% of the hypertension market (recitals 24 to 27).

27. The Decision describes the conduct of the Bayer Group when faced with the phenomenon of parallel exports of Adalat from Spain and France to the United Kingdom, and the reactions of the wholesalers and customers of Bayer Spain and Bayer France in that respect.

28. As to the legal assessment of that conduct, the Decision states (recitals 155 to 159) that Bayer France and Bayer Spain committed an infringement of Article 85(1) of the Treaty by imposing an export ban as part of their commercial relations with their respective wholesalers, that the latter knew the real reasons of Bayer France and Bayer Spain, and that they aligned their conduct in accordance with the requirements of
**Bayer France and Bayer Spain.** The Decision considers that this constitutes an appreciable restriction of competition and has an appreciable effect on trade between Member States.

**Substance**

29.

The applicant pleads, primarily, infringement of Article 85(1) of the Treaty inasmuch as its conduct, as referred to in the Decision, was unilaterally planned and adopted by itself, and does not fall within the scope of that provision in the absence of any agreement between itself and its wholesalers concerning exports of products delivered to the United Kingdom. In the alternative, the applicant claims that the Commission made an obvious error of assessment by applying that provision to conduct that was lawful by virtue of Article 47 of the Act of Accession of Spain to the European Communities concerning the protection of patents. In the further alternative, it puts forward a plea in law alleging breach of the principles of legal certainty and proportionality through the imposition of a fine pursuant to a novel application of Article 85 of the Treaty, and infringement of Article 15(2) 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).

The main plea in law, alleging infringement of Article 85(1) of the Treaty, in that the Commission considers that provision to be applicable to the facts of the case

I - Arguments of the parties

30.

According to the applicant, the relevant facts in this case may be summarised as follows: in a Member State in which prices have been fixed by the national health authorities well below the prices charged in other Member States, a manufacturer who does not dominate the market accepts orders from wholesalers only in respect of a volume corresponding to the quantities normally sold in their traditional delivery areas. The reason for which the orders for products are partially refused lies in the fact that the wholesalers disproportionately raise the quantities normally ordered for the purpose of exporting the surplus in order to profit from price differences. For the applicant such a practice is unwelcome because it causes major turnover losses for its own subsidiaries established in the other States, threatening their economic existence. So as not to commit an infringement of Article 85 of the Treaty, it gives its sales personnel strict instructions to solve the problem solely by unilaterally placing quotas on the quantities ordered and citing to the wholesalers as the reason only 'stock shortages'. In time, the wholesalers nevertheless discover the true motives of the manufacturer. Given that the latter accepts orders only if they are at the level of the quantities ordered previously, the wholesalers pretend to adjust their orders accordingly while at the same time obtaining larger supplies for export by asking other wholesalers to buy the products for them. In fact, the parallel exports continue and even increase.

31.

The applicant points out that, in most Member States, the price of Adalat is directly or indirectly fixed by the health services of the State, which, on account of the use of very different criteria, causes enormous price differences between one Member State and another. In particular, during the period at issue - from 1989 to 1993 - in Spain and France the State health services fixed the prices on average 40% lower than in the United Kingdom, where the prices of pharmaceutical products are subject to a different form of control by the State, based on the profits of the pharmaceutical companies.

32.

It was on account of such price differences that Spanish wholesalers, who traditionally undertake the supply of pharmacies in their Spanish sales area and buy Adalat from the applicant's Spanish subsidiary, began in 1989 to export that product in large quantities to the United Kingdom, thereby achieving far larger profits than those achieved by supplying their traditional customers in Spain (the applicant states, for example, that a single wholesaler suddenly ordered a quantity representing nearly half the total consumption of Spain; see recital 114 of the Decision). The applicant adds that, because of the immense profits to be made with those exports, some of the Spanish wholesalers even completely gave up supplying the Spanish pharmacies to which they normally delivered in order to resell nearly all their Adalat in the United Kingdom. That situation caused major supply shortages for pharmacies in certain regions of Spain, and forced Bayer, in order to protect patients, to deliver directly to the pharmacies neglected by the Spanish wholesalers.
As for French wholesalers, the applicant states that similar events took place in France as from September-October 1991, when those wholesalers began, in turn, to export large quantities of Adalat to the United Kingdom.

The applicant maintains that it was in the face of that situation, and having regard to the long-term problems for Bayer UK, that it wished to react against that phenomenon of parallel imports, which was examined at the highest level of decision-making and responsibility. After thorough discussions and a meticulous legal examination of the various possible measures, taking account of the Commission's decision-making practice and the Community case-law on the matter, it was decided that, rather than ceasing to supply the wholesalers altogether and itself assuming the task of distribution, a 'softer' measure should be chosen - merely a reduction in the quantities delivered. The applicant therefore decided to accept orders from wholesalers only on the basis of their orders in the previous year, while nevertheless allowing them to be raised by about 10% per year, in line with the rise in consumption.

The applicant acknowledges that it has an internal information system in order to try to establish the existence and level of parallel imports, but denies both the scope of that system, as alleged in the Decision, and the statements as to its actual application in relation to French and Spanish wholesalers, which are circumstances from which the Commission erroneously deduces the existence of an 'export ban'. It explains that the system consisted only of noting the quantities delivered to each wholesaler in previous years and, on the basis of those 'reference quantities', increased, reasonably, by about 10% per annum to take account of both inflation and the rise in general price indices, of fixing in advance the quantities to be delivered annually and monthly.

The applicant denies having put into practice a policy of supply contingent upon compliance with an alleged export ban, as argued by the Commission, and explains that the system established does not involve the carrying out of subsequent checks to determine whether the quantities delivered had been exported.

Finally, the applicant emphasises the freedom of wholesalers to export the products delivered, arising from the fact that, knowing that Bayer did not in any way monitor the final destination of those products, they could not fear 'sanctions' if the ultimate destination of the products was the United Kingdom. The wholesalers took 'de facto' advantage of that freedom, to a large extent exporting the products which had been delivered to them and those delivered to other wholesalers or local agents.

The applicant maintains that the Commission has not established the existence of an agreement between Bayer and its wholesalers, and claims that there was no intention to establish an agreement either on its part, because it considered it lawful to implement a unilateral policy of limited delivery in order to make parallel exports more difficult, or on the part of the wholesalers, who demonstrated by their conduct their total opposition to such a policy being applied. In the applicant's submission, the Commission's argument amounts to saying that the requirement of the existence of an agreement between undertakings within the meaning of Article 85 of the Treaty is fulfilled even if the party placing the order merely pretends to alter his conduct, and his actual conduct proves quite clearly that he specifically does not wish to conclude the alleged agreement. Such an approach is, the applicant submits, contrary to the wording and the purpose of Article 85, since concurrence of wills, that is to say the central element in the concept of agreement, would no longer be necessary in such a concept of agreement.

Moreover, the applicant maintains that, in order to justify the adoption of that new approach, the Commission could not rely on decision-making and case-law precedents, given the differences between the facts in this case and those in point in previous decisions concerning hindrances to parallel exports.

The applicant claims that, hitherto, it has been undisputed that the partial or complete refusal of deliveries constitutes a unilateral act that cannot fall within Article 85 of the Treaty. In the absence of an agreement within the meaning of Article 85(1) of the Treaty, that provision cannot be applied in this case. In its submission, the Commission's argument extends the scope of Article 85 of the Treaty to a unilateral refusal of delivery which could fall only under Article 86 of the Treaty, is such a way as to eliminate the systematic delimitation between the scope of Article 85 and that of Article 86.

According to the applicant, by adopting the Decision, the Commission embarked upon a new experiment in order to test the viability of a policy approach based upon a new and special legal regime for parallel imports and the problems raised by them in competition matters. That policy went beyond the
42. Furthermore, the decision of principle contained in the Decision has a scope going far beyond this case and would entail a very wide obligation to contract on undertakings which do not dominate the market, given that a manufacturer could not refuse to fulfil orders on the grounds referred to above without infringing Article 85 of the Treaty. That result would diametrically contradict the wording and scheme of Articles 85 and 86 of the Treaty.

43. Next, the applicant criticises the Commission for ignoring the fact that competition for pharmaceutical products is greatly distorted by price regulations, which are different in each Member State. The applicant contends that those regulations are difficult to reconcile with Article 30 of the EC Treaty (now Article 28 EC). It also argues that the national systems for directly and indirectly fixing the prices of pharmaceutical products, which are very different from each other, greatly distort competition and therefore infringe Article 3(g) of the EC Treaty.

44. It also notes that, in the pharmaceutical area, the Community is still far from achieving an internal market, and criticises the fact that undertakings are treated as if it had already been achieved, whereas the Community has not taken any effective measures to harmonise national systems for fixing prices so that the conditions of competition are not distorted.

45. It also challenges the Commission’s argument that Community rules are not necessary because, in the long term, parallel imports will bring about harmonisation of the prices of medicinal products.

46. The applicant proposes that certain witnesses be heard in order to prove, first, that the conduct of certain Spanish wholesalers, who had exported all their boxes of Adalat, had endangered the supply of many Spanish pharmacies; second, that the decision no longer to fulfil all orders had been preceded by a meticulous legal examination of the compatibility of that decision with Community law; and, third, that the Commission had declined to pursue an investigation prior to the one which gave rise to this action, in which the conduct of Bayer towards parallel importers would already have been examined.

47. The EFPIA, which has intervened in support of the applicant, endorses the applicant’s arguments.

48. The Commission contends that the infringement is constituted by the agreement between the applicant and Spanish and French wholesalers concerning the ban on exporting the product Adalat to other Member States.

49. It maintains that Bayer France and Bayer Spain planned and imposed an export ban, and that, in order to establish it, the Bayer Group set up a system for monitoring parallel imports consisting in identifying exporting wholesalers, drastically reducing deliveries, monitoring the final destination of the quantities delivered, and penalising wholesalers who exported deliveries by reducing deliveries in the future. The Commission considers it established that Bayer put that system into operation, that the wholesalers knew the applicant’s motives, and that they consented to the export ban because they knew that, otherwise, they had to expect that their orders would be fulfilled only at the level of the needs of the national market, or at a lower level fixed by the applicant.

50. The Commission submits that it is incorrect to maintain that Bayer decided, in a generalised manner, to deliver to all the wholesalers quantities at least equivalent to the reference quantity, namely the quantity of the previous year increased by 10%. Thus, the reductions in deliveries in relation to orders were not applied to all the wholesalers in accordance with the alleged single reference level (see recital 96 of the Decision). For certain wholesalers, the orders were reduced to the level of the previous year without applying the 10% increase (case of CERP Lorraine, referred to in recitals 87 and 165 of the Decision, and the case of Hefame, referred to in recitals 122 to 124 and 168 of the Decision), while in other cases the size of the reduction could even have harmed the capacity of the wholesalers concerned to supply their traditional market in sufficient quantity (case of Hufasa, referred to in recitals 114, 127 and 166 of the Decision, and the case of Cofares, referred to in recitals 121 and 169 of the Decision).

51. The wholesalers therefore considered that the restrictions imposed were linked to exports and that, in view of the possible retaliatory measures, they had every interest in formally complying with the export
ban, which they did. The wholesalers agreed with the applicant not to export Adalat so as to obtain sufficient supplies in return.

The Commission claims that, in order to put that export ban into place, the applicant counted on the acquiescence of the wholesalers, and maintains that the concurrence of wills is not contradicted by the fact that the two parties did not have the same interest in concluding the agreement. An agreement within the meaning of Article 85(1) of the Treaty requires only that the two parties have an interest in its being concluded, without there being any need for that interest to be identical. Since the wholesalers had an interest in avoiding restrictions on deliveries and the applicant had an interest in preventing, or at least limiting, parallel exports, a concurrence of wills to prevent, or at least limit, parallel exports existed.

The Commission maintains that the fact that the wholesalers did not completely renounce exports cannot call into doubt the existence in this case of an agreement or an acquiescence on their part in relation to the export ban. Whilst it recognises that the Spanish and French wholesalers would have preferred to continue their export operations to the United Kingdom, it claims that they had reduced the quantities ordered to a level such that Bayer must have had the impression that they were responding to its declared wish to see them limit themselves to the needs of their traditional markets only.

The Commission contends that the Decision is entirely consistent with its decision-making practice and the case-law of the Court of Justice, the concept of an agreement having formed the subject of a similar interpretation, in particular, in Case C-277/87 (Summary publication) Sandoz v Commission [1990] ECR I-45 and Case C-279/87 (Summary publication) Tipp-Ex v Commission [1990] ECR I-261.

The Commission denies having called into question the delimitation between the scope of Article 85 and that of Article 86 of the Treaty. It maintains that in this case the facts fall within Article 85 concerning agreements because the wholesalers decided themselves to bend to the will of the applicant and ensure sufficient supplies by agreeing to limit exports. Therefore, the Commission argues, the considerations of legal policy put forward by the applicant are based on premises that are themselves erroneous, for which reason it is not necessary to examine them further.

The Commission does not agree with the applicant’s statement that the pharmaceutical sector constitutes a special market to which the competition rules should apply only in a limited way. It acknowledges that many Member States continue to intervene in the pharmaceutical products market and that, given the existing differences in approach, average prices and consumption habits differ. The Commission points out, however, that it has been held that it cannot challenge price control systems as such by recourse to the rules on the free movement of goods, but can only combat possible discriminatory repercussions in the light of Article 30 of the Treaty. It was for that reason that the Commission attacked only State measures which clearly discriminated in favour of national pharmaceutical industry or research.

It maintains that the fact that the Member States have different systems for regulating prices does not mean that the objective of establishing an internal market does not apply to the pharmaceutical area. It contends that since, in any event, the price regulation systems leave undertakings sufficient margin for manoeuvre, parallel imports must not be hindered either by State measures or by conduct in restraint of competition by the undertakings. Moreover, if State measures hindering parallel exports are prohibited, measures taken by undertakings pursuing the same goal, as in this case, should also be prohibited. Consequently, the Commission argues, the very fact of hindering parallel imports of medicinal products infringes Article 85 of the Treaty, as is shown in particular by the Sandoz judgment.

The Commission adds that, in its judgments in Case 15/74 Centrafarm v Sterling Drug [1974] ECR 1147 and Joined Cases 55/80 and 57/80 Musik-Vertrieb Membran v GEMA [1981] ECR 147, the Court of Justice has already stated that the rules on the implementation of the free movement of goods apply to an industry whether or not the national provisions concerned have been subject to harmonisation. The Commission therefore concludes that steps may also be taken to combat export bans even in the pharmaceutical sector, as is clear from the case-law of the Court of Justice. It refers in particular, as regards Article 30 of the Treaty, to Case 104/75 De Peijper [1976] ECR 613, Case 102/77 Hoffman-La Roche v Centrafarm [1978] ECR 1139, and Case 187/80 Merck v Stephani and Exler [1981] ECR 2063, and, concerning Article 85(1) of the Treaty, to the judgment in Sandoz, cited above.

The Commission then affirms that it sets out from the principle that, in the long term, parallel imports will bring about the harmonisation of the price of medicinal products and it does not consider it acceptable
for parallel imports to be hindered so as to enable pharmaceutical companies to impose excessive tariffs in countries not applying any price control in order to compensate for lower profits in Member States which intervene more on prices.

60. The BAI states, on the one hand, that, in the medicinal-products market, pharmacies are unable both economically and logistically to keep a full assortment of current medicines in stock in sufficient quantities, and, on the other hand, that, by reason of their position and function on that market, wholesalers are obliged to have such an assortment in stock, so as to be able to deliver rapidly to a pharmacy all the medicinal products ordered by it, lest it turn to a wholesaler having the necessary stocks. In those circumstances, and bearing in mind the structure of the pharmaceutical market and of the system for monitoring distribution established by Bayer, the BAI contends that wholesalers had no option but to yield to that control, significantly reduce orders and hence significantly reduce exports, without the manufacturer needing to threaten them expressly.

61. As regards the export ban, the existence of sanctions against exporting wholesalers is, for the BAI, indisputable, because Bayer constantly monitored the distribution of its products and always adapted itself to market developments. In support of that contention, it maintains that the table of orders for 'Adalate 20 mg LP' contained in recital 87 of the Decision clearly proves that any wholesaler who carried out exports had to expect a subsequent reduction in the volumes delivered, and that Bayer reacted each time to the volume of the wholesalers' orders and penalised exporting wholesalers by making very large reductions in deliveries.

II - Findings of the Court of First Instance

A. Preliminary observations

62. It is settled case-law that, where it hears an action for the annulment of a decision applying Article 85(1) of the Treaty, the Court of First Instance must undertake a comprehensive review of the question whether or not the conditions for applying Article 85(1) are met (Case 42/84 Remia v Commission [1985] ECR 2545, paragraph 34; Joined Cases 142/84 and 156/84 BAT and Reynolds v Commission [1987] ECR 4487, paragraph 62).

63. Under the first paragraph of Article 85(1) of the Treaty:

'The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market ...'

64. It is clear from the wording of that article that the prohibition thus proclaimed concerns exclusively conduct that is coordinated bilaterally or multilaterally, in the form of agreements between undertakings, decisions by associations of undertakings and concerted practices.

65. In this case, it is found in the Decision that there is an 'agreement between undertakings' within the meaning of that article. The applicant maintains, however, that the Decision penalises unilateral conduct on its part that falls outside the scope of the article. It claims that the Commission has given the concept of an agreement within the meaning of Article 85(1) of the Treaty an interpretation which goes beyond the precedents in the case-law and that its application to the present case infringes that provision of the Treaty. The Commission contends that it has fully followed the case-law in its evaluation of that concept and has applied it in a wholly appropriate manner to the facts of this case. It therefore needs to be determined whether, having regard to the definition of that concept in the case-law, the Commission was entitled to perceive in the conduct established in the Decision the factors constituting an agreement between undertakings within the meaning of Article 85(1) of the Treaty.

B. The concept of an agreement within the meaning of Article 85(1) of the Treaty

It is also clear from the case-law in that order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case 41/69 ACF Chemiefarma v Commission [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 Van Landewyck and Others v Commission [1980] ECR 3125, paragraph 86; Case T-7/89 Hercules Chemicals v Commission [1991] ECR II-1711, paragraph 256).

As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (see, in particular, ACF Chemiefarma, paragraph 112, and Van Landewyck, paragraph 86), without its having to constitute a valid and binding contract under national law (Sandoz, paragraph 13).

It follows that the concept of an agreement within the meaning of Article 85(1) of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.

In certain circumstances, measures adopted or imposed in an apparently unilateral manner by a manufacturer in the context of his continuing relations with his distributors have been regarded as constituting an agreement within the meaning of Article 85(1) of the Treaty (Joined Cases 32/78, 36/78 to 82/78 BMW Belgium and Others v Commission [1979] ECR 2435, paragraphs 28 to 30; AEG, paragraph 38; Ford and Ford Europe, paragraph 21; Case 75/84 Metro v Commission ("Metro I") [1985] ECR 3021, paragraphs 72 and 73; Sandoz, paragraphs 7 to 12; Case C-70/93 BMW v ALD [1995] ECR I-3439, paragraphs 16 and 17).

That case-law shows that a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within Article 85(1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers.

It is also clear from that case-law that the Commission cannot hold that apparently unilateral conduct on the part of a manufacturer, adopted in the context of the contractual relations which he maintains with his dealers, in reality forms the basis of an agreement between undertakings within the meaning of Article 85(1) of the Treaty if it does not establish the existence of an acquiescence by the other partners, express or implied, in the attitude adopted by the manufacturer (BMW Belgium, paragraphs 28 to 30; AEG, paragraph 38; Ford and Ford Europe, paragraph 21; Metro II, paragraphs 72 and 73; Sandoz, paragraphs 7 to 12; BMW v ALD, paragraphs 16 and 17).

C. The application of the concept of an agreement in this case

In this case, in the absence of direct documentary evidence of the conclusion of an agreement between the parties concerning the limitation or reduction of exports, the Commission has held that the concurrence of wills underlying that agreement is clear from the conduct of the applicant and the wholesalers referred to in the Decision respectively.

Thus, in the Decision, the Commission states (recital 155) that 'Bayer France and Bayer Spain have committed an infringement of Article 85(1)' of the Treaty and that the conditions for applying that article
were met because those subsidiaries imposed 'an export ban as part of their continuous commercial relations with their customers'. It then states (recital 156) that 'analysis of the conduct engaged in by Bayer France and Bayer Spain vis-à-vis their wholesalers shows that Bayer France and Bayer Spain have imposed an export ban in their commercial relations with their wholesalers' and presents it as an established fact (recital 176) that the wholesalers adopted 'an implicit acquiescence in the export ban'.

75. Where, therefore, the Commission refers in the Decision to the 'export ban', it views it as a unilateral demand which has formed the subject-matter of an agreement between the applicant and the wholesalers. If the Commission concluded that an agreement existed contrary to Article 85(1) of the Treaty, it did so because it considered it established that the applicant sought and obtained an agreement with its wholesalers in Spain and France, the purpose of which was to prevent or limit parallel imports.

76. The applicant acknowledges having introduced a unilateral policy designed to reduce parallel imports. However, it denies having planned and imposed an export ban. In that regard, it denies ever having had discussions with the wholesalers, let alone making an agreement with them, in order to prevent them from exporting or to limit them in the export of the quantities delivered. Moreover, it states that the wholesalers did not adhere in any way to its unilateral policy and had no wish to do so.

77. In those circumstances, in order to determine whether the Commission has established to the requisite legal standard the existence of a concurrence of wills between the parties concerning the limitation of parallel exports, it is necessary to consider whether, as the applicant maintains, the Commission wrongly assessed the respective intentions of Bayer and the wholesalers.

1. The alleged intention of the applicant to impose an export ban

(a) Preliminary observations

78. The Decision presents it as an established fact that the French and Spanish subsidiaries of the applicant imposed on the French and Spanish wholesalers respectively an export ban which was put in place by identifying the exporting wholesalers and applying successive reductions in the volumes delivered to them if it became apparent that they were exporting all or part of the products in question. In the words of the second paragraph of recital 156 of the Decision, the export ban 'may be deduced from the following additional factors: (a) a system for detecting exporting wholesalers, and (b) successive reductions in the amounts supplied by Bayer France and Bayer Spain where wholesalers export all or some of the products'.

79. In the Decision, the Commission sets out (recitals 160 to 170) the reasons for which it considered it to have been established that the applicant carried out 'successive reductions in the amounts supplied by Bayer France and Bayer Spain where wholesalers export[ed] all or some of the products' and that, therefore, 'supply [was] subject to compliance with an export ban'. In particular, the Commission states in the first paragraph of recital 160: 'Whenever wholesalers export some of the products supplied, they run the risk of having their subsequent orders cut by Bayer France and Bayer Spain.' It adds in recital 163: 'The evidence in the Commission's possession shows that supply of the quantities allowed by Bayer France and Bayer Spain is subject to compliance with an export ban. Bayer France and Bayer Spain make the extent of the reduction in the amounts they supply dependent on the wholesalers' conduct in response to the export ban. If the wholesalers infringe the export ban, this entails a further automatic reduction in the supplies they receive.'

80. The Commission concludes (recital 170): 'All these aspects of the conduct of Bayer France and Bayer Spain show that the two companies have subjected their wholesalers to a permanent threat of reducing the quantities supplied, a threat which was repeatedly carried out if they did not comply with the export ban.'

(b) The scope of the system for monitoring the distribution of Adalat established by the applicant

81. The applicant admits that, in order to apply its policy of fulfilling orders only in so far as they met the traditional needs of the wholesalers, it used a general monitoring system for the distribution of Adalat. It also admits that it had an interest in knowing which wholesalers were export-oriented in order to be able to
apply that policy correctly. But it argues that that information system did not enable it to carry out checks subsequent to delivery in order to discover whether or not the products delivered had been actually exported or not. The system consisted solely in determining the quantities delivered to the wholesalers during previous years and, on that basis, fixing in advance the quantities which it wished to deliver to each wholesaler. Therefore, the applicant maintains, the Commission's argument that Bayer made deliveries to each wholesaler subject to verification that the quantities delivered in accordance with the new policy had not finally been exported to the United Kingdom, and had established a system for penalising wholesalers continuing to export after the implementation of that policy, is factually inaccurate.

In order to describe the system for monitoring the distribution of Adalat established by the applicant, the Commission relies upon the document reproduced in recital 109 of the Decision, emanating from Bayer Spain, which Commission officers found at the premises of Bayer France. That document consists of a series of conference slides used by a manager of the Spanish subsidiary to explain at a meeting held at the premises of Bayer France the system for controlling the distribution of Adalat established in Spain. According to the Commission, that document gives a complete description of the system used by the applicant for identifying which of its customers were exporting.

The applicant admitted at the hearing that those slides correctly describe the system which it applied. Since this is a document which, by its nature, was supposed to be used exclusively inside the Bayer Group, it should be regarded as illustrative of the way in which Bayer decided to face up to parallel imports.

The Court notes that those slides begin with a summary of the problem, indicating that the volume of orders for Adalat grew up to 300% in a few weeks, that that increase caused stock shortages, that it put uniform delivery throughout the country at risk, that it caused general discontent amongst wholesalers, the 'internal and external sales organisation' and pharmacists, and, finally, that it disturbed the rhythm of production due to urgent needs for Adalat.

Next, they show that the applicant considered that the most appropriate solution to the problem raised by the sudden and exorbitant increase in orders for Adalat was to define a delivery limit in advance for each wholesaler, taking into account a series of considerations, including 'identification of possible exporters'. The document also shows that, in order to implement that monitoring system in Spain, the Bayer Group had prepared itself to have to discuss limits to the volume of supplies assigned to each wholesaler. For that purpose, the Group had planned, first, a single argument to be presented by the lower echelons of its distribution department, namely an 'interruption in stocks' and, second, the designation of a person responsible for direct contacts with wholesalers who, predictably, would insist on obtaining a reappraisal of the limits fixed.

The slides show that, for the purpose of applying the limit fixed for each customer, the system established enabled an order from a customer exceeding the quantity attributed to be blocked automatically, so as to allow a 'manual' monitoring of that order. It is further stated that that system has, amongst other advantages, that of enabling 'suspect wholesalers' to be identified. Finally, as regards the action to be taken over orders controlled manually, those slides show that the system leads to 'the quantity being reduced rather than the cancellation of the order'.

The practical application of that monitoring system is precisely illustrated by the table, headed 'Result', contained in those slides and reproduced at the end of recital 109 of the Decision. That table shows that Bayer Spain fixed monthly and annual limits in advance for the orders of each wholesaler and that it verified on the occasion of each delivery note whether the wholesaler had exceeded those limits.

However, those slides do not contain any indication of an intention by Bayer to prohibit exports or to monitor the quantities actually exported by each of the wholesalers under examination and to react in consequence.

Therefore, and contrary to the interpretation put forward by the Commission, the contents of that internal document cannot be regarded as demonstrating that the applicant had based its strategy on the monitoring of the final destinations of the products delivered and the penalisation of the exporting wholesalers.

It is necessary next to examine the various examples of French and Spanish wholesalers to whom the Commission refers in support of its contention that the reductions in supplies were not pre-established
unilaterally but constituted the reaction to the wholesalers' conduct in the matter of orders, thus proving the existence of the policy of systematically monitoring exports and penalising wholesalers who exported the products supplied.  

91. In relation to the case of CERP Lorraine, the Commission refers to the table of orders placed by that French wholesaler, set out in recital 87 of the Decision. The Commission states that, according to that table, whereas CERP Lorraine placed average monthly orders of between 50,000 and 70,000 packets of Adalat between June 1991 and February 1992, and had received 69,000 packets from Bayer France in July 1991, it received only 35,000 in September 1991, then 15,000 per month during the following three months, and only 7,500 in February 1992. The Commission maintains that those reductions in supplies prove that Bayer did not always apply the same criterion, namely the reference quantities fixed by reference to orders in the previous year.

92. The wording of recital 87 of the Decision shows that, from September 1991, Bayer significantly reduced its supplies to that wholesaler in relation to previous months and that it gave as the reason problems with stock shortages on the French market. However, no reference is made to possible exports of the quantities supplied. The Commission cannot therefore rely on that order table in support of its argument that supply was conditional. On the contrary, that recital in the Decision also reproduces a letter from Bayer France to CERP Lorraine in which, the Commission says, Bayer France points out that 'CERP Lorraine's monthly requirements (on average) were 9,000 packets a month' and that, for that reason, Bayer France was unable to keep pace with increased demand the following year. That statement must be interpreted as a confirmation that, as the applicant claims, its new delivery policy was based on the traditional needs of each wholesaler, which, in the case of CERP Lorraine, were between seven and nine times less than the quantities ordered in the months preceding the establishment of the new policy. The applicant's argument is confirmed by recital 165 of the Decision, which states that Bayer France closely monitored the orders of CERP Lorraine and agreed to deliver to it only at the strict level of the previous year.

93. The case of the French wholesaler OCP calls for a like finding. Recital 91 of the Decision sets out the situation of that wholesaler, which had announced to Bayer France a planned order of 50,000 packets of Adalat for March, April and May 1992. Mention is made of a telex from OCP to Bayer France, complaining that it delivered only 15,000 packets in February and 5,000 in March. However, in the absence of any reference to an export ban of any kind, the Commission cannot use that telex to support its argument that supply was conditional.

94. As regards the Spanish wholesaler Hefame, the Commission claims that it had also been identified as a parallel exporter. In recital 120 of the Decision, which reproduces the explanations which Hefame is said to have given to dissatisfied customers in the United Kingdom, the Commission argues in particular that the comment 'the parallel-export is to[o] big and the multinational-control' (which, in the Commission's submission is a reference to Bayer) proves that the applicant was indeed monitoring the situation, knew exactly which wholesalers carried out parallel exports and penalised them in consequence. However, even if that document does, it is true, show that Bayer applied supply restrictions to Hefame which caused problems for the latter's customers, it is not capable of sustaining the Commission's argument that supplies were conditional upon the final destination of the products delivered, since none of those factors can be interpreted as proof of an attempt on Bayer's part to ban exports of the products supplied and to penalise such a practice. On the contrary, the fact that Bayer limited itself to establishing a policy of limited supply in accordance with national needs appears to be corroborated by the following sentences, contained in the document reproduced in recital 120 of the Decision: 'I understand you are not happy about this news but in one year all are change [sic] and the parallel-export is to[o] big and the multinational-control. ... For quite some time now we have been experiencing serious difficulties in obtaining sufficient quantities of [Adalat], (…) and (…) from Spain. ... It would appear that, once more, Bayer and (…) are doing their utmost to keep availability of their products strictly in line with their presumed needs for Spain, thereby impeding free trade within the EC. Is there any way in which you can take any action against these companies?'

95. Again in relation to Hefame, recitals 122 to 124 of the Decision set out the agreements made by that wholesaler with a number of small wholesalers. In the words of one of those agreements, which forms part of the Commission's file, a small wholesaler undertook 'to support, by supplying products or quantities of the products that it may have available, in addition to those provided by Hefame, to facilitate the normal supply of Hefame's foreign customers with the necessary quantities'. The Commission maintains that, if Hefame concluded those agreements, that was because it knew that, as a parallel exporter identified by the applicant, it would not obtain fresh supplies of Adalat. That proves, the Commission submits, that supplies
did not take place in accordance with pre-set values or thresholds, as certain wholesalers who were not suspected had received larger quantities without difficulty, and that the applicant applied a very clear distinction between wholesalers who were suspected of carrying out parallel exports and those who were not known as being parallel exporters. Finally, the Decision states (recital 124) that the applicant rapidly hindered such distribution amongst wholesalers, since it identified the small wholesalers as also being parallel exporters and likewise reduced the supplied intended for them in consequence.

96. The Court notes that those extracts from documents do reveal the existence of agreements set up by that wholesaler with other local wholesalers in an attempt to obtain packets of Adalat in addition to those supplied directly by the applicant. However, they do not provide any evidence in support of the assertion that the applicant made its supply policy for each wholesaler conditional upon the actual conduct of the latter in relation to the final destination of the products supplied. Contrary to what the Commission claims, the documents referred to in recital 122 of the Decision do not demonstrate that supplies under the new policy did not take place in accordance with pre-set values or thresholds on the basis of historic needs. Moreover, the Commission itself states, in recitals 124 and 168 of the Decision, that Bayer, putting into practice its new policy of confining itself to historic needs, where it found that small wholesalers were procuring deliveries of unusually high quantities in relation to their 'normal' needs on the local market, decided to supply them only up to the level of their traditional needs.

97. As regards the case of Cofares, the Commission cites in recital 121 of the Decision a statement which that wholesaler is alleged to have made at the time of the Commission's investigation on its premises.

98. That statement refers, first, in a general way, to the difficulties raised by certain laboratories in respect of the delivery of products intended for export and also, more particularly, to discussions between Cofares and Bayer Spain concerning the extent of the needs of its national market. However, even though that statement refers to supply difficulties, it makes no mention of any export ban imposed by Bayer or of an attempt by Bayer to monitor the actual destination of products supplied in Spain so as to react in consequence if they were exported. Therefore, the Commission cannot rely on that statement either in support of its argument that supplies were conditional.

99. As regards Hufasa, recital 127 of the Decision reproduces the minutes taken by that wholesaler of a meeting held with the managers of Bayer Spain with the object of obtaining larger supplies, a document to which the Commission attributes particular significance (see recitals 166 and 167 of the Decision) for the purposes of establishing the existence of an export ban.

100. However, that document of Hufasa does not contain any reference to an export ban imposed by the applicant or to the alleged implementation by the latter of a policy of systematic monitoring, *a posteriori* of the actual destinations of the products supplied. Contrary to what the Commission claims, nothing in that document proves the alleged need for Hufasa to make Bayer understand that it would not engage in exports.

101. It should also be noted that the Decision itself sets out factual considerations (recitals 96 and 159) which confirm the applicant's case concerning the supply policy that was established. Thus, where in recital 96 it states that 'Bayer France accepts as normal an increase or decrease of 10% in domestic requirements', the Decision itself contradicts the Commission's argument that Bayer did not have recourse to the approach referred to. The same observation may be made with regard to recital 159, which, referring to recitals 78 and 79, states that 'the Commission has in its possession documents setting out monthly lists of the quantities ordered and the highlighted increase in their amount as compared with the statistics for the previous year'.

102. Finally, in this case, the Commission cannot counter the applicant's statement, to the effect that the quantities of products to be supplied were fixed in advance according to the historic needs of the party concerned, increased by 10% and taking no account of any possible exportation of the products, by arguing that that policy may not always have been applied in an exact or automatic way. As the applicant explained at the hearing, since there was a delay of some months in implementing its new supply policy, it is possible that wholesalers who received very large quantities of the products after the adoption of that policy subsequently had their supplies reduced to the level corresponding to their traditional needs determined by the internal statistics of the Bayer Group. That was in particular the case with CERP Lorraine (described in recital 87 of the Decision) which, at the beginning of 1991, received all its orders of more than 60 000 packets of Adalat a month and subsequently received only 9 000, the quantity
corresponding to its orders prior to the development of the problem of parallel imports. Moreover, the
fact that wholesalers whom the applicant did not perceive as exporters were able to obtain extra quantities
more easily than wholesalers who were identified as exporters, which the applicant does not appear to
contest as such, cannot invalidate the findings made above concerning the lack of evidence of the alleged
policy of monitoring exports actually carried out and penalising the exporters in question.

103. As regards the allegedly probative documents set out in detail in recitals 83 to 85 and 96 to 103 of the
Decision, concerning France, and, as regards Spain, in recitals 110 to 131, to which recital 160 of the
Decision refers in support of the Commission’s argument, it need merely be observed that, like the
documents contained in the recitals which have just been examined, they do not in any way demonstrate
the establishment by Bayer of a supply policy conditional upon actual compliance with an alleged export
ban.

104. At the hearing and in reply to a question put by the Court, the Commission referred to recitals 80, 110,
140 and 147 of the Decision in support of its argument that supply was conditional upon compliance with
the export ban.

105. Those recitals of the Decision reproduce letters exchanged between managers of the British and French
subsidiaries, between the Spanish subsidiary and the parent company of the Bayer Group, between the
British subsidiary and the parent company, and an internal board memorandum of Bayer France. All those
documents concern the implementation by the Bayer Group of its new supply policy and the system for
monitoring the distribution of Adalat in order to deal with the problem of parallel imports. Those
documents prove that the Bayer Group had an interest in identifying wholesalers intending to export.
However, in the absence of any reference in those documents to any intention to monitor the conduct of
each wholesaler and to penalise him if he were found to have exported the products supplied, the
Commission cannot rely on them in support of its argument.

106. Finally, the Commission’s arguments based on the subjective perception of the situation by the
wholesalers are not capable of altering the foregoing conclusions as to the applicant’s alleged intention to
impose an export ban and penalties for failure to comply with it.

107. The Commission claims that the wholesalers were aware of the applicant’s motives and that, therefore,
they regarded the restrictions imposed by Bayer as being linked to exports. It adds that the wholesalers had
every interest in formally complying with the export ban and that they therefore accepted that ban in order
to ensure a sufficient supply of Adalat. Finally, it claims that wholesalers who did not follow the export ban
left themselves open to threats and sanctions on the part of Bayer.

108. However, as has just been held, the Commission has not established that the applicant put in place a
policy for monitoring the final destination of the products delivered under the new policy and making
supply conditional on that destination. Therefore, the argument that the wholesalers had every interest in
formally complying with the export ban in order to ensure a sufficient supply of Adalat is factually
inaccurate. Moreover, the Commission has not proved to the requisite legal standard the existence of
sanctions against wholesalers who had decided to export the packets of Adalat and threats by Bayer in that
regard. Nor has the Commission put forward anything that would even indicate that Bayer ‘demanded’ of
wholesalers that they should not export the products supplied or that a wholesaler gave ‘assurances’ to
Bayer concerning exports. On the contrary, as the applicant maintains, in the absence of any monitoring of
the final destination of the products supplied, the wholesalers did not have to fear sanctions and did not
fear them, as is apparent from the statement of the wholesaler quoted in recital 185 of the Decision: ‘The
important thing was actual receipts rather than the order.’ In those circumstances, the wholesalers’
knowledge of the applicant’s intention to prevent parallel imports is not capable of establishing the alleged
link between the restriction of supplies and the conduct of the wholesalers in the matter of exporting.

109. Having regard to the above, it must be concluded that the Commission has not proved to the requisite
legal standard either that Bayer France and Bayer Spain imposed an export ban on their respective
wholesalers, or that Bayer established a systematic monitoring of the actual final destination of the packets
of Adalat supplied after the adoption of its new supply policy, or that the applicant applied a policy of
threats and sanctions against exporting wholesalers, or that it made supplies of this product conditional on
compliance with the alleged export ban.
Nor, finally, do the documents reproduced in the Decision show that the applicant sought to obtain any form of agreement from the wholesalers concerning the implementation of its policy designed to reduce parallel imports.

2. The alleged intention of the wholesalers to adhere to the applicant's policy designed to reduce parallel imports.

(a) Preliminary observations

111. The applicant acknowledges in this case that it adopted and unilaterally implemented a new supply policy designed to make it more difficult for wholesalers to carry out parallel exports. According to case-law, as has already been noted, apparently unilateral conduct on the part of a manufacturer, adopted in the context of the contractual relations which it maintains with his dealers, may in reality form the basis of an agreement between undertakings within the meaning of Article 85(1) of the Treaty, if express or implied acquiescence by the other contracting parties in the attitude adopted by the manufacturer is established.

112. The Commission claims that, in order to establish its policy of restricting supplies, the applicant counted on the acquiescence of the wholesalers.

113. Therefore, in the circumstances of this case, it is necessary to consider whether the Commission has proved to the requisite legal standard the express or implied adherence of the wholesalers to the unilateral policy of preventing parallel imports adopted by Bayer.

(b) Proof of the wholesalers' 'implicit acquiescence'

114. The Commission maintains in recital 176 of the Decision that the wholesalers' conduct reflected an 'implicit acquiescence in the export ban', and describes that conduct in more detail in recitals 181 to 185. It arrives at that conclusion in the light of a series of facts which it considers to be established.

115. First, the Commission notes (recital 180), on the one hand, that the wholesalers were aware of the existence of the export ban, a factor, it claims, which had been decisive in the Sandoz case and in the light of which the mere 'fact that they did not react to the export ban suggested that they accepted it and that the necessary evidence substantiating the existence of an agreement' was present, and, on the other hand, that, as in Sandoz, the export ban formed part of continuous commercial relations between Bayer France or Bayer Spain and their respective wholesalers.

116. Secondly, the Commission states (recital 180) that, in this case, as a further element in addition to those held to be relevant in Sandoz, 'the conduct of the wholesalers shows that they have not only understood that an export ban applies to the goods supplied, but also that they have aligned their conduct on this ban'.

117. The Commission contends that that 'alignment of the wholesalers' conduct on the requirements imposed by Bayer France and Bayer Spain' is established by the finding that, once they had understood the real intentions of Bayer France and Bayer Spain, the wholesalers demonstrated, 'at least in appearance, their acceptance ... of their supplier's export ban in their commercial relations with the supplier' (recital 181). They adapted themselves to the requirement of BayerFrance and Bayer Spain, as is proved by the various systems they put in place in order to obtain supplies, particularly the system of spreading orders intended for export among the various agencies and the orders with small wholesalers (recital 182).

118. According to the Decision (recitals 183 and 184), the wholesalers 'complied with the national "quotas" imposed by their supplier, negotiating as far as they could to increase them to the maximum, thus bowing to the strict application of and compliance with the figures regarded by Bayer France and Bayer Spain as normal for the supplying of the domestic market'. That attitude shows, the Commission claims, that the wholesalers 'were aware of the real motives of Bayer France and Bayer Spain and of the tactics deployed by the two companies to thwart parallel exports: they adapted to the system established by their supplier so as to comply with its requirements'.

119.
It should, however, be borne in mind, first, that, as has been held, the Commission has not sufficiently established in law that Bayer adopted a systematic policy of monitoring the final destination of the packets of Adalat supplied, that it applied a policy of threats and penalties against wholesalers who had exported them, that, therefore, Bayer France and Bayer Spain imposed an export ban on their respective wholesalers, or, finally, that supplies were made conditional on compliance with the alleged export ban.

Second, there is nothing in the documents before the Court to show that Bayer France or Bayer Spain required any particular form of conduct on the part of the wholesalers concerning the final destination of the packets of Adalat supplied or compliance with a certain manner of placing orders, its policy having consisted simply in limiting supplies unilaterally by determining in advance the quantities to be supplied, using traditional needs as the basis.

Finally, the Commission has not established that the applicant made any attempt to obtain the agreement or acquiescence of the wholesalers to the implementation of its policy. It has not even claimed that Bayer sought to get the wholesalers to change their way of formulating orders.

It follows that the statements contained in recitals 181 to 185 of the Decision, on the basis of which the Commission considers that the wholesalers aligned their conduct in accordance with the alleged export ban, fail on factual grounds, because they are based on factual circumstances that have not been established.

Since, in this case, the Commission does not have any document referring expressly to an agreement between Bayer and its wholesalers concerning exports for the purpose of establishing a concurrence of wills, it claims to have followed the case-law approach consisting of examining the actual conduct of the wholesalers in order to determine the existence of their acquiescence. Thus, the Commission states in recital 180 of the Decision: ‘In the present case, ... the conduct of the wholesalers shows that they have not only understood that an export ban applies to the goods supplied, but also that they have aligned their conduct on this ban.’ By contrast, the applicant maintains that it is precisely their conduct which is the best proof that there was no concurrence of wills.

In the circumstances of this case, it therefore needs to be determined whether, having regard to the actual conduct of the wholesalers following the adoption by the applicant of its new policy of restricting supplies, the Commission could legitimately conclude that they acquiesced in that policy.

(i) The conduct of the French wholesalers

As a preliminary point, it should be borne in mind that recital 96 of the Decision, in which the Commission gives a general description of the way in which the three French wholesalers organised themselves in order to try to obtain supplies, states:

‘The three wholesalers adopted the same method: they stopped placing orders for export and made arrangements to increase the orders which were officially intended for the French market.

Bayer France accepts as normal an increase or decrease of 10% in domestic requirements. The wholesalers have a number of local agencies situated throughout France which normally provide supplies at local level.

The domestic orders placed by each of the agencies increased, with no indication being given to Bayer France of their destination. The aim was to induce Bayer France to believe that domestic demand had increased, by spreading it over the different agencies. The amounts which were in fact intended for export were then rechannelled within each wholesaler’s organisation so that they could be exported.’

Recitals 97 to 101 of the Decision, which are devoted to setting out the strategy put in place by the wholesaler CERP Rouen in order to circumvent Bayer’s policy of restricting supplies, reproduce several letters exchanged between October 1991 and January 1992 between CERP Rouen’s central purchasing department and the directors of the group’s local agencies in order to obtain the extra packets of Adalat needed by the Boulogne agency, which had responsibility within the group for exporting to the United
Kingdom. However, contrary to what the Commission claims, the passages of those documents are not capable of proving that that wholesaler agreed to cease exporting, reduce its orders or limit its exports, or that it tried to give Bayer the impression that it was going to do so. The only illustration they provide is that of the reaction of an undertaking in trying to continue its export activities as far as possible. There is no direct mention or evidence of an intention to support Bayer's policy of preventing exports, of which the wholesaler was perfectly aware, as is indicated in recital 94 of the Decision.

127. Examination of the documents referred to in recitals 102 and 103 of the Decision, concerning the cases of CERP Lorraine and OCP, merely confirms that finding. Moreover, recital 102 shows that, despite the difficulties raised by Bayer's attitude, CERP Lorraine succeeded in obtaining significant quantities for export. That recital contains an extract from an internal CERP Lorraine report, in which the author states:

'Although I do not see a favourable solution in the short term concerning supplies from Bayer (we have managed to obtain minimal quantities of product through the agencies), I think that the budget should be attainable at the end of the financial year.'

128. The documents reproduced in recitals 105, 106 and 107 go in the opposite direction to the Commission's argument, because they show that the CERP Lorraine and CERP Rouen wholesalers did not genuinely adapt their orders to the new policy of restricting supplies put in place by Bayer. They show that Bayer are 'blocking supplies of Adalat' ordered by CERP Lorraine (recital 105), that CERP Rouen's demand at the beginning of 1992 amounted to 'up to 50 000 packets a month' but that it was able to supply 'only 7 000 packets' to meet that demand, and that OCP had sent Bayer an initial order projection of 50 000 packets per month for February and March 1992, but that it was supplied with only 15 000 packets in February and 5 000 packets in March (recitals 91 and 107).

129. It follows that the passages reproduced in recitals 96 to 107 of the Decision are not capable of supporting the argument that the French wholesalers expressly or impliedly agreed to the policy put in place by Bayer. Those passages do not refer to any predisposition to adhere in any way to Bayer's policy of preventing parallel exports. On the contrary, they bear witness to the fact that those wholesalers adopted a line of conduct demonstrating a firm and persistent intention to react against a policy that was fundamentally contrary to their interests.

(ii) The conduct of the Spanish wholesalers

130. Nor, in relation to the Spanish wholesalers, do recitals 113 to 130 of the Decision contain anything capable of supporting the argument of tacit acquiescence put forward by the Commission.

131. On the contrary, recitals 115, 118, 119 and 120 contradict such an argument. Those recitals show, first, that Bayer Spain constantly maintained its policy of restricting supplies to the level of traditional needs and, second, that the wholesalers were very annoyed by the losses caused by the impossibility of obtaining the quantities necessary to respond to orders from their British customers. Particular note should be taken of recital 115, which reproduces passages from documents exchanged between CERP Rouen and its Spanish subsidiary Commercial Genové: 'Every week I want a copy of the order forms for Adalat and (...) sent to the laboratories and the delivery notes corresponding to those orders. I am trying to present a watertight case against the labs (...). With regard to your fax today concerning (...) and Bayer laboratories, I give you my word that I am doing my utmost to obtain supplies greater than our requirements. The laboratories are refusing to listen to any arguments. They know that the quantities they supply to us are easily enough to cover the needs of the Spanish market.' Similarly, the quotations contained in recital 118 - 'they do not supply as much as we need. We have only stock for our market' - and in recital 119 - 'Bayer does not deliver to us the quantities we order' - demonstrate that, contrary to what the Commission alleges, the wholesalers did not adapt their ordering policy to the new situation and continued to order quantities greater than their traditional needs.

132. It is necessary to examine the case of each of the Spanish wholesalers concerned by the Decision.

133. As regards Cofares, the main wholesaler in Spain, the Decision states in recital 121 that the proof of its acquiescence is to be found in the statement made by the managers of that undertaking during an
investigation by the Commission at its premises. The managing director of Cofares is said to have stated that 'Cofares' export activity account[ed] for a very small proportion of its total invoicing because of the difficulties posed by certain laboratories (including Bayer) to orders for export', and that, in his capacity as director with responsibility for purchasing, 'when Bayer set an Adalat quota for Cofares that was initially clearly insufficient to cover the requirements of its domestic market ... [he] warned them of a possible complaint because of such restrictions. Since then, Bayer ha[d] supplied Cofares with sufficient quantities to meet national consumption of the product in question'.

Contrary to what the Commission claims, it cannot be deduced from that document that 'Cofares complied with Bayer Spain's requirement that it confine itself to its domestic market'.

The first sentence, to the effect that the negligible extent of exports in relation to turnover was due to the difficulties caused by certain laboratories in supplying products for export, does not in itself constitute direct evidence of an agreement between that wholesaler and Bayer Spain that the packets of Adalat received should not be exported. The fact that the exports were negligible cannot lead to the conclusion that they did not exist or that they had ceased. On the contrary, that statement may demonstrate that, at least in part, Cofares continued to export. The fact that, unlike the situation as regards the other wholesalers, the Decision does not show that Cofares set up a strategy for circumventing Bayer's policy does not reverse the burden of proving its acquiescence in Bayer's new policy, which still rests with the Commission. Since this was the largest wholesaler in Spain, with 20.6% of the market (according to recital 112 of the Decision), the Commission could not legitimately consider that the statement reproduced in recital 121 proves that Cofares complied with Bayer Spain's requirement that it confine itself to its domestic market without verifying whether Cofares had a strong export tradition and without considering the possibility that, quite simply, Cofares had decided to view exports only as a very subsidiary possibility; such a decision might have been the most reasonable one to take given the difficulty of obtaining additional quantities of products in relation to habitual needs. That is so a fortiori in view of the lack of any reference in the Decision to the relative importance of Adalat in the overall sales of Cofares.

Moreover, that statement by the managing director of Cofares, rather than being evidence of alleged adherence to an alleged export ban, calls for the finding that Bayer's policy of restricting supplies, together with the difficulties raised by other laboratories, had led that wholesaler to consider exporting only once appropriate supply of the domestic market was assured. That interpretation seems more plausible than that of the Commission, bearing in mind, in particular, the fact that wholesalers are required to ensure the distribution of products on the national market in an appropriate and stable manner, and that this case concerns the premier national wholesaler.

According to recital 137 of the Decision, the figures for export sales between 1989 and 1993, supplied by Cofares at the Commission's request, show that export sales 'remained at a minimum level' and that proves that 'Cofares accepted the regime imposed by Bayer Spain and confined itself strictly to the Spanish domestic market'.

However, examination of those figures reveals rather the contrary, because, even if it constitutes a minimal percentage of Cofares's sales as a whole, the percentage corresponding to exports of Adalat only rises in the course of the years, in an irregular but constant fashion, as is demonstrated by the fact that the smallest percentage of the five years under consideration is precisely that of the first year, namely 1989. Finally, it should be added that it was hard for the Commission to come to the above conclusion without knowing the figures for the years before 1989, that is to say the period immediately prior to the establishment by Bayer Spain of its policy of restricting supplies. Without that information, it is impossible to determine whether Cofares modified its tendency to export that product following the introduction of that policy by Bayer.

As regards the passage, contained in the statement, concerning the discussions between the managing director of Cofares and Bayer Spain, it needs to be considered whether, in the absence of any direct or indirect reference to the freedom to export the quantities received, the fact that the parties agreed to increase the supply quantities initially assigned by Bayer to that wholesaler in order to ensure that its national needs were met demonstrates acquiescence by the wholesaler in the applicant's policy designed to make parallel exports difficult. Recital 143 of the Decision contains a passage of a document which, although it was not directly relied on by the Commission in the context of this question, must be referred to because it is an internal memorandum of Bayer Spain which also refers to the quota which Bayer initially conceded to Cofares to cover its needs on the national market.
That internal memorandum shows that Bayer Spain and Cofares discussed minimum supply quantities to enable that wholesaler to meet its growth and penetration needs on the national market and that they reached an agreement on the figures corresponding to those needs. It appears to be undisputed that Bayer Spain assured Cofares that the supplies would, at least, correspond to those quantities. It is also clear that Bayer Spain was ready to envisage revision of the reduced supply levels initially adopted if problems in supplying the national market appeared, bearing in mind its legal and moral obligation to ensure appropriate distribution of its products on the Spanish market.

However, nothing in that internal memorandum refers to the slightest restriction on the freedom of Cofares to assign products received after the conversations on the level of national needs to exports. The Commission therefore has no basis for arguing that Cofares was supplied only after assuring Bayer that the supplies were intended solely for the internal market. Finally, it should be noted that, during the bargaining, Bayer Spain claimed that Spanish pharmacies not supplied by the wholesalers were supplied directly by the manufacturer. That fact, instead of indicating that the wholesalers were prevented or penalised by Bayer when they decided to export those products even at the cost of abandoning parts of the national market, seems rather to demonstrate that they were covered in that respect by the manufacturer.

In those circumstances, the conclusion must be that neither the document referred to by recital 143 of the Decision nor the statement by the managing director of Cofares reproduced in recital 121 of the Decision may be construed as proving either the alleged 'requirement' by Bayer Spain that the wholesaler should stay in the domestic market or any acceptance of that requirement on the part of Cofares.

The Decision then goes on to describe (recital 122) how the Spanish wholesaler Hefame established a system for obtaining packets of Adalat for export. It sets out in detail a standard agreement headed 'Cooperation Agreement for External Markets' which Hefame concluded with several small wholesalers in order to obtain larger quantities of medicinal products that it was profitable to export, including Adalat. However, there is nothing in that document to show that Hefame's conduct had been favourable to any idea of acquiescing in Bayer's new policy.

As regards the Spanish subsidiaries of CERP Rouen, the description of the conduct of Commercial Genové, Hufasa and Disdasa, contained in recitals 125 to 129 of the Decision, confirms the lack of proof of any concurrence of wills or acquiescence in the policy of preventing parallel exports.

The Commission itself says in recital 126 of the Decision: 'Documents were found on the premises of Commercial Genové, Hufasa and Disdasa, contained in recitals 125 to 129 of the Decision, confirms the lack of proof of any concurrence of wills or acquiescence in the policy of preventing parallel exports.

The Decision then refers to the wholesaler Hufasa (recital 127), citing a record of a meeting between Hufasa and Bayer Spain which is alleged to demonstrate that Hufasa fully accepted Bayer Spain's arguments, namely that it had to concentrate on domestic sales. In that regard, the Commission relies on the following quotation in particular: '... we had reached an agreement with Bayer to maintain higher supplies of Adalat, it was better not to submit figures that would not be accepted as possible for Hufasa and which revealed our interest in exporting significant amounts.'

That record shows that a conversation took place between a representative of Hufasa and managers of Bayer Spain, during which the Bayer managers refused to supply the quantities requested because they accounted for 50% of the domestic market and were much higher than those of other firms in the same area; that the Hufasa representative reacted by arguing that his company needed larger quantities of Adalat on the ground, in particular, that the estimate of needs for the domestic market had been made on the basis of needs recorded in an untypical year in which Hufasa had suffered a crisis that was reflected in the abnormally low level of Adalat purchases; and that, following those conversations, Bayer undertook to revise the supply limit figures and increase them to the level of those of another, unidentified, wholesaler.

That record clearly shows that the true intentions and the actual conduct of the Spanish subsidiaries of the CERP Rouen group could not be further removed from any intention to comply with, or align
themselves upon, Bayer's policy of preventing parallel imports. It is sufficient in that regard to cite the part
of that document which follows the passage cited above and to read it in the context of the group strategy
adopted by CERP Rouen: 'I took the view that it was more important to obtain a quantity of Adalat for
export with very plausible figures rather than to maintain a very high level of orders which would not be
supplied. The important thing was actual receipts rather than the order. That is no doubt why (...) orders
less than forecast.' Moreover, whilst it is true that the record reproduced shows that that company
bargained hard with Bayer Spain to secure its acknowledgement that its traditional domestic needs were
higher and that they should be satisfied, that fact cannot serve to support the Commission's statement that
'Hufasa completely accepted Bayer Spain's arguments, namely that it had to concentrate on domestic sales.'

Finally, although the Hufasa manager refers in that record to 'an agreement with Bayer to maintain
higher supplies of Adalat', which Hufasa is said to have concluded with Bayer Spain, it is clear from the
literal content of that statement and its context that the parties limited themselves to negotiating the exact
determination of the quantities which the wholesaler traditionally requested, that being the criterion in
accordance with which the applicant had decided to adjust its new supply policy, and the upward revision
of the figures for national needs and, therefore, the quantities to which Hufasa was to be entitled pursuant
to that criterion. Since the sentence '[T]his led them to believe that a substantial proportion of the product
was intended for export' was only a subjective assessment on the part of the Hufasa manager, it cannot be
regarded as demonstrating an intention on the part of Bayer to deal with the question of exports or the
actual destinations of the products supplied. Moreover, it is not in any event capable of contradicting the
general sense of the record, which merely reflects the difficulties which Bayer was encountering in
implementing its new policy of reducing supplies and in which, what is more, there is nothing capable of
establishing that Bayer Spain and Hufasa concluded an agreement to limit or to prevent in any way parallel
exports of the packets of Adalat supplied. The absence of any concurrence of wills in relation to exports is
corroborated, moreover, by the text of this recital in the Decision itself, where the Commission states:
'However, the record is explicit; the pressure put on Bayer Spain on the basis of domestic-market
arguments was merely a means used by Hufasa to obtain the amounts intended for export.'

Recitals 128 and 129 of the Decision set out the content of a letter from CERP Rouen to its subsidiaries
and of a letter sent to CERP Rouen by its subsidiary Commercial Genové, also concerning the mechanism
put in place by that group to try to obtain more products of the applicant in Spain and underlining the
difficulty in obtaining extra packets of Adalat. The Commission cannot rely on these documents either in
order to establish that the subsidiaries of CERP Rouen in Spain wished to adhere in any way whatsoever to
Bayer Spain's new policy designed to limit parallel exports of the products supplied.

Examination of the attitude and actual conduct of the wholesalers shows that the Commission has no
foundation for claiming that they aligned themselves on the applicant's policy designed to reduce parallel
imports.

The argument based on the fact that the wholesalers concerned had reduced their orders to a given level
in order to give Bayer the impression that they were complying with its declared intention thereby to cover
only the needs of their traditional market, and that they acted in that way in order to avoid penalties, must
be rejected, because the Commission has failed to prove that the applicant demanded or negotiated the
adoption of any particular line of conduct on the part of the wholesalers concerning the destination for
export of the packets of Adalat which it had supplied, and that it penalised the exporting wholesalers or
threatened to do so.

For the same reasons, the Commission cannot claim that the reduction in orders could be understood by
Bayer only as a sign that the wholesalers had accepted its requirements, or maintain that it is because
they satisfied Bayer's requirements that they had to procure extra quantities destined for export from
wholesalers who were not 'suspect' in Bayer's eyes and whose higher orders were therefore fulfilled without
difficulty.

Moreover, it is obvious from the recitals of the Decision examined above that the wholesalers continued
to try to obtain packets of Adalat for export and persisted in that line of activity, even if, for that purpose,
they considered it more productive to use different systems to obtain supplies, namely the system of
distributing orders intended for export among the various agencies on the one hand, and that of placing
orders indirectly through small wholesalers on the other. In those circumstances, the fact that the
wholesalers changed their policy on orders and established various systems for breaking them down or
diversifying them, by placing them through indirect means, cannot be construed as evidence of their
intention to satisfy Bayer or as a response to any request from Bayer. On the contrary, that fact could be regarded as demonstrating the firm intention on the part of the wholesalers to continue carrying on parallel exports of Adalat.

155. In the absence of evidence of any requirement on the part of the applicant as to the conduct of the wholesalers concerning exports of the packets of Adalat supplied, the fact that they adopted measures to obtain extra quantities can be construed only as a negation of their alleged acquiescence. For the same reasons, the Court must also reject the Commission's argument that, in the circumstances of the case, it is normal that certain wholesalers should have tried to obtain extra supplies by circuitous means since they had to undertake to Bayer not to export and thus to order reduced quantities, not capable of being exported.

156. Nor, finally, has the Commission proved that the wholesalers wished to pursue Bayer's objectives or wished to make Bayer believe that they did. On the contrary, the documents examined above demonstrate that the wholesalers adopted a line of conduct designed to circumvent Bayer's new policy of restricting supplies to the level of traditional orders.

157. The Commission was therefore wrong in holding that the actual conduct of the wholesalers constitutes sufficient proof in law of their acquiescence in the applicant's policy designed to prevent parallel imports.

3. The case-law precedents cited by the Commission

158. The Commission contends that the Decision entirely corresponds to its decision-making practice and to the case-law of the Court of Justice on the concept of an agreement, and maintains that in this case, as in a number of previous cases, there was an export ban inserted into a series of continuous commercial relations between the supplier and its customers, as witnessed by the fact that the wholesalers placed orders, were regularly supplied and received corresponding invoices, and that there was tacit consent on the part of the wholesalers, which the Commission maintains is established by the reduction in orders.

159. However, it cannot effectively rely on the case-law precedents referred to in order to call into question the analysis, which has led the Court to conclude that in this case acquiescence of the wholesalers in Bayer's new policy has not been established and that the Commission has therefore failed to prove the existence of an agreement.

160. The Commission relies first on Sandoz, in which it maintains that, as in this case, the distributors on the one hand tacitly consented to the export ban in order to maintain their commercial relations (paragraph 11 of the judgment) and, on the other hand, although they had no interest in abandoning exports, accepted the manufacturer's export ban because they wished to continue obtaining the goods.

161. That case concerned the penalty imposed by the Commission on a subsidiary of a multinational pharmaceutical company, Sandoz, which was guilty of inserting into invoices which it sent to customers (wholesalers, pharmacies and hospitals) the express words 'export prohibited'. Sandoz had not denied the presence of those words in its invoices, but had disputed that there was an agreement within the meaning of Article 85(1) of the Treaty. The Court of Justice dismissed the action after replying to each of the applicant's arguments. It considered that the sending of invoices with those words did not constitute unilateral conduct, but, on the contrary, formed part of the general framework of commercial relations which the undertaking maintained with its customers. It reached that conclusion after examining the way in which the undertaking proceeded before authorising a new customer to market its products and taking into account the practices repeated and applied uniformly and systematically at each sales operation (paragraph 10 of the judgment). It was at that stage in its reasoning that the Court of Justice dealt with the question of the acquiescence of the commercial partners in the export ban, mentioned in the invoice, in the following terms:

'It should also be noted that the customers of Sandoz PF were sent the same standard invoice after each individual order or, as the case may be, after the delivery of the products. The repeated orders of the products and the successive payments without protest by the customer of the prices indicated on the invoices, bearing the words ’export prohibited’", constituted a tacit acquiescence on the part of the latter in the clauses stipulated in the invoice and the type of commercial relations underlying the business relations
between Sandoz PF and its clientele. The approval initially given by Sandoz PF was thus based on the tacit acceptance on the part of the customers of the line of conduct adopted by Sandoz PF towards them.

162. It was only after those findings that the Court of Justice concluded that the Commission was entitled to take the view that 'the whole of the continuous commercial relations, of which the "export prohibited" clause formed an integral part, established between Sandoz PF and its customers, were governed by a pre-established general agreement applicable to the innumerable individual orders for Sandoz products. Such an agreement is covered by the provisions of Article 85(1) of the Treaty'.

163. Although the two cases resemble each other in that they concern attitudes of pharmaceutical groups designed to prevent parallel imports of medicinal products, the concrete circumstances characterising them are very different. In the first place, unlike the situation in the present case, the manufacturer in Sandoz had expressly introduced into all its invoices a clause restraining competition, which, by appearing repeatedly in documents concerning all transactions, formed an integral part of the contractual relations between Sandoz and its wholesalers. Second, the actual conduct of the wholesalers in relation to the clause, which they complied with de facto and without discussion, demonstrated their tacit acquiescence in that clause and the type of commercial relations underlying it. On the facts of the present case, however, neither of the two principal features of Sandoz is to be found; there is no formal clause prohibiting export and no conduct of non-contention or acquiescence, either in form or in reality.

164. Second, the Commission relies on the judgment in Tipp-Ex v Commission, cited above, in which the Court of Justice confirmed its decision penalising an agreement designed to prevent exports and in which, unlike the situation in Sandoz, there had not been a written stipulation concerning the export ban. It claims that Tipp-Ex, like the applicant in this case, had also argued before the Court of Justice that this was a unilateral measure that did not fall within the scope of Article 85(1) of the Treaty, and that, since the supplies from the distributor to the parallel exporter had actually taken place, there was no common interest in parallel exports being terminated.

165. That case concerned an exclusive distribution agreement between Tipp-Ex and its French distributor, DMI, which had complied with the manufacturer's demand that the prices charged to a customer should be raised so far as was necessary to eliminate any economic interest on his part in parallel imports. Moreover, it had been established that the manufacturer carried out subsequent checks so as to give the exclusive distributor an incentive actually to adopt that conduct (recital 58 of Commission Decision 87/406/EEC of 10 July 1987 relating to a proceeding under Article 85 of the EEC Treaty (OJ 1987 L 222, p. 1). Paragraphs 18 to 21 of the judgment show the reasoning followed by the Court of Justice, which, after finding the existence of a verbal exclusive distribution agreement for France between Tipp-Ex and DMI and recalling the principal facts, wished to examine the reaction of and, therefore, the conduct adopted by the distributor following the penalising conduct adopted by the manufacturer. The Court of Justice then found that the distributor reacted by raising by between 10 and 20% the prices charged only to the undertaking ISA France. After the interruption of ISA France's purchases from DMI during the whole of 1980, DMI refused at the beginning of 1981 itself to supply Tipp-Ex products to ISA France. It was only after those findings with regard to the conduct of the manufacturer and the distributor that the Court of Justice arrived at its conclusion as to the existence of an agreement within the meaning of Article 85(1) of the Treaty: 'it is therefore established that DMI acted upon the request of Tipp-Ex not to sell to customers who resell Tipp-Ex products in other Member States' (paragraph 21 of the judgment).

166. In Tipp-Ex, therefore, unlike the situation in the present case, there was no doubt as to the fact that the policy of preventing parallel exports was established by the manufacturer with the cooperation of the distributors. As indicated in that judgment, that intention was already manifest in the oral and written contracts existing between the two parties (see paragraphs 19 and 20 concerning the distributor DMI and 22 and 23 concerning the distributor Beiersdorf) and, if there were any remaining doubt, analysis of the behaviour of the distributors, pressed by the manufacturer, showed very clearly their acquiescence in the intentions of Tipp-Ex in restriction of competition. The Commission had proved not only that the distributors had reacted to threats and pressure on the part of the manufacturer, but also the fact that at least one of them had sent the manufacturer proof of its cooperation. Finally, the Commission itself observes in this case that, in Tipp-Ex, in order to determine whether an agreement existed, the Court of Justice took the approach of analysing the reaction of the distributors to the conduct of the manufacturer running counter to parallel exports and that it was in assessing that reaction of the distributor that it
concluded that there must be an agreement in existence between it and Tipp-Ex designed to prevent parallel exports.

167. It follows that that judgment, like *Sandoz*, merely confirms the case-law to the effect that, although apparently unilateral conduct by a manufacturer may lie at the root of an agreement between undertakings within the meaning of Article 85(1) of the Treaty, this is on condition that the subsequent conduct of the wholesalers or customers may be interpreted as *de facto* acquiescence. As that condition is not fulfilled in this case, the Commission cannot rely on the alleged similarity between these two cases in support of its argument that acquiescence existed in this case.

168. For the same reasons, neither the Commission nor BAI may validly rely on the assessments carried out by the Court of Justice in *BMW Belgium*, *AEG* and *Ford and Ford Europe* in support of their argument that acquiescence by the wholesalers exists in this case.

169. In *BMW Belgium*, in order to determine whether there was an agreement within the meaning of Article 85(1) of the Treaty between BMW and its Belgian dealers, the Court of Justice examined the measures capable of demonstrating the existence of an agreement, in that case circulars sent to BMW dealers, 'according to their tenor and in relation to the legal and factual context in which they [were] set', and concluded that the circulars in question 'indicate[d] an intention to put an end to all exports of new BMW vehicles from Belgium' (paragraph 28). It added that 'in sending those circulars to all the Belgian dealers, BMW Belgium played the leading role in the conclusion with those dealers of an agreement designed to halt such exports completely' (paragraph 29). Paragraph 30 of that judgment shows that the Court of Justice intended to confirm the existence of acquiescence by the dealers.

170. In *AEG*, in which the respective intentions of the manufacturer and the distributors do not appear clearly and in which the applicant expressly relied on the unilateral nature of its conduct, the Court of Justice considered that, in the context of a selective distribution system, a practice whereby the manufacturer, with a view to maintaining a high level of prices or to excluding certain modern channels of distribution, refused to approve distributors who satisfied the qualitative criteria of the system did 'not constitute, on the part of the undertaking, unilateral conduct which, as AEG claims, would be exempt from the prohibition contained in Article 85(1) of the Treaty. On the contrary, it forms part of the contractual relations between the undertaking and resellers' (paragraph 38). The Court of Justice then sought to determine the existence of acquiescence by the distributors by stating: 'Indeed, in the case of the admission of a distributor, approval is based on the acceptance, tacit or express, by the contracting parties of the policy pursued by AEG which requires inter alia the exclusion from the network of all distributors who are qualified for admission but are not prepared to adhere to that policy' (paragraph 38). That approach has been confirmed in the other selective-distribution cases decided by the Court of Justice (*Ford and Ford Europe*, paragraph 21; *Metro II*, paragraphs 72 and 73; *BMW v. ALD*, paragraphs 16 and 17).

171. It follows that the Commission cannot rely on the case-law precedents which it has cited in order to establish the existence of an agreement in this case.

4. The Commission's argument that, in order to prove the existence of an agreement, it is sufficient to find that the parties maintain their commercial relations.

172. The Commission's reasoning shows that it maintains, albeit ambiguously (see the structure of the Decision summarised in recitals 155 and 156 and developed in recitals 171 to 188), that the mere finding of fact that the wholesalers did not interrupt their commercial relations with Bayer after the latter established its new policy designed to restrain exports is a sufficient ground for it to hold that the existence of an agreement between undertakings within the meaning of Article 85(1) of the Treaty is established.

173. Such an argument cannot be accepted. The proof of an agreement between undertakings within the meaning of Article 85(1) of the Treaty must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed (see, in particular, *ACF Chemieinarma*, paragraph 112; *Van Landewyck and Others*, paragraph 86). The Commission
misjudges that concept of the concurrence of wills in holding that the continuation of commercial relations with the manufacturer when it adopts a new policy, which it implements unilaterally, amounts to acquiescence by the wholesalers in that policy, although their de facto conduct is clearly contrary to that policy.

Moreover, in accordance with the general scheme of the Treaty, an undertaking may be penalised under Community competition law only if it has infringed prohibitions contained in Article 85(1) or Article 86 of the Treaty. In that respect, it should be noted that the applicability of Article 85(1) is based on a number of conditions, namely that, (a) there must be an agreement between at least two undertakings or a similar arrangement such as a decision of an association of undertakings or a concerted practice between undertakings, (b) that arrangement must be capable of affecting trade within the Community, and (c) that it must have as its object or effect the restriction of competition to an appreciable extent. It follows that, in the context of that article, the effects of the conduct of an undertaking on competition within the common market may be examined only if the existence of an agreement, a decision of an association of undertakings or a concerted practice within the meaning of Article 85(1) of the Treaty has already been established (Case 56/65 Société Technique Minière v Maschinenbau Ulm [1966] ECR 235, at p. 248 et seq.). It follows that the aim of that provision is not to ‘eliminate’ obstacles to intra-Community trade altogether; it is more limited, since only obstacles to competition set up as a result of a concurrence of wills between at least two parties are prohibited by that provision.

That interpretation of Article 85(1) of the Treaty was followed by the Court of Justice in Case C-73/95 P Viho v Commission [1996] ECR I-5457, paragraphs 15 to 17, in which, upholding a judgment of the Court of First Instance, it held that the fact that the policy implemented by a parent company consisting essentially in dividing various national markets between its subsidiaries might produce effects outside the ambit of the group which were capable of affecting the competitive position of third parties could not render Article 85(1) of the Treaty applicable, even when read in conjunction with Article 2 and Article 3(c) and (g) of the EC Treaty. On the other hand, such unilateral conduct could fall under Article 86 of the Treaty if the conditions for its application, as laid down in that article, were fulfilled.

Having regard to the foregoing considerations, and contrary to what the Commission and the BAI appear to maintain, the right of a manufacturer faced, as in this case, with an event harmful to his interests, to adopt the solution which seems to him to be the best is qualified by the Treaty provisions on competition only to the extent that he must comply with the prohibitions referred to in Articles 85 and 86. Accordingly, provided he does so without abusing a dominant position, and there is no concurrence of wills between him and his wholesalers, a manufacturer may adopt the supply policy which he considers necessary, even if, by the very nature of its aim, for example, to hinder parallel imports, the implementation of that policy may entail restrictions on competition and affect trade between Member States.

The Commission relies in this respect on the judgment of the Court of Justice in Joined Cases C-267/95 and C-268/95 Merck and Beecham [1996] ECR I-6285, as a basis for arguing that in all circumstances parallel imports must be protected. It maintains that, in that judgment, the Court of Justice put an end to speculation concerning the scope of the solution adopted in the judgment in Case 187/80 Merck v Stephar and Exler [1981] ECR 2063 by stating that the control of prices in certain Member States did not justify any derogation from the principle of the free movement of goods and that the possibility of preventing parallel imports entailed an undesirable partitioning of national markets. Therefore, the Commission maintains, even in the pharmaceutical sector, parallel imports may not be hindered either by national measures or by agreements between undertakings.

It should, however, be noted that, in that judgment, the Court of Justice limits itself to answering the question concerning, first, the expiry date of certain transitional provisions contained in the Act of Accession of the Kingdom of Spain and the Portuguese Republic (Articles 47 and 209 of the Act of Accession) which permitted the prevention of parallel exports of pharmaceutical products from those countries into other parts of the Community, and, second, the legal regime applicable to parallel imports after the expiry of the relevant transitional periods and to the question whether the scope of the solution adopted in Merck v Stephar and Exler should be reconsidered. The reasoning of the Court of Justice in Merck and Beecham does not concern the issue in this case, which does not fall within the law on the free movement of goods under Articles 30, 34 and 36 of the EC Treaty (now, after amendment, Articles 28 EC, 29 EC and 30 EC), and, contrary to what the Commission claims, does not in any way presume a general prohibition on preventing parallel exports applying not only to Member States but also, and in all cases, to undertakings.
In reality, rather than supporting the Commission’s argument, that judgment merely confirms that, under the system of the Treaty, it is not open to the Commission to attempt to achieve a result, such as the harmonisation of prices in the medicinal products market, by enlarging or straining the scope of Section 1 (Rules applying to undertakings) of Chapter 1 of Title VI of the Treaty, especially since that Treaty gives the Commission specific means of seeking such harmonisation where it is undisputed that large disparities in the prices of medicinal products in the Member States are engendered by the differences existing between the state mechanisms for fixing prices and the rules for reimbursement, as is the case here (see recitals 151 and 152 of the Decision). As the Court of Justice pointed out in paragraph 47 of the judgment in Merck and Beecham, it is settled case-law that distortions caused by different price legislation in a Member State must be remedied by measures taken by the Community authorities (see Case 16/74 Centrafarm v Winthrop [1974] ECR 1183, paragraph 17; Musik-Vertrieb Membran and K-tel International v GEMA, paragraph 24; Joined Cases C-427/93, C-429/93 and C-436/93 Bristol-Myers Squibb and Others [1996] ECR I-3457, paragraph 46; Merck and Beecham, paragraph 47).

An extension of the scope of Article 85(1) of the Treaty, such as that proposed by the Commission, would lead to a paradoxical situation in which refusal to sell would be penalised more heavily in the context of Article 85(1) than in that of Article 86, since the prohibition in Article 85(1) would hit a manufacturer deciding to refuse or restrict future supplies but without terminating his commercial relations with his customers altogether, whereas, under Article 86, refusal to supply, even where it is total, is prohibited only if it constitutes an abuse. The case-law of the Court of Justice indirectly recognises the importance of safeguarding free enterprise when applying the competition rules of the Treaty where it expressly acknowledges that even an undertaking in a dominant position may, in certain cases, refuse to sell or change its supply or delivery policy without falling under the prohibition laid down in Article 86 (see Case 27/76 United Brands v Commission [1978] ECR I-207, paragraphs 182 to 191).

Nor, finally, can the Commission rely in support of its argument upon its conviction, which is, moreover, devoid of all foundation, that parallel imports will in the long term bring about the harmonisation of the price of medicinal products. The same applies to its claim that ‘it is not acceptable for parallel imports to be hindered so that pharmaceutical undertakings may impose excessive rates in countries not applying any price control in order to compensate for lower profits in Member States which intervene more on prices’.

It follows that the Commission could not legitimately regard an agreement between the wholesalers and the manufacturer as being established on the basis of the mere finding that pre-existing commercial relations continued.

D. Conclusion

It follows from the whole of the foregoing considerations that the Commission incorrectly assessed the facts of the case and made an error in the legal assessment of those facts by holding it to be established that there was a common intention between Bayer and the wholesalers referred to in the Decision, which justified the conclusion that there was an agreement within the meaning of 85(1) of the Treaty, designed to prevent or limit exports of Adalat from France and Spain to the United Kingdom.

As a result, the principal plea in law raised in this action must be declared to be well founded. The Decision must therefore be annulled, without there being any need to hear witnesses, as proposed by the applicant, or to examine the pleas in law raised in the alternative, alleging erroneous application of Article 85(1) of the Treaty to conduct that was legitimate under Article 47 of the Act of Accession of Spain to the European Communities, and misapplication of Article 15 of Regulation No 17 in imposing a fine on the applicant.

Costs

Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. As the Commission has been unsuccessful
and the applicant has applied for costs, the Commission must be ordered to bear its own costs and pay those incurred by the applicant, including those incurred by it in the proceedings for interim relief.

Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court of First Instance may order an intervener other than those mentioned in the preceding subparagraph to bear its own costs. In this case, the EFPIA, which has intervened in support of the applicant, and the BAI, which has intervened in support of the Commission, must be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber, Extended Composition),

hereby:

1. **Annuls Commission Decision 96/478/EC of 10 January 1996 relating to a proceeding under Article 85 of the EC Treaty (Case IV/34.279/F3 - Adalat)**;

2. **Orders the Commission to bear its own costs and to pay the costs incurred by the applicant, including those incurred by the latter in the proceedings for interim relief**;

3. Orders the European Federation of Pharmaceutical Industries' Associations and the Bundesverband der Arzneimittel-Importeure eV to bear their own costs.

Cooke
García-Valdecasas
Lindh

Pirrung

Vilaras

Delivered in open court in Luxembourg on 26 October 2000.
JUDGMENT OF THE COURT (Third Chamber)

4 June 2009 (*)

(Reference for a preliminary ruling – Article 81(1) EC – Concept of ‘concerted practice’ – Causal connection between concerted action and the market conduct of undertakings – Appraisal in accordance with the rules of national law – Whether a single meeting is sufficient or whether concerted action on a regular basis over a long period is necessary)

In Case C-8/08,

REFERENCE for a preliminary ruling under Article 234 EC from the College van Beroep voor het bedrijfsleven (Netherlands), made by decision of 31 December 2007, received at the Court on 9 January 2008, in the proceedings

T-Mobile Netherlands BV,

KPN Mobile NV,

Orange Nederland NV,

Vodafone Libertel NV

v

Raad van bestuur van de Nederlandse Mededingingsautoriteit,
THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues, J. Klučka (Rapporteur) and U. Lõhmus, Judges,

Advocate General: J. Kokott,

Registrar: R. Ţeşes, Administrator,

having regard to the written procedure further to the hearing on 15 January 2009,

after considering the observations submitted on behalf of:

– T-Mobile Netherlands BV, by I. VerLoren van Themaat and V.H. Affourtit, advocaten,

– KPN Mobile NV, by B.J.H. Braeken and P. Glazener, advocaten,

– Vodafone Libertel BV, by G. van der Klis, advocaat,

– the Raad van bestuur van de Nederlandse Mededingingsautoriteit, by A. Prompers, acting as Agent,

– the Netherlands Government, by C. Wissels, Y. de Vries and M. de Grave, acting as Agents,

– the Commission of the European Communities, by A. Bouquet and S. Noë, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 February 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 81(1) EC.

2 The reference was made in proceedings between T-Mobile Netherlands BV (‘T-Mobile’), KPN Mobile NV (‘KPN’), Orange Nederland NV (‘Orange’) and Vodafone Libertel NV (‘Vodafone’) and the Raad van bestuur van de Nederlandse Mededingingsautoriteit (the Netherlands competition authority) (‘NMa’) concerning fines which that authority imposed on those undertakings for breach of Article 81 EC and Article 6(1) of the law on competition (Mededingingswet), in the version resulting from the law amending the law on competition (Wet houdende van de Mededingingswet) of 9 December 2004 (‘the Mw’).

I – Legal context

Community legislation

3 The fifth recital of the preamble to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2002 L 1, p. 1) provides as follows:

‘In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. ... This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.’
Article 2 of that regulation, entitled ‘Burden of Proof’, states as follows:

‘In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. …’

Article 3(1) and (2) of that regulation provides as follows:

‘1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. …

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty …’

National legislation

According to Article 1(h) of the Mw, ‘concerted practice’ means any concerted practice within the meaning of Article 81(1) EC.

Pursuant to Article 6(1) of the Mw, the following are prohibited: all agreements between undertakings, all decisions by associations of undertakings and all concerted practices of undertakings which have as their object or effect the prevention, restriction or distortion of competition on the Netherlands market or a part thereof.

Under Article 88 of the Mw, the Nma has the power to apply Article 81 EC.

The dispute in the main proceedings and the questions referred for a preliminary ruling

The facts in the main proceedings

It is apparent from the order for reference that the representatives of operators providing mobile telecommunications services on the Netherlands market met on 13 June 2001.

At that time, five operators in the Netherlands had their own mobile telephone network, namely Ben Nederland (‘Ben’, now T-Mobile), KPN Duchtone NV (‘Duchtone’, now Orange), Libertel-Vodafone NV (‘Libertel-Vodafone’, now Vodafone) and Telfort Mobile BV (subsequently O2 (Netherlands) BV – ‘O2 (Netherlands)’ – and now Telfort). In 2001, the market share held by the five operators amounted, respectively, to 10.6%, 42.1%, 9.7%, 26.1% and 11.4%. It was unforeseeable that a sixth mobile telephone network would be established because no further licences had been issued. Access to the market for mobile telecommunications services was therefore possible only through the conclusion of an agreement with one or more of those five operators.

Within the range of mobile telecommunications services on offer, a distinction is made between prepaid packages and postpaid subscriptions. The characteristic feature of prepaid packages is that a customer pays the cost of communications in advance. In acquiring or reloading a prepaid card, the customer purchases a credit of call minutes which can be used for calls up to the value of the credit purchased. By contrast, postpaid subscriptions are characterised by the fact that the number of minutes called in a particular period is invoiced to the customer subsequently and, in addition, the customer pays a fixed subscription charge which may also include a credit in respect of call minutes.

On 13 June 2001, representatives of mobile telecommunications operators offering mobile telecommunications services in the Netherlands held a meeting. At that meeting they discussed, inter alia, the
reduction of standard dealer remunerations for postpaid subscriptions, which was to take effect on or about 1 September 2001. As is evident from the order for reference, confidential information came up in discussions between the participants at the meeting.

By decision of 30 December 2002, the NMa found that Ben, Duchtone, KPN, O2 (Netherlands) and Libertel-Vodafone had concluded an agreement with each other or had entered into a concerted practice. Taking the view that such conduct restricted competition to an appreciable extent and was thus incompatible with the prohibition in Article 6(1) of the Mw, the NMa imposed fines on those undertakings.

The undertakings concerned lodged an objection against the decision of the NMa.

By decision of 27 September 2004, the NMa upheld in part the grounds of challenge put forward by T-Mobile, KPN, Orange, Libertel-Vodafone and O2 (Netherlands) and found that the practices described in the decision of 30 December 2002 constituted an infringement not only of Article 6 of the Mw but also of Article 81(1) EC. Accordingly, the NMa upheld all the fines imposed on those companies while at the same time reducing the amounts imposed.

T-Mobile, Orange, Vodafone and Telfort brought an action against the decision of 27 September 2004 before the Rechtbank te Rotterdam (District Court, Rotterdam). In its judgment of 13 July 2006, that court annulled the decision in question and ordered the NMa to adopt a new decision.

T-Mobile, KPN, Orange and the NMa appealed against that judgment to the College van Beroep voor het bedrijfsleven, to which it falls to determine whether the concept of concerted practice was interpreted correctly in the light of the established case-law of the Court on that matter.

The referring court

The College van Beroep voor het bedrijfsleven considers that it is required to determine, first, whether the purpose of the exchange of information on postpaid subscriptions at the meeting held on 13 June 2001 was to restrict competition and whether it was correct for the NMa to omit to consider the effects of the concerted practice and, second, whether there is a causal connection between the concerted practice and the market conduct of the operators in question.

The referring court states, first, that the concerted practice at issue in the main proceedings relates neither to the consumer prices to be applied by the undertakings in question nor to the subscription tariffs to be invoiced by those operators to the end users. What it actually relates to is the remuneration which those operators intend to pay for the services supplied to them by dealers. The point that is therefore emphasised by the referring court is that the direct object of the concerted practice cannot be said to be the determination of prices for postpaid subscriptions on the retail market.

Next, the College van Beroep voor het bedrijfsleven states that it is uncertain as to whether the object of the concerted practice of the operators in question, which relates to the remuneration paid to dealers for concluding postpaid subscription agreements, may be considered to be the prevention, restriction or distortion of competition within the meaning of Article 81(1) EC. It is of the view that the competition case-law of the Court may be interpreted as meaning that the object of an agreement or concerted practice is to restrict competition if experience shows that, by virtue of that agreement or that practice, irrespective of economic circumstances, competition is always, or almost always, prevented, restricted or distorted. That is the case, according to the referring court, where the actual detrimental effects are unmistakable and will occur irrespective of the characteristic features of the relevant market. It is therefore always necessary, in its view, to examine the effects of a concerted practice in order to ensure that conduct is not regarded as pursuing the object of restricting competition when it is clear that it does not have any restrictive effects.

Lastly, as regards the causal link between the concerted practice and the market conduct of the operators, the referring court questions the relevance of the presumption established in Case C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125 and Case C-199/92 P Hüls v Commission [1999] ECR I-4287, according to which, subject to proof to the contrary, which it is for the economic operators concerned to produce, undertakings participating in concerted arrangements and remaining active on the market are presumed to
take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period. The referring court is uncertain whether it is required under Community law to apply that presumption in spite of the fact that different provisions governing evidence apply under national law and whether such a presumption can be applied to situations in which the concerted practice has its roots in participation at a single meeting.

22 It is in those circumstances that the College van Beroep voor het bedrijfsleven decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. When applying Article 81(1) EC, which criteria must be applied when assessing whether a concerted practice has as its object the prevention, restriction or distortion of competition within the common market?

2. Is Article 81 EC to be interpreted as meaning that, when a national court applies that provision, the evidence of a causal connection between concerted practice and market conduct must be adduced and appraised in accordance with the rules of national law, provided that those rules are no less favourable than the rules governing similar domestic actions and they do not make the exercise of the rights granted by Community law in practice impossible or excessively difficult?

3. When applying the concept of concerted practices in Article 81 EC, is there always a presumption of a causal connection between concerted practice and market conduct even if the concerted practice is an isolated event and the undertaking which took part in the practice remains active on the market or only in those cases in which the concerted practice has taken place with a certain degree of regularity over a lengthy period?

The questions referred for a preliminary ruling

The first question

23 As a preliminary point, the definitions of ‘agreement’, ‘decisions by associations of undertakings’ and ‘concerted practice’ are intended, from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves (see, to that effect, Commission v Axis Partecipazioni, paragraph 131).

24 It follows, as the Advocate General stated in essence at point 38 of her Opinion, that the criteria laid down in the Court’s case-law for the purpose of determining whether conduct has as its object or effect the prevention, restriction or distortion of competition are applicable irrespective of whether the case entails an agreement, a decision or a concerted practice.

25 In that regard, it should be noted that the Court has already provided a number of criteria on the basis of which it is possible to ascertain whether an agreement, decision or concerted practice is anti-competitive.

26 With regard to the definition of a concerted practice, the Court has held that such a practice is a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition (see 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, paragraph 26, and 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, paragraph 63).

27 With regard to the assessment as to whether a concerted practice is anti-competitive, close regard must be paid in particular to the objectives which it is intended to attain and to its economic and legal context (see, to that effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others v Commission [1983] ECR 3369, paragraph 25, and Case C-209/07 Beef Industry Development Society and Barry Brothers [2008] ECR I-0000, paragraphs 16 and 21). Moreover, while the intention of the parties is not an essential factor in determining whether a concerted practice is restrictive, there is nothing to prevent the
Commission of the European Communities or the competent Community judicature from taking it into account (see, to that effect, *LAZ International Belgium and Others v Commission*, paragraphs 23 to 25).

28 As regards the distinction to be drawn between concerted practices having an anti-competitive object and those with anti-competitive effects, it must be borne in mind that an anti-competitive object and anti-competitive effects constitute not cumulative but alternative conditions in determining whether a practice falls within the prohibition in Article 81(1) EC. It has, since the judgment in Case 56/65 *LTM* [1966] ECR 235, 249, been settled case-law that the alternative nature of that requirement, indicated by the conjunction ‘or’, means that it is necessary, first, to consider the precise purpose of the concerted practice, in the economic context in which it is to be pursued. Where, however, an analysis of the terms of the concerted practice does not reveal the effect on competition to be sufficiently deleterious, its consequences should then be considered and, for it to be caught by the prohibition, it is necessary to find that those factors are present which establish that competition has in fact been prevented or restricted or distorted to an appreciable extent (see, to that effect, *Beef Industry Development Society and Barry Brothers*, paragraph 15).

29 Moreover, in deciding whether a concerted practice is prohibited by Article 81(1) EC, there is no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition within the common market (see, to that effect, *Joined Cases 56/64 and 58/64 Consten and Grundig v Commission* [1966] ECR 299, 342; *Case C-105/04 P Nederlandsche Federatie Vervening voor de Groothandel op Elektrische Gebied v Commission* [2006] ECR I-8725, paragraph 125; and *Beef Industry Development Society and Barry Brothers*, paragraph 16). The distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (*Beef Industry Development Society and Barry Brothers*, paragraph 17).

30 Accordingly, contrary to what the referring court claims, there is no need to consider the effects of a concerted practice where its anti-competitive object is established.

31 With regard to the assessment as to whether a concerted practice, such as that at issue in the main proceedings, pursues an anti-competitive object, it should be noted, first, as pointed out by the Advocate General at point 46 of her Opinion, that in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages.

32 Second, with regard to the exchange of information between competitors, it should be recalled that the criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market (see *Suiker Unie and Others v Commission*, paragraph 173; *Case 172/80 Züchner* [1981] ECR 2021, paragraph 13; *Ahlströöm Osakeyhtiö and Others v Commission*, paragraph 63; and *Case C-7/95 P Deere v Commission* [1998] ECR I-3111, paragraph 86).

33 While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (see, to that effect, *Suiker Unie and Others v Commission*, paragraph 174; *Züchner*, paragraph 14; and *Deere v Commission*, paragraph 87).

34 At paragraphs 88 et seq. of *Deere v Commission*, the Court therefore held that on a highly concentrated oligopolistic market, such as the market in the main proceedings, the exchange of information was such as to
enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders.

35 It follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted (see Deere v Commission, paragraph 90, and Case C-194/99 P Thyssen Stahl v Commission [2003] ECR I-10821, paragraph 81).

36 Third, as to whether a concerted practice may be regarded as having an anti-competitive object even though there is no direct connection between that practice and consumer prices, it is not possible on the basis of the wording of Article 81(1) EC to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited.

37 On the contrary, it is apparent from Article 81(1)(a) EC that concerted practices may have an anti-competitive object if they 'directly or indirectly fix purchase or selling prices or any other trading conditions'. In the present case, as the Netherlands Government submitted in its written observations, as far as concerns postpaid subscriptions, the remuneration paid to dealers is evidently a decisive factor in fixing the price to be paid by the end user.

38 In any event, as the Advocate General pointed out at point 58 of her Opinion, Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.

39 Therefore, contrary to what the referring court would appear to believe, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices.

40 Fourth, as regards Vodafone's argument that the object of the concerted practice at issue in the main proceedings cannot be to restrict competition because standard dealer remunerations should, in any event, have been reduced as a result of market conditions, it is, admittedly, clear from paragraph 33 above that the requirement that economic operators should be free to act independently does not deprive them of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors.

41 However, as the Advocate General observed at points 66 to 68 of her Opinion, while not all parallel conduct of competitors on the market can be traced to the fact that they have adopted a concerted action with an anti-competitive object, an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object, and that extends to situations, such as that in the present case, in which the modification relates to the reduction in the standard commission paid to dealers.

42 It is for the referring court to determine whether, in the dispute in the main proceedings, the information exchanged at the meeting held on 13 June 2001 was capable of removing such uncertainties.

43 In the light of all the foregoing considerations, the answer to the first question must be that a concerted practice pursues an anti-competitive object for the purpose of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.

The second question

44 By its second question, the referring court asks essentially whether, in examining whether there is a causal connection between the concerted practice and the market conduct of the undertakings participating in the
practice – a connection which must exist if it is to be established that there is a concerted practice within the meaning of Article 81(1) EC – the national court is required to apply the presumption of a causal connection established in the Court's case-law, according to which, where they remain active on the market, such undertakings are presumed to take account of the information exchanged with their competitors, or whether that court can apply the rules of national law pertaining to the burden of proof.

45 As the Advocate General pointed out at point 76 of her Opinion, that question seeks to clarify whether national authorities and courts are also obliged to base their application of Article 81(1) EC on the presumption which operates at Community level.

46 According to the referring court, if that presumption is intrinsic to the concept of concerted practice in Article 81(1) EC, the national court is obliged to apply it. It maintains, on the other hand, that if that presumption must be regarded as a procedural rule, it would be permissible for the national court not to apply it, in accordance with the principle of procedural autonomy of the Member States.

47 Vodafone, T-Mobile and KPN observe that there is nothing in Article 81 EC or in the Court’s case-law to support the conclusion that the presumption of a causal connection forms an intrinsic part of the concept of concerted practice in Article 81(1) EC. They therefore take the view that, in accordance with established case-law, in the absence of relevant Community rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are no less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render in practice impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).

48 On the other hand, the Netherlands Government and the Commission are of the view that the presumption of a causal connection was intended to form a constituent element of the concept of concerted practice within the meaning of Article 81(1) EC and not a procedural rule that is independent of that concept, so that the national courts and tribunals are obliged to apply it.

49 It should be borne in mind at the outset that Article 81 EC, first, produces direct effects in relations between individuals, creating rights for the persons concerned which the national courts must safeguard and, second, is a matter of public policy, essential for the accomplishment of the tasks entrusted to the Community, which must be automatically applied by national courts (see, to that effect, Case C-126/97 Eco Swiss [1999] ECR I-3055, paragraphs 36 and 39, and Joined Cases C-295/04 to C-298/04 Manfredi and Others [2006] ECR I-6619, paragraphs 31 and 39).

50 In applying Article 81 EC, any interpretation that is provided by the Court is therefore binding on all the national courts and tribunals of the Member States.

51 As regards the presumption of a causal connection formulated by the Court in connection with the interpretation of Article 81(1) EC, it should be pointed out, first, that the Court has held that the concept of a concerted practice, as it derives from the actual terms of that provision, implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. However, the Court went on to consider that, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. That is all the more the case where the undertakings concert together on a regular basis over a long period. Lastly, the Court concluded that such a concerted practice is caught by Article 81(1) EC, even in the absence of anti-competitive effects on the market (see Hill, paragraphs 161 to 163).

52 In those circumstances, it must be held that the presumption of a causal connection stems from Article 81(1) EC, as interpreted by the Court, and it consequently forms an integral part of applicable Community law.

53 In the light of the foregoing considerations, the answer to the second question must be that, in examining whether there is a causal connection between the concerted practice and the market conduct of the
undertakings participating in the practice – a connection which must exist if it is to be established that there is concerted practice within the meaning of Article 81(1) EC – the national court is required, subject to proof to the contrary, which it is for the undertakings concerned to adduce, to apply the presumption of a causal connection established in the Court's case-law, according to which, where they remain active on that market, such undertakings are presumed to take account of the information exchanged with their competitors.

The third question

54 By its third question, the referring court asks essentially whether, when applying the concept of concerted practices in Article 81(1) EC, there is in all cases a presumption of a causal connection between the concerted practice and the market conduct of the undertakings concerned, even if the concerted action is the result of a single meeting.

55 Vodafone, T-Mobile and KPN essentially take the view that it cannot be inferred from Commission v Anic Partecipazioni or Hüls that the presumption of a causal connection is applicable in all cases. In their view, that presumption should be applied only in cases in which the facts and circumstances are the same as those in those cases. In essence, they submit that it is only where the undertakings concerned meet on a regular basis, in the knowledge that confidential information has been exchanged in the course of previous meetings, that those undertakings can be presumed to have been guided in their market conduct on the basis of the concerted action. Moreover, they consider that it is irrational to take the view that an undertaking should base its market conduct on information exchanged in the course of just one meeting, in particular where, as in the case in the main proceedings, the meeting has a legitimate purpose.

56 On the other hand, the Netherlands Government and the Commission submit that it is evident from the case-law, in particular Commission v Anic Partecipazioni and Hüls, that the presumption of a causal connection is not dependent on the number of meetings which gave rise to the concerted action. They observe that such a presumption is justified if the contact which took place, regard being had to its context, content and the frequency with which it occurred, is sufficient to result in coordination of conduct on the market that is capable of preventing, restricting or distorting competition within the meaning of Article 81(1) EC and if, moreover, the undertakings concerned remain active on the market.

57 According to the Netherlands Government, the action in the main proceedings is a perfect illustration of the fact that a single meeting is sufficient for concerted action to be established. First, the meeting held on 13 June 2001 enabled the operators concerned to collude in the reduction of dealer remunerations. Second, it was possible as a result of that meeting to remove the uncertainties as to which operator would reduce its expenditure on recruitment, when and to what extent it would do so, and as to the time-frame within which the other participating operators would do likewise.

58 It is evident from paragraph 162 of Hüls and paragraph 121 of Commission v Anic Partecipazioni that the Court found that that presumption applied only where there was concerted action and where the undertaking concerned remained active on the market. The addition of the words 'particularly when they concert together on a regular basis over a long period', far from supporting the argument that there is a presumption of a causal connection only if the undertakings meet regularly, must necessarily be interpreted as meaning that that presumption is more compelling where undertakings have concerted their actions on a regular basis over a long period.

59 Any other interpretation would be tantamount to a claim that an isolated exchange of information between competitors could not in any case lead to concerted action that is in breach of the competition rules laid down in the Treaty. Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails.

60 As the Netherlands Government correctly pointed out, together with the Advocate General at points 104 and 105 of her Opinion, the number, frequency, and form of meetings between competitors needed to concert their market conduct depend on both the subject-matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted actions in
relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, as in the main proceedings, the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve.

61 In those circumstances, what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question.

62 In the light of the foregoing, the answer to the third question must be that, in so far as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. A concerted practice pursues an anti-competitive object for the purposes of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.

2. In examining whether there is a causal connection between the concerted practice and the market conduct of the undertakings participating in the practice – a connection which must exist if it is to be established that there is concerted practice within the meaning of Article 81(1) EC – the national court is required, subject to proof to the contrary, which it is for the undertakings concerned to adduce, to apply the presumption of a causal connection established in the Court’s case-law, according to which, where they remain active on that market, such undertakings are presumed to take account of the information exchanged with their competitors.

3. In so far as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion.

[Signatures]
IN JOINED CASES 56 AND 58/64

56/64 - ETABLISSEMENTS CONSTEN SARL, HAVING ITS REGISTERED OFFICE AT COURBEVOIE ( SEINE ), REPRESENTED BY J . LASSIER, ADVOCATE AT THE COUR D' APPEL, PARIS, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF J . WELTER, AVOCAT - AVOUE, 6 RUE WILLY-GOERGEN,

58/64 - GRUNDIG-VERKAUFS-GMBH, HAVING ITS REGISTERED OFFICE AT FUERTH ( BAVARIA ), REPRESENTED BY ITS MANAGING DIRECTOR, MAX GRUNDIG, ASSISTED BY H . HELLMANN AND K . PFEIFFER, OF THE COLOGNE
BAR, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF A. NEYENS, AVOCAT-AVOUE, 9 RUE DES GLACIS,

APPLICANTS,

V

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, REPRESENTED BY ITS LEGAL ADVISERS, G. LE TALLEC (CASE 56/64) AND J. THIESING (CASE 58/64), ACTING AS AGENTS, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE SECRETARIAT OF THE LEGAL DEPARTMENT OF THE EUROPEAN EXECUTIVES, 2 PLACE DE METZ,

DEFENDANT,

THE COMPLAINT RELATING TO THE DESIGNATION OF THE CONTESTED MEASURE

THE APPLICANT CONSTEN PLEADS INFRINGEMENT OF AN ESSENTIAL PROCEDURAL REQUIREMENT SINCE THE TEXT OF THE CONTESTED MEASURE IS DESCRIBED IN THE OFFICIAL JOURNAL AS A DIRECTIVE, WHEREAS A MEASURE OF THIS TYPE CANNOT BE ADDRESSED TO INDIVIDUALS.

WHERE A MEASURE IS DIRECTED TO SPECIFICALLY NAMED UNDERTAKINGS, ONLY THE TEXT WHICH IS NOTIFIED TO THE ADDRESSEES IS AUTHENTIC. THE TEXT IN QUESTION INCLUDES THE WORDS 'THE COMMISSION HAS ADOPTED THE PRESENT DECISION'.

THIS SUBMISSION IS THEREFORE UNFOUNDED.

THE COMPLAINTS REGARDING VIOLATION OF THE RIGHTS OF THE DEFENCE

THE APPLICANT CONSTEN COMPLAINS THAT THE COMMISSION VIOLATED THE RIGHTS OF THE DEFENCE IN THAT IT FAILED TO COMMUNICATE TO IT THE CONTENT OF THE COMPLETE FILE.

THE APPLICANT GRUNDIG MAKES THE SAME COMPLAINT, IN PARTICULAR WITH REGARD TO TWO NOTES FROM FRENCH AND GERMAN AUTHORITIES WHICH THE COMMISSION TOOK INTO ACCOUNT IN REACHING ITS DECISION.

THE PROCEEDINGS BEFORE THE COMMISSION CONCERNING THE APPLICATION OF ARTICLE 85 OF THE TREATY ARE ADMINISTRATIVE PROCEEDINGS, WHICH IMPLIES THAT THE PARTIES CONCERNED SHOULD BE PUT IN A POSITION BEFORE THE DECISION IS ISSUED TO PRESENT THEIR OBSERVATIONS ON THE COMPLAINTS WHICH THE COMMISSION CONSIDERS MUST BE UPHeld AGAINST THEM. FOR THAT PURPOSE, THEY MUST BE INFORMED OF THE FACTS UPON WHICH THESE COMPLAINTS ARE BASED. IT IS NOT NECESSARY HOWEVER THAT THE ENTIRE CONTENT OF THE FILE SHOULD BE COMMUNICATED TO THEM. IN THE PRESENT CASE IT APPEARS THAT THE STATEMENT OF THE COMMISSION OF 20 DECEMBER 1963 INCLUDES ALL THE FACTS THE KNOWLEDGE OF WHICH IS NECESSARY TO ASCERTAIN WHICH COMPLAINTS WERE TAKEN INTO CONSIDERATION. THE APPLICANTS DULY RECEIVED A COPY OF THAT STATEMENT AND WERE ABLE TO PRESENT THEIR WRITTEN AND ORAL OBSERVATIONS. THE CONTESTED DECISION IS NOT BASED ON COMPLAINTS OTHER THAN THOSE WHICH WERE THE SUBJECT OF THOSE PROCEEDINGS.
THE APPLICANT CONSTITEN MAINTAINS THAT THE DECISION IS ALSO VITIATED BY VIOLATION OF THE RIGHTS OF THE DEFENCE IN THAT IT DID NOT TAKE ACCOUNT OF THE PRINCIPAL SUBMISSIONS MADE BY IT TO THE COMMISSION, IN PARTICULAR OF REQUESTS FOR FURTHER INQUIRIES.

IN NON-JUDICIAL PROCEEDINGS OF THIS KIND THE ADMINISTRATION IS NOT REQUIRED TO GIVE REASONS FOR ITS REJECTION OF THE PARTIES’ SUBMISSIONS.

IT DOES NOT APPEAR THEREFORE THAT THE RIGHTS OF THE DEFENCE OF THE PARTIES WERE VIOLATED DURING THE PROCEEDINGS BEFORE THE COMMISSION.

THIS SUBMISSION IS UNFOUNDED.

THE COMPLAINT CONCERNING THE INCLUSION IN THE OPERATIVE PART OF THE DECISION OF THE FINDING OF INFRINGEMENT

THE GERMAN GOVERNMENT SUPPORTS THE SUBMISSION THAT THERE WAS AN INFRINGEMENT OF AN ESSENTIAL PROCEDURAL REQUIREMENT ON THE GROUND THAT THE FINDING THAT AN INFRINGEMENT OF ARTICLE 85 OF THE EEC TREATY HAD NOT BEEN COMMITTED SHOULD HAVE BEEN INCLUDED SOLELY IN THE PREAMBLE TO AND NOT IN THE OPERATIVE PART OF THE DECISION.

THAT FINDING CONSTITUTES THE BASIS OF THE OBLIGATION OF THE PARTIES TO TERMINATE THE INFRINGEMENT. ITS EFFECTS ON THE LEGAL SITUATION OF THE UNDERTAKINGS CONCERNED DO NOT DEPEND ON ITS POSITION IN THE DECISION.

THIS COMPLAINT THEREFORE DOES NOT DISCLOSE ANY LEGAL INTEREST REQUIRING PROTECTION AND MUST CONSEQUENTLY BE REJECTED.

THE COMPLAINTS CONCERNING THE APPLICABILITY OF ARTICLE 85(1) TO SOLE DISTRIBUTORSHIP CONTRACTS

THE APPLICANTS SUBMIT THAT THE PROHIBITION IN ARTICLE 85(1) APPLIES ONLY TO SO-CALLED HORIZONTAL AGREEMENTS. THE ITALIAN GOVERNMENT SUBMITS FURTHERMORE THAT SOLE DISTRIBUTORSHIP CONTRACTS DO NOT CONSTITUTE ' AGREEMENTS BETWEEN UNDERTAKINGS ' WITHIN THE MEANING OF THAT PROVISION, SINCE THE PARTIES ARE NOT ON A FOOTING OF EQUALITY. WITH REGARD TO THESE CONTRACTS, FREEDOM OF COMPETITION MAY ONLY BE PROTECTED BY VIRTUE OF ARTICLE 86 OF THE TREATY.

NEITHER THE WORDING OF ARTICLE 85 NOR THAT OF ARTICLE 86 GIVES ANY GROUND FOR HOLDING THAT DISTINCT AREAS OF APPLICATION ARE TO BE ASSIGNED TO EACH OF THE TWO ARTICLES ACCORDING TO THE LEVEL IN THE ECONOMY AT WHICH THE CONTRACTING PARTIES OPERATE. ARTICLE 85 REFERS IN A GENERAL WAY TO ALL AGREEMENTS WHICH DISTORT COMPETITION WITHIN THE COMMON MARKET AND DOES NOT LAY DOWN ANY DISTINCTION BETWEEN THOSE AGREEMENTS BASED ON WHETHER THEY ARE MADE BETWEEN COMPETITORS OPERATING AT THE SAME LEVEL IN THE ECONOMIC PROCESS OR BETWEEN NON-COMPETING PERSONS OPERATING AT DIFFERENT LEVELS. IN PRINCIPLE, NO DISTINCTION CAN BE MADE WHERE THE TREATY DOES NOT MAKE ANY DISTINCTION.
FURTHERMORE, THE POSSIBLE APPLICATION OF ARTICLE 85 TO A SOLE DISTRIBUTORSHIP CONTRACT CANNOT BE EXCLUDED MERELY BECAUSE THE GRANTOR AND THE CONCESSIONNAIRE ARE NOT COMPETITORS INTER SE AND NOT ON A FOOTING OF EQUALITY. COMPETITION MAY BE DISTORTED WITHIN THE MEANING OF ARTICLE 85(1) NOT ONLY BY AGREEMENTS WHICH LIMIT IT AS BETWEEN THE PARTIES, BUT ALSO BY AGREEMENTS WHICH PREVENT OR RESTRICT THE COMPETITION WHICH MIGHT TAKE PLACE BETWEEN ONE OF THEM AND THIRD PARTIES. FOR THIS PURPOSE, IT IS IRRELEVANT WHETHER THE PARTIES TO THE AGREEMENT ARE OR ARE NOT ON A FOOTING OF EQUALITY AS REGARDS THEIR POSITION AND FUNCTION IN THE ECONOMY. THIS APPLIES ALL THE MORE, SINCE, BY SUCH AN AGREEMENT, THE PARTIES MIGHT SEEK, BY PREVENTING OR LIMITING THE COMPETITION OF THIRD PARTIES IN RESPECT OF THE PRODUCTS, TO CREATE OR GUARANTEE FOR THEIR BENEFIT AN UNJUSTIFIED ADVANTAGE AT THE EXPENSE OF THE CONSUMER OR USER, CONTRARY TO THE GENERAL AIMS OF ARTICLE 85.

IT IS THUS POSSIBLE THAT, WITHOUT INVOLVING AN ABUSE OF A DOMINANT POSITION, AN AGREEMENT BETWEEN ECONOMIC OPERATORS AT DIFFERENT LEVELS MAY AFFECT TRADE BETWEEN MEMBER STATES AND AT THE SAME TIME HAVE AS ITS OBJECT OR EFFECT THE PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION, THUS FALLING UNDER THE PROHIBITION OF ARTICLE 85(1).

IN ADDITION, IT IS POINTLESS TO COMPARE ON THE ONE HAND THE SITUATION, TO WHICH ARTICLE 85 APPLIES, OF A PRODUCER BOUND BY A SOLE DISTRIBUTORSHIP AGREEMENT TO THE DISTRIBUTOR OF HIS PRODUCTS WITH ON THE OTHER HAND THAT OF A PRODUCER WHO INCLUDES WITHIN HIS UNDERTAKING THE DISTRIBUTION OF HIS OWN PRODUCTS BY SOME MEANS, FOR EXAMPLE, BY COMMERCIAL REPRESENTATIVES, TO WHICH ARTICLE 85 DOES NOT APPLY. THESE SITUATIONS ARE DISTINCT IN LAW AND, MOREOVER, NEED TO BE ASSESSED DIFFERENTLY, SINCE TWO MARKETING ORGANIZATIONS, ONE OF WHICH IS UNTEGRATED INTO THE MANUFACTURER'S UNDERTAKING WHILST THE OTHER IS NOT, MAY NOT NECESSARILY HAVE THE SAME EFFICIENCY. THE WORDING OF ARTICLE 85 CAUSES THE PROHIBITION TO APPLY, PROVIDED THAT THE OTHER CONDITIONS ARE MET, TO AN AGREEMENT BETWEEN SEVERAL UNDERTAKINGS. THUS IT DOES NOT APPLY WHERE A SOLE UNDERTAKING INTEGRATES ITS OWN DISTRIBUTION NETWORK INTO ITS BUSINESS ORGANIZATION. IT DOES NOT THEREBY FOLLOW, HOWEVER, THAT THE CONTRACTUAL SITUATION BASED ON AN AGREEMENT BETWEEN A MANUFACTURING AND A DISTRIBUTING UNDERTAKING IS RENDERED LEGALLY ACCEPTABLE BY A SIMPLE PROCESS OF ECONOMIC ANALOGY - WHICH IS IN ANY CASE INCOMPLETE AND IN CONTRADICTION WITH THE SAID ARTICLE. FURTHERMORE, ALTHOUGH IN THE FIRST CASE THE TREATY INTENDED IN ARTICLE 85 TO LEAVE UNTouched THE INTERNAL ORGANIZATION OF AN UNDERTAKING AND TO RENDER IT LIABLE TO BE CALLED IN QUESTION, BY MEANS OF ARTICLE 86, ONLY IN CASES WHERE IT REACHES SUCH A DEGREE OF SERIOUSNESS AS TO AMOUNT TO AN ABUSE OF A DOMINANT POSITION, THE SAME RESERVATION COULD NOT APPLY WHEN THE IMPEDIMENTS TO COMPETITION RESULT FROM AGREEMENT BETWEEN TWO DIFFERENT UNDERTAKINGS WHICH THEN AS A GENERAL RULE SIMPLY REQUIRE TO BE PROHIBITED.

FINALLY, AN AGREEMENT BETWEEN PRODUCER AND DISTRIBUTOR WHICH MIGHT TEND TO RESTORE THE NATIONAL DIVISIONS IN TRADE BETWEEN
MEMBER STATES MIGHT BE SUCH AS TO FRUSTRATE THE MOST FUNDAMENTAL OBJECTIONS OF THE COMMUNITY. THE TREATY, WHOSE PREAMBLE AND CONTENT AIM AT ABOLISHING THE BARRIERS BETWEEN STATES, AND WHICH IN SEVERAL PROVISIONS GIVES EVIDENCE OF A STERN ATTITUDE WITH REGARD TO THEIR REAPPEARANCE, COULD NOT ALLOW UNDERTAKINGS TO RECONSTRUCT SUCH BARRIERS. ARTICLE 85(1) IS DESIGNED TO PURSUE THIS AIM, EVEN IN THE CASE OF AGREEMENTS BETWEEN UNDERTAKINGS PLACED AT DIFFERENT LEVELS IN THE ECONOMIC PROCESS.

THE SUBMISSIONS SET OUT ABOVE ARE CONSEQUENTLY UNFOUNDED.

THE COMPLAINT BASED ON REGULATION NO 19/65 OF THE COUNCIL

THE APPLICANT GRUNDIG RAISES THE QUESTION WHETHER THE PROHIBITION IN ARTICLE 85(1) WAS APPLICABLE TO THE AGREEMENT IN QUESTION BEFORE THE ADOPTION OF REGULATION NO 19/65 OF THE COUNCIL CONCERNING THE APPLICATION OF ARTICLE 85(3) TO CERTAIN CATEGORIES OF AGREEMENTS.

THIS SUBMISSION WAS RELIED UPON BY THE APPLICANT FOR THE FIRST TIME IN THE REPLY. THE FACT THAT THIS REGULATION WAS ADOPTED AFTER THE APPLICATION WAS BROUGHT DOES NOT JUSTIFY SUCH DELAY. IN FACT, THIS SUBMISSION REALLY AMOUNTS TO A CLAIM THAT BEFORE THE ADOPTION OF THE REGULATION THE COMMISSION SHOULD NOT HAVE APPLIED ARTICLE 85(1) SINCE IT LACKED THE POWERS TO GRANT EXEMPTIONS BY CATEGORIES OF AGREEMENTS.

IN VIEW OF THE FACT THAT THE SITUATION IN QUESTION EXISTED BEFORE REGULATION NO 19/65 WAS ADOPTED, THE REGULATION CANNOT CONSTITUTE A FRESH ISSUE, WITHIN THE MEANING OF ARTICLE 42 OF THE RULES OF PROCEDURE, CAPABLE OF JUSTIFYING THE DELAY IN INDICATING IT.

THE COMPLAINT IS THEREFORE INADMISSIBLE.

THE COMPLAINTS RELATING TO THE CONCEPT OF ' AGREEMENTS...WHICH MAY AFFECT TRADE BETWEEN MEMBER STATES'

THE APPLICANTS AND THE GERMAN GOVERNMENT MAINTAIN THAT THE COMMISSION HAS RELIED ON A MISTAKEN INTERPRETATION OF THE CONCEPT OF AN AGREEMENT WHICH MAY AFFECT TRADE BETWEEN MEMBER STATES AND HAS NOT SHOWN THAT SUCH TRADE WOULD HAVE BEEN GREATER WITHOUT THE AGREEMENT IN DISPUTE.

THE DEFENDANT REPLIES THAT THIS REQUIREMENT IN ARTICLE 85(1) IS FULFILLED ONCE TRADE BETWEEN MEMBER STATES DEVELOPS, AS A RESULT OF THE AGREEMENT, DIFFERENTLY FROM THE WAY IN WHICH IT WOULD HAVE DONE WITHOUT THE RESTRICTION RESULTING FROM THE AGREEMENT, AND ONCE THE INFLUENCE OF THE AGREEMENT ON MARKET CONDITIONS REACHES A CERTAIN DEGREE. SUCH IS THE CASE HERE, ACCORDING TO THE DEFENDANT, PARTICULARLY IN VIEW OF THE IMPEDIMENTS RESULTING WITHIN THE COMMON MARKET FROM THE DISPUTED AGREEMENT AS REGARDS THE EXPORTING AND IMPORTING OF GRUNDIG PRODUCTS TO AND FROM FRANCE.

THE CONCEPT OF AN AGREEMENT 'WHICH MAY AFFECT TRADE BETWEEN MEMBER STATES' IS INTENDED TO DEFINE, IN THE LAW GOVERNING CARTELS, THE BOUNDARY BETWEEN THE AREAS RESPECTIVELY COVERED BY COMMUNITY LAW AND NATIONAL LAW. IT IS ONLY TO THE EXTENT TO WHICH THE
AGREEMENT MAY AFFECT TRADE BETWEEN MEMBER STATES THAT THE DETERIORATION IN COMPETITION CAUSED BY THE AGREEMENT FALLS UNDER THE PROHIBITION OF COMMUNITY LAW CONTAINED IN ARTICLE 85; OTHERWISE IT ESCAPES THE PROHIBITION.

IN THIS CONNEXION, WHAT IS PARTICULARLY IMPORTANT IS WHETHER THE AGREEMENT IS CAPABLE OF CONSTITUTING A THREAT, EITHER DIRECT OR INDIRECT, ACTUAL OR POTENTIAL, TO FREEDOM OF TRADE BETWEEN MEMBER STATES IN A MANNER WHICH MIGHT HARM THE ATTAINMENT OF THE OBJECTIVES OF A SINGLE MARKET BETWEEN STATES. THUS THE FACT THAT AN AGREEMENT ENCOURAGES AN INCREASE, EVEN A LARGE ONE, IN THE VOLUME OF TRADE BETWEEN STATES IS NOT SUFFICIENT TO EXCLUDE THE POSSIBILITY THAT THE AGREEMENT MAY 'AFFECT' SUCH TRADE IN THE ABOVEMENTIONED MANNER. IN THE PRESENT CASE, THE CONTRACT BETWEEN GRUNDIG AND CONSTEN, ON THE ONE HAND BY PREVENTING UNDERTAKINGS OTHER THAN CONSTEN FROM IMPORTING GRUNDIG PRODUCTS INTO FRANCE, AND ON THE OTHER HAND BY PROHIBITING CONSTEN FROM RE-EXPORTING THOSE PRODUCTS TO OTHER COUNTRIES OF THE COMMON MARKET, INDISPUTABLY AFFECTS TRADE BETWEEN MEMBER STATES. THESE LIMITATIONS ON THE FREEDOM OF TRADE, AS WELL AS THOSE WHICH MIGHT ENSUE FOR THIRD PARTIES FROM THE REGISTRATION IN FRANCE BY CONSTEN OF THE GINT TRADE MARK, WHICH GRUNDIG PLACES ON ALL ITS PRODUCTS, ARE ENOUGH TO SATISFY THE REQUIREMENT IN QUESTION.

CONSEQUENTLY, THE COMPLAINTS RAISED IN THIS RESPECT MUST BE DISMISSED.

THE COMPLAINTS CONCERNING THE CRITERION OF RESTRICTION ON COMPETITION

THE APPLICANTS AND THE GERMAN GOVERNMENT MAINTAIN THAT SINCE THE COMMISSION RESTRICTED ITS EXAMINATION SOLELY TO GRUNDIG PRODUCTS THE DECISION WAS BASED UPON A FALSE CONCEPT OF COMPETITION AND OF THE RULES ON PROHIBITION CONTAINED IN ARTICLE 85(1), SINCE THIS CONCEPT APPLIES PARTICULARLY TO COMPETITION BETWEEN SIMILAR PRODUCTS OF DIFFERENT MAKES; THE COMMISSION, BEFORE DECLARING ARTICLE 85(1) TO BE APPLICABLE, SHOULD, BY Basing ITSELF UPON THE 'RULE OF REASON', HAVE CONSIDERED THE ECONOMIC EFFECTS OF THE DISPUTED CONTRAST UPON COMPETITION BETWEEN THE DIFFERENT MAKES. THERE IS A PRESUMPTION THAT VERTICAL SOLE DISTRIBUTORSHIP AGREEMENTS ARE NOT HARMFUL TO COMPETITION AND IN THE PRESENT CASE THERE IS NOTHING TO INVALIDATE THAT PRESUMPTION. ON THE CONTRARY, THE CONTRACT IN QUESTION HAS INCREASED THE COMPETITION BETWEEN SIMILAR PRODUCTS OF DIFFERENT MAKES.

THE PRINCIPLE OF FREEDOM OF COMPETITION CONCERNS THE VARIOUS STAGES AND MANIFESTATIONS OF COMPETITION. ALTHOUGH COMPETITION BETWEEN PRODUCERS IS GENERALLY MORE NOTICEABLE THAN THAT BETWEEN DISTRIBUTORS OF PRODUCTS OF THE SAME MAKE, IT DOES NOT THEREBY FOLLOW THAT AN AGREEMENT TENDING TO RESTRICT THE LATTER KIND OF COMPETITION SHOULD ESCAPE THE PROHIBITION OF ARTICLE 85(1) MERELY BECAUSE IT MIGHT INCREASE THE FORMER.

BESIDES, FOR THE PURPOSE OF APPLYING ARTICLE 85(1), THERE IS NO NEED TO TAKE ACCOUNT OF THE CONCRETE EFFECTS OF AN AGREEMENT ONCE IT
APPEARS THAT IT HAS AS ITS OBJECT THE PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION.

THEREFORE THE ABSENCE IN THE CONTESTED DECISION OF ANY ANALYSIS OF THE EFFECTS OF THE AGREEMENT ON COMPETITION BETWEEN SIMILAR PRODUCTS OF DIFFERENT MAKES DOES NOT, OF ITSELF, CONSTITUTE A DEFECT IN THE DECISION.

IT THUS REMAINS TO CONSIDER WHETHER THE CONTESTED DECISION WAS RIGHT IN FOUNDING THE PROHIBITION OF THE DISPUTED AGREEMENT UNDER ARTICLE 85(1) ON THE RESTRICTION ON COMPETITION CREATED BY GRUNDIG PRODUCTS ALONE. THE INFRINGEMENT WHICH WAS FOUND TO EXIST BY THE CONTESTED DECISION RESULTS FROM THE ABSOLUTE TERRITORIAL PROTECTION CREATED THE SAID CONTRACT IN FAVOUR OF CONSTEN ON THE BASIS OF FRENCH LAW. THE APPLICANTS THUS WISHED TO ELIMINATE ANY POSSIBILITY OF COMPETITION AT THE WHOLESALE LEVEL IN GRUNDIG PRODUCTS IN THE TERRITORY SPECIFIED IN THE CONTRAST ESSENTIALLY BY TWO METHODS.

FIRST, GRUNDIG UNDERTOOK NOT TO DELIVER EVEN INDIRECTLY TO THIRD PARTIES PRODUCTS INTENDED FOR THE AREA COVERED BY THE CONTRACT. THE RESTRICTIVE NATURE OF THAT UNDERTAKING IS OBVIOUS IF IT IS CONSIDERED IN THE LIGHT OF THE PROHIBITION ON EXPORTING WHICH WAS IMPOSED NOT ONLY ON CONSTEN BUT ALSO ON ALL THE OTHER SOLE CONCESSIONNAIRES OF GRUNDIG, AS WELL AS THE GERMAN WHOLESALERS. SECONDLY, THE REGISTRATION IN FRANCE BY CONSTEN OF THE GINT TRADE MARK, WHICH GRUNDIG AFFIXES TO ALL ITS PRODUCTS, IS INTENDED TO INCREASE THE PROTECTION INHERENT IN THE DISPUTED AGREEMENT, AGAINST THE RISK OF PARALLEL IMPORTS INTO FRANCE OF GRUNDIG PRODUCTS, BY ADDING THE PROTECTION DERIVING FROM THE LAW ON INDUSTRIAL PROPERTY RIGHTS. THUS NO THIRD PARTY COULD IMPORT GRUNDIG PRODUCTS FROM OTHER MEMBER STATES OF THE COMMUNITY FOR RESALE IN FRANCE WITHOUT RUNNING SERIOUS RISKS.

THE DEFENDANT PROPERLY TOOK INTO ACCOUNT THE WHOLE DISTRIBUTION SYSTEM THUS SET UP BY GRUNDIG. IN ORDER TO ARRIVE AT A TRUE REPRESENTATION OF THE CONTRACTUAL POSITION THE CONTRACT MUST BE PLACED IN THE ECONOMIC AND LEGAL CONTEXT IN THE LIGHT OF WHICH IT WAS CONCLUDED BY THE PARTIES. SUCH A PROCEDURE IS NOT TO BE REGARDED AS AN UNWARRANTABLE INTERFERENCE IN LEGAL TRANSACTIONS OR CIRCUMSTANCES WHICH WERE NOT THE SUBJECT OF THE PROCEEDINGS BEFORE THE COMMISSION.

GRUNDIG PRODUCTS AND MAINTAINING ARTIFICIALLY, FOR PRODUCTS OF A
VERY WELL-KNOWN BRAND, SEPARATE NATIONAL MARKETS WITHIN THE
COMMUNITY, IT IS THEREFORE SUCH AS TO DISTORT COMPETITION IN THE
COMMON MARKET.

IT WAS THEREFORE PROPER FOR THE CONTESTED DECISION TO HOLD THAT
THE AGREEMENT CONSTITUTES AN INFRINGEMENT OF ARTICLE 85(1). NO
FURTHER CONSIDERATIONS, WHETHER OF ECONOMIC DATA (PRICE
DIFFERENCES BETWEEN FRANCE AND GERMANY, REPRESENTATIVE CHARACTER
OF THE TYPE OF APPLIANCE CONSIDERED, LEVEL OF OVERHEADS BORNE BY
CONSTEN) OR OF THE CORRECTIONS OF THE CRITERIA UPON WHICH THE
COMMISSION RELIED IN ITS COMPARISONS BETWEEN THE SITUATIONS OF THE
FRENCH AND GERMAN MARKETS, AND NO POSSIBLE FAVOURABLE EFFECTS OF
THE AGREEMENT IN OTHER RESPECTS, CAN IN ANY WAY LEAD, IN THE FACE OF
THE ABOVEMENTIONED RESTRICTIONS, TO A DIFFERENT SOLUTION UNDER
ARTICLE 85(1).

THE COMPLAINTS RELATING TO THE EXTENT OF THE PROHIBITION

THE APPLICANT GRUNDIG AND THE GERMAN GOVERNMENT COMPLAIN THAT
THE COMMISSION DID NOT EXCLUDE FROM THE PROHIBITION, IN THE
OPERATIVE PART OF THE CONTESTED DECISION, THOSE CLAUSES OF THE
CONTRACT IN RESPECT OF WHICH THERE WAS FOUND NO EFFECT CAPABLE OF
RESTRICTING COMPETITION, AND THAT IT THEREBY FAILED TO DEFINE THE
INFRINGEMENT.

IT IS APPARENT FROM THE STATEMENT OF THE REASONS FOR THE CONTESTED
DECISION, AS WELL AS FROM ARTICLE 3 THEREOF, THAT THE INFRINGEMENT
DECLARED TO EXIST BY ARTICLE 1 OF THE OPERATIVE PART IS NOT TO BE
FOUND IN THE UNDERTAKING BY GRUNDIG NOT TO MAKE DIRECT DELIVERIES
IN FRANCE EXCEPT TO CONSTEN. THAT INFRINGEMENT ARISES FROM THE
CLAUSES WHICH, ADDED TO THIS GRANT OF EXCLUSIVE RIGHTS, ARE
INTENDED TO IMPEDE, RELYING UPON NATIONAL LAW, PARALLEL IMPORTS OF
GRUNDIG PRODUCTS INTO FRANCE BY ESTABLISHING ABSOLUTE TERRITORIAL
PROTECTION IN FAVOUR OF THE SOLE CONCESSIONNAIRE.

THE PROVISION IN ARTICLE 85(2) THAT AGREEMENTS PROHIBITED PURSUANT
TO ARTICLE 85 SHALL BE AUTOMATICALLY VOID APPLIES ONLY TO THOSE
PARTS OF THE AGREEMENT WHICH ARE SUBJECT TO THE PROHIBITION, OR TO
THE AGREEMENT AS A WHOLE IF THOSE PARTS DO NOT APPEAR TO BE
SEVERABLE FROM THE AGREEMENT ITSELF. THE COMMISSION SHOULD,
THEREFORE, EITHER HAVE CONFINED ITSELF IN THE OPERATIVE PART OF THE
CONTESTED DECISION TO DECLARING THAT AN INFRINGEMENT LAY IN THOSE
PARTS ONLY OF THE AGREEMENT WHICH CAME WITHIN THE PROHIBITION, OR
ELSE IT SHOULD HAVE SET OUT IN THE PREAMBLE TO THE DECISION THE
REASONS WHY THOSE PARTS DID NOT APPEAR TO IT TO BE SEVERABLE FROM
THE WHOLE AGREEMENT.

IT FOLLOWS, HOWEVER, FROM ARTICLE 1 OF THE DECISION THAT THE
INFRINGEMENT WAS FOUND TO LIE IN THE AGREEMENT AS A WHOLE,
ALTHOUGH THE COMMISSION DID NOT ADEQUATELY STATE THE REASONS
WHY IT WAS NECESSARY TO RENDER THE WHOLE OF THE AGREEMENT VOID
WHEN IT IS NOT ESTABLISHED THAT ALL THE CLAUSES INFRINGED THE
PROVISIONS OF ARTICLE 85(1). THE STATE OF AFFAIRS FOUND TO BE
INCOMPATIBLE WITH ARTICLE 85(1) STEMS FROM CERTAIN SPECIFIC CLAUSES
OF THE CONTRACT OF 1 APRIL 1957 CONCERNING ABSOLUTE TERRITORIAL PROTECTION AND FROM THE ADDITIONAL AGREEMENT ON THE GINT TRADE MARK RATHER THAN FROM THE COMBINED OPERATION OF ALL CLAUSES OF THE AGREEMENT, THAT IS TO SAY, FROM THE AGGREGATE OF ITS EFFECTS.

ARTICLE 1 OF THE CONTESTED DECISION MUST THEREFORE BE ANNULLED IN SO FAR AS IT RENDERS VOID, WITHOUT ANY VALID REASON, ALL THE CLAUSES OF THE AGREEMENT BY VIRTUE OF ARTICLE 85(2).

THE SUBMISSIONS CONCERNING THE FINDING OF AN INFRINGEMENT IN RESPECT OF THE AGREEMENT ON THE GINT TRADE MARK

THE APPLICANTS COMPLAIN THAT THE COMMISSION INFRINGED ARTICLES 36, 222 AND 234 OF THE EEC TREATY AND FURTHERMORE EXCEEDED THE LIMITS OF ITS POWERS BY DECLARING THAT THE AGREEMENT ON THE REGISTRATION IN FRANCE OF THE GINT TRADE-MARK SERVED TO ENSURE ABSOLUTE TERRITORIAL PROTECTION IN FAVOUR OF CONSTEN AND BY EXCLUDING THEREBY, IN ARTICLE 3 OF THE OPERATIVE PART OF THE CONTESTED DECISION, ANY POSSIBILITY OF CONSTEN'S ASSERTING ITS RIGHTS UNDER NATIONAL TRADE-MARK LAW, IN ORDER TO OPPOSE PARALLEL IMPORTS.

THE APPLICANTS MAINTAIN MORE PARTICULARLY THAT THE CRITICIZED EFFECT ON COMPETITION IS DUE NOT TO THE AGREEMENT BUT TO THE REGISTRATION OF THE TRADE-MARK IN ACCORDANCE WITH FRENCH LAW, WHICH GIVES RISE TO AN ORIGINAL INHERENT RIGHT OF THE HOLDER OF THE TRADE-MARK FROM WHICH THE ABSOLUTE TERRITORIAL PROTECTION DERIVES UNDER NATIONAL LAW.

CONSTEN'S RIGHT UNDER THE CONTRACT TO THE EXCLUSIVE USER IN FRANCE OF THE GINT TRADE-MARK, WHICH MAY BE USED IN A SIMILAR MANNER IN OTHER COUNTRIES, IS INTENDED TO MAKE IT POSSIBLE TO KEEP UNDER SURVEILLANCE AND TO PLACE AN OBSTACLE IN THE WAY OF PARALLEL IMPORTS. THUS, THE AGREEMENT BY WHICH GRUNDIG, AS THE HOLDER OF THE TRADE-MARK BY VIRTUE OF AN INTER-NATIONAL REGISTRATION, AUTHORIZED CONSTEN TO REGISTER IT IN FRANCE IN ITS OWN NAME TENDS TO RESTRICT COMPETITION.

ALTHOUGH CONSTEN IS, BY VIRTUE OF THE REGISTRATION OF THE GINT TRADE-MARK, REGARDED UNDER FRENCH LAW AS THE ORIGINAL HOLDER OF THE RIGHTS RELATING TO THAT TRADE-MARK, THE FACT Never THELESS REMAINS THAT IT WAS BY VIRTUE OF AN AGREEMENT WITH GRUNDIG THAT IT WAS ABLE TO EFFECT THE REGISTRATION.

THAT AGREEMENT THEREFORE IS ONE WHICH MAY BE CAUGHT BY THE PROHIBITION IN ARTICLE 85(1). THE PROHIBITION WOULD BE INEFFECTIVE IF CONSTEN COULD CONTINUE TO USE THE TRADE-MARK TO ACHIEVE THE SAME OBJECT AS THAT PURSUED BY THE AGREEMENT WHICH HAS BEEN HELD TO BE UNLAWFUL.

ARTICLES 36, 222 AND 234 OF THE TREATY RELIED UPON BY THE APPLICANTS DO NOT EXCLUDE ANY INFLUENCE WHATSOEVER OF COMMUNITY LAW ON THE EXERCISE OF NATIONAL INDUSTRIAL PROPERTY RIGHTS.

ARTICLE 36, WHICH LIMITS THE SCOPE OF THE RULES ON THE LIBERALIZATION OF TRADE CONTAINED IN TITLE I, CHAPTER 2, OF THE TREATY, CANNOT LIMIT THE FIELD OF APPLICATION OF ARTICLE 85. ARTICLE 222 CONFINES ITSELF TO STATING THAT THE 'TREATY SHALL IN NO WAY
PREJUDICE THE RULES IN MEMBER STATES GOVERNING THE SYSTEM OF PROPERTY OWNERSHIP. THE INJUNCTION CONTAINED IN ARTICLE 3 OF THE OPERATIVE PART OF THE CONTESTED DECISION TO REFRAIN FROM USING RIGHTS UNDER NATIONAL TRADE-MARK LAW IN ORDER TO SET AN OBSTACLE IN THE WAY OF PARALLEL IMPORTS DOES NOT AFFECT THE GRANT OF THOSE RIGHTS BUT ONLY LIMITS THEIR EXERCISE TO THE EXTENT NECESSARY TO GIVE EFFECT TO THE PROHIBITION UNDER ARTICLE 85(1). THE POWER OF THE COMMISSION TO ISSUE SUCH AN INJUNCTION FOR WHICH PROVISION IS MADE IN ARTICLE 3 OF REGULATION NO 17/62 OF THE COUNCIL IS IN HARMONY WITH THE NATURE OF THE COMMUNITY RULES ON COMPETITION WHICH HAVE IMMEDIATE EFFECT AND ARE DIRECTLY BINDING ON INDIVIDUALS.

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SUCH A BODY OF RULES, BY REASON OF ITS NATURE DESCRIBED ABOVE AND ITS FUNCTION, DOES NOT ALLOW THE IMPROPER USE OF RIGHTS UNDER ANY NATIONAL TRADE-MARK LAW IN ORDER TO FRUSTRATE THE COMMUNITY’S LAW ON CARTELS.

ARTICLE 234 WHICH HAS THE AIM OF PROTECTING THE RIGHTS OF THIRD COUNTRIES IS NOT APPLICABLE IN THE PRESENT INSTANCE.

THE ABOVEMENTIONED SUBMISSIONS ARE THEREFORE UNFOUNDED.

THE COMPLAINTS CONCERNING THE FAILURE TO HEAR THIRD PARTIES CONCERNED

THE APPLICANTS AND THE GERMAN GOVERNMENT STATE THAT ARTICLE 3 OF THE OPERATIVE PART OF THE CONTESTED DECISION APPLIES IN FACT TO THE WHOLE DISTRIBUTION OF GRUNDIG PRODUCTS IN THE COMMON MARKET. IN SO DOING IT IS SAID THAT THE COMMISSION EXCEEDED ITS POWERS AND DISREGARDED THE RIGHT OF ALL THOSE CONCERNED TO BE HEARD.

THE PROHIBITION IMPOSED UPON GRUNDIG BY THE ABOVEMENTIONED ARTICLE 3, PREVENTING ITS DISTRIBUTORS AND SOLE CONCESSIONNAIRES FROM EXPORTING TO FRANCE, CONSTITUTES THE COROLLARY TO THE PROHIBITION ON THE ABSOLUTE TERRITORIAL PROTECTION WHICH WAS ESTABLISHED FOR THE BENEFIT OF CONSTEN. THIS PROHIBITION THUS DOES NOT EXCEED THE LIMITS OF THE PROCEEDINGS WHICH CULMINATED IN THE APPLICATION OF ARTICLE 85(1) TO THE AGREEMENT BETWEEN GRUNDIG AND CONSTEN. FURTHERMORE THE CONTESTED DECISION DOES NOT DIRECTLY AFFECT THE LEGAL VALIDITY OF THE AGREEMENTS CONCLUDED BETWEEN GRUNDIG AND THE WHOLESALERS AND CONCESSIONNAIRES OTHER THAN CONSTEN, BUT IT CONFINES ITSELF TO RESTRICTING GRUNDIG’S FREEDOM OF ACTION AS REGARDS THE PARALLEL IMPORTS OF ITS PRODUCTS INTO FRANCE.

ALTHOUGH IT IS DESIRABLE THAT THE COMMISSION SHOULD EXTEND ITS INQUIRIES AS FAR AS POSSIBLE TO THOSE WHO MIGHT BE AFFECTED BY ITS DECISIONS, THE MERE INTEREST IN PREVENTING AN AGREEMENT TO WHICH THEY ARE NOT PARTIES FROM BEING DECLARED ILLEGAL SO THAT THEY MAY RETAIN THE BENEFITS WHICH THEY DERIVE DE FACTO FROM THE SITUATION WHICH RESULTS FROM THAT AGREEMENT CANNOT CONSTITUTE A SUFFICIENT BASIS FOR ESTABLISHING A RIGHT FOR THE OTHER CONCESSIONNAIRES OF GRUNDIG TO BE CALLED AUTOMATICALLY BY THE COMMISSION TO TAKE PART.
IN THE PROCEEDINGS CONCernING THE RELATIONSHIP BETWEEN CONSTEN AND GRUNDIG.

Consequently this submission is unfounded.

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The complaints concerning the application of Article 85(1)

The conditions of application

The applicants, supported on several points by the German government, allege inter alia that all the conditions for application of the exemption, the existence of which is denied in the contested decision, are met in the present case. The defendant starts from the premise that it is for the undertakings concerned to prove that the conditions required for exemption are satisfied.

The undertakings are entitled to an appropriate examination by the commission of their requests for article 85(3) to be applied. For this purpose the commission may not confine itself to requiring from undertakings proof of the fulfilment of the requirements for the grant of the exemption but must, as a matter of good administration, play its part, using the means available to it, in ascertaining the relevant facts and circumstances.

Furthermore, the exercise of the commission's powers necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the commission deduces therefrom. This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based.

The contested decision states that the principal reason for the refusal of exemption lies in the fact that the requirement contained in article 85(3)(a) is not satisfied.

The German government complains that the said decision does not answer the question whether certain factors, especially the advance orders and the guarantee and after-sales services, the favourable effects of which were recognized by the commission, could be maintained intact in the absence of absolute territorial protection.

The contested decision admits only by way of assumption that the sole distributorship contract in question contributes to an improvement in production and distribution. Then the contested decision examines the question 'whether an improvement in the distribution of goods by virtue of the sole distribution agreement could no longer be achieved if parallel imports were admitted'.
MILITATES IN FAVOUR OF THE NECESSITY FOR ABSOLUTE TERRITORIAL PROTECTION HAS BEEN PUT FORWARD OR HINTED AT'.

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THE QUESTION WHETHER THERE IS AN IMPROVEMENT IN THE PRODUCTION OF DISTRIBUTION OF THE GOODS IN QUESTION, WHICH IS REQUIRED FOR THE GRANT OF EXEMPTION, IS TO BE ANSWERED IN ACCORDANCE WITH THE SPIRIT OF ARTICLE 85. FIRST, THIS IMPROVEMENT CANNOT BE IDENTIFIED WITH ALL THE ADVANTAGES WHICH THE PARTIES TO THE AGREEMENT OBTAIN FROM IT IN THEIR PRODUCTION OR DISTRIBUTION ACTIVITIES. THESE ADVANTAGES ARE GENERALLY INDISPUTABLE AND SHOW THE AGREEMENT AS IN ALL RESPECTS INDISPENSABLE TO AN IMPROVEMENT AS UNDERSTOOD IN THIS SENSE. THIS SUBJECTIVE METHOD, WHICH MAKES THE CONTENT OF THE CONCEPT OF 'IMPROVEMENT' DEPEND UPON THE SPECIAL FEATURES OF THE CONTRACTUAL RELATIONSHIPS IN QUESTION, IS NOT CONSISTENT WITH THE AIMS OF ARTICLE 85. FURTHERMORE, THE VERY FACT THAT THE TREATY PROVIDES THAT THE RESTRICTION OF COMPETITION MUST BE 'INDISPENSABLE' TO THE IMPROVEMENT IN QUESTION CLEARLY INDICATES THE IMPORTANCE WHICH THE LATTER MUST HAVE. THIS IMPROVEMENT MUST IN PARTICULAR SHOW APPRECIABLE OBJECTIVE ADVANTAGES OF SUCH A CHARACTER AS TO COMPENSATE FOR THE DISADVANTAGES WHICH THEY CAUSE IN THE FIELD OF COMPETITION.

THE ARGUMENT OF THE GERMAN GOVERNMENT, BASED ON THE PREMISE THAT ALL THOSE FEATURES OF THE AGREEMENT WHICH FAVOUR THE IMPROVEMENT AS CONCEIVED BY THE PARTIES TO THE AGREEMENT MUST BE MAINTAINED INTACT, PRESUPPOSES THAT THE QUESTION WHETHER ALL THESE FEATURES ARE NOT ONLY FAVOURABLE BUT ALSO INDISPENSABLE TO THE IMPROVEMENT OF THE PRODUCTION OR DISTRIBUTION OF THE GOODS IN QUESTION HAS ALREADY BEEN SETTLED AFFIRMATIVELY. BECAUSE OF THIS THE ARGUMENT NOT ONLY TENDS TO WEAKEN THE REQUIREMENT OF INDISPENSABILITY BUT ALSO AMONG OTHER CONSEQUENCES TO CONFUSE SOLICITUDE FOR THE SPECIFIC INTERESTS OF THE PARTIES WITH THE OBJECTIVE IMPROVEMENTS CONTEMPLATED BY THE TREATY.


THE APPLICANTS MAINTAIN THAT THE ADMISSION OF PARALLEL IMPORTS WOULD MEAN THAT THE SOLE REPRESENTATIVE WOULD NO LONGER BE IN A POSITION TO ENGAGE IN ADVANCE PLANNING.
A certain degree of uncertainty is inherent in all forecasts of future sales possibilities. Such forecasting must in fact be based on a series of variable and uncertain factors. The admission of parallel imports may indeed involve increased risks for the concessionnaire who gives firm orders in advance for the quantities of goods which he considers he will be able to sell. However, such a risk is inherent in all commercial activity and thus cannot justify special protection on this point.

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The applicants complain that the Commission did not consider on the basis of concrete facts whether it is possible to provide guarantee and after-sales services without absolute territorial protection. They emphasize in particular the importance for the reputation of the Grundig name of the proper provision of these services for all the Grundig machines put on the market. The freeing of parallel imports would compel Consten to refuse these services for machines imported by its competitors who did not themselves carry out these services satisfactorily. Such a refusal would also be contrary to the interests of consumers.

As regards the free guarantee service, the decision states that a purchaser can normally enforce his right to such a guarantee only against his supplier and subject to conditions agreed with him. The applicant parties do not seriously dispute that statement.

The fears concerning the damage which might result for the reputation of Grundig products from an inadequate service do not, in the circumstances, appear justified.

In fact, UNEF, the main competitor of Consten, although it began selling Grundig products in France later than Consten and while having had to bear not inconsiderable risks, nevertheless supplies a free guarantee and after-sales services against remuneration upon conditions which, taken as a whole, do not seem to have harmed the reputation of the Grundig name. Moreover, nothing prevents the applicants from informing consumers, through adequate publicity, of the nature of the services and any other advantages which may be offered by the official distribution network for Grundig products. It is thus not correct that the publicity carried out by Consten must benefit parallel importers to the same extent.

Consequently, the complaints raised by the applicants are unfounded.

The applicants complain that the Commission did not consider whether absolute territorial protection was still indispensable to enable the risk costs borne by Consten in launching the Grundig products on the French market to be amortized.

The defendant objects that before the adoption of the contested decision it had at no time became aware of any market introduction costs which had not been amortized.
THIS STATEMENT BY THE DEFENDANT HAS NOT BEEN DISPUTED. THE COMMISSION CANNOT BE EXPECTED OF ITS OWN MOTION TO MAKE INQUIRIES ON THIS POINT. FURTHER, THE ARGUMENT OF THE APPLICANTS AMOUNTS IN SUBSTANCE TO SAYING THAT THE CONESSIONNAIRE WOULD NOT HAVE ACCEPTED THE AGREED CONDITIONS WITHOUT ABSOLUTE TERRITORIAL PROTECTION. HOWEVER, THAT FACT HAS NO CONNEXION WITH THE IMPROVEMENTS IN DISTRIBUTION REFERRED TO IN ARTICLE 85(3).

CONSEQUENTLY THIS COMPLAINT CANNOT BE UPHELD.

THE APPLICANT GRUNDIG MAINTAINS, FURTHER, THAT WITHOUT ABSOLUTE TERRITORIAL PROTECTION THE SOLE DISTRIBUTOR WOULD NOT BE INCLINED TO BEAR THE COSTS NECESSARY FOR MARKET OBSERVATION SINCE THE RESULT OF HIS EFFORTS MIGHT BENEFIT PARALLEL IMPORTERS.

THE DEFENDANT OBJECTS THAT SUCH MARKET OBSERVATION, WHICH IN PARTICULAR ALLOWS THE APPLICATION TO THE PRODUCTS INTENDED FOR EXPORT TO FRANCE OF TECHNICAL IMPROVEMENTS DESIRED BY THE FRENCH CONSUMER, CAN BE OF BENEFIT ONLY TO CONSTEN.

IN FACT, CONSTEN, IN ITS CAPACITY AS SOLE CONCESSIONNAIRE WHICH IS NOT THREATENED BY THE CONTESTED DECISION, WOULD BE THE ONLY ONE TO RECEIVE THE MACHINES EQUIPPED WITH THE FEATURES ADAPTED ESPECIALLY TO THE FRENCH MARKET.

CONSEQUENTLY THIS COMPLAINT IS UNFOUNDED.

THE COMPLAINTS MADE AGAINST THAT PART OF THE DECISION WHICH Relates TO THE EXISTENCE IN THE PRESENT CASE OF THE REQUIREMENTS OF ARTICLE 85(3)(A), CONSIDERED SEPARATELY AND AS A WHOLE, DO NOT APPEAR TO BE WELL FOUNDED. SINCE ALL THE REQUIREMENTS NECESSARY FOR GRANTING THE EXEMPTION PROVIDED FOR IN ARTICLE 85(3) MUST BE FULFILLED, THERE IS THEREFORE NO NEED TO EXAMINE THE SUBMISSIONS RELATING TO THE OTHER REQUIREMENTS FOR EXEMPTION.

THE COMPLAINT CONCERNING THE FAILURE TO GRANT A CONDITIONAL EXEMPTION


THE PARTIAL ANNULMENT OF THE CONTESTED DECISION RENDERS ANY FURTHER DISCUSSION OF THE PRESENT COMPLAINT UNNECESSARY.

UNDER ARTICLE 69(3) OF ITS RULES OF PROCEDURE, WHERE EACH PARTY SUCCEDES ON SOME AND FAILS ON OTHER HEADS THE COURT MAY ORDER THAT THE PARTIES BEAR THEIR OWN COSTS IN WHOLE OR IN PART. SUCH IS THE CASE IN THE PRESENT INSTANCE.

THE COURT
HEREBY:


2. DISMISSES THE REST OF APPLICATIONS 56/64 AND 58/64 AS UNFOUNDED;

3. ORDERS THE APPLICANTS, THE DEFENDANTS AND THE INTERVENING PARTIES EACH TO BEAR THEIR OWN COSTS.

JUDGMENT OF THE COURT (Second Chamber)

13 December 2012 (*)
In Case C-226/11,

REFERENCE for a preliminary ruling under Article 267 TFEU, from the Cour de cassation (France), made by decision of 10 May 2011, received at the Court on 16 May 2011, in the proceedings

Expedia Inc.

v

Autorité de la concurrence and Others,

THE COURT (Second Chamber),

composed of A. Rosas, acting as President of the Second Chamber, U. Lõhmus (Rapporteur), A. Ó Caoimh, A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 27 June 2012,

after considering the observations submitted on behalf of:

– Expedia Inc., by F. Molinié and F. Ninane, avocats,

– the Autorité de la concurrence, by F. Zivy and L. Gauthier-Lescop, acting as Agents, and by E. Baraduc, avocate,

– the French Government, by G. de Bergues and J. Gstalter, acting as Agents,

– Ireland, by D. O’Hagan, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,

– the Polish Government, by M. Szpunar, acting as Agent,

– the European Commission, by N. von Lingen and B. Mongin, acting as Agents,

– the EFTA Surveillance Authority, by X. Lewis, M. Schneider and M. Moustakali, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2012,

gives the following

Judgment

That reference has been made in the course of proceedings between the company Expedia Inc. (‘Expedia’) and, inter alia, the Autorité de la concurrence (‘the Competition Authority’, formerly the Conseil de la concurrence) regarding the proceedings brought and financial penalties imposed by the latter because of the agreements relating to the creation of a joint subsidiary concluded between Expedia and the Société nationale des chemins de fer français (SNCF) (‘SNCF’).

**Legal context**

*European Union legislation*

Article 3(1) and (2) of Regulation No 1/2003 provides:

‘1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) [EC] which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 [EC] to such agreements, decisions or concerted practices ….

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(3) [EC], or which fulfil the conditions of Article 81(3) [EC] or which are covered by a Regulation for the application of Article 81(3) [EC]. …’

The Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) [EC] (de minimis) (OH 2001 C 368, p. 13, ‘the de minimis notice’) states at paragraphs 1, 2, 4, 6 and 7:

‘1. … The Court of Justice […] has clarified that [Article 81(1) EC] is not applicable where the impact of the agreement on intra-Community trade or on competition is not appreciable.

2. In this notice the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition under Article 81 [EC]. This negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this notice appreciably restrict competition. Such agreements may still have only a negligible effect on competition and may therefore not be prohibited by Article 81(1) [EC] …

…

4. In cases covered by this notice the Commission will not institute proceedings either upon application or on its own initiative. Where undertakings assume in good faith that an agreement is covered by this notice, the Commission will not impose fines. Although not binding on them, this notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81 [EC].

…

6. This notice is without prejudice to any interpretation of Article 81 [EC] which may be given by the Court of Justice or the Court of First Instance …

7. The Commission holds the view that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 81(1) [EC]:

(a) if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between
undertakings which are actual or potential competitors on any of these markets (agreements between competitors) ...

FRENCH LEGISLATION

5 Article L. 420-1 of the Commercial Code is worded as follows:

‘Concerted actions, agreements, express or tacit understandings or coalitions, particularly when they are intended to:

1. limit access to the market or the free exercise of competition by other undertakings;
2. prevent price fixing by the free play of the market, by artificially encouraging the increase or reduction of prices;
3. limit or control production, markets, investment or technical progress;
4. share markets or sources of supply,

shall be prohibited, even through the direct or indirect intermediation of a company in a group established outside France, when they have the object, or may have the effect, of preventing, restricting or distorting competition in a market.’

6 Article L. 464-6-1 of that code provides that the Competition Authority may also decide that there are no grounds for continuing the proceedings when the practices referred to in Article L. 420-1 do not relate to contracts entered into pursuant to the Public Procurement Code and the cumulative market share of the companies or bodies which are parties to the challenged agreement or practice does not exceed certain thresholds, corresponding to those set out in paragraph 7 of the de minimis notice.

THE DISPUTE IN THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

7 In order to expand the sale of train tickets and travel over the internet, SNCF concluded, in September 2001, a number of agreements with Expedia, a company incorporated under US law and specialised in the sale of travel over the internet, and created with it a joint subsidiary called GL Expedia. The website voyages-SNCF.com, which until then specialised in information on the reservation and sale of train tickets over the internet, hosted the activities of GL Expedia and expanded to offer, in addition to its initial services, the services of an online travel agency. In 2004, the joint subsidiary changed its name to Agence de voyages SNCF.com (‘Agence VSC’).

8 By decision of 5 February 2009, the French Competition Authority found that the partnership between SNCF and Expedia creating Agence VSC constituted an agreement contrary to Article 81 EC and Article L. 420-1 of the Commercial Code, the object and effect of which is to promote that joint subsidiary in the market for travel agency services provided for leisure travel to the detriment of competitors. It imposed financial penalties on Expedia and on SNCF.

9 The Competition Authority found, inter alia, that Expedia and SNCF were competitors in the market for online travel agency services, that their market shares were more than 10% and that, consequently, the ‘de minimis’ rule, as set out in paragraph 7 of the ‘de minimis’ notice and Article L. 464-2-1 of the Commercial Code, were not applicable.

10 Before the Cour d’appel, Paris, Expedia submitted that the Competition Authority had overestimated the market shares held by Agence VSC. That court did not rule directly on that plea. In its judgment of 23 February 2010, it held, inter alia, in the light of the wording of Article L. 464-6-1 of the Commercial Code and, in particular, the use of the word ‘may’, that it is possible for the Competition Authority, in any event, to
bring proceedings against practices implemented by undertakings whose market share is below the thresholds specified by that article and by the *de minimis* notice.

11 Ruling on the appeal brought by Expedia against that judgment, the Cour de cassation notes that it is not disputed that, as the Competition Authority concluded, the agreement at issue in the main proceedings has an anti-competitive object. It considers that, in view of the relevant case-law of the Court, it is not established that the Commission would bring proceedings against such an agreement where the market shares concerned do not exceed the thresholds specified in the *de minimis* notice.

12 The national court is of the opinion, moreover, that the assertions set out in paragraphs 4 and 6 of the *de minimis* notice, to the effect that that notice is not binding on the courts and authorities of the Member States and is without prejudice to any interpretation of Article 101 TFEU that may be given by the courts of the European Union, give rise to uncertainty as to whether the market share thresholds established by that notice amount to a non-rebuttable presumption of there being no appreciable effect on competition as provided for in that article.

13 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 101(1) TFEU and Article 3(2) of Regulation (EC) No 1/2003 be interpreted as precluding the bringing of proceedings and the imposition of penalties by a national competition authority, on the grounds of both Article 101(1) TFEU and the national law of competition, in respect of a practice under agreements, decisions of associations of undertakings or concerted action that may affect trade between Member States, but that does not reach the thresholds specified by the European Commission in its *de minimis* notice?’

**The question referred for a preliminary ruling**

14 By its question, the referring court seeks to know, essentially, whether Article 101(1) TFEU and Article 3(2) of Regulation No 1/2003 must be interpreted as precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings that may affect trade between Member States, but that does not reach the thresholds specified by the Commission in its *de minimis* notice.

15 It should be noted that Article 101(1) TFEU prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

16 It is settled case-law that an agreement of undertakings falls outside the prohibition in that provision, however, if it has only an insignificant effect on the market (Case 5/69 Völk v Vervaeke [1969] ECR 295, paragraph 7; Case C-7/95 P John Deere v Commission [1998] ECR I-3111, paragraph 77; Joined Cases C-215/96 and C-216/96 Bagnasco and Others [1999] ECR I-135, paragraph 34, and Case C-238/05 Asnef-Equifax and Administración del Estado [2006] ECR I-11125, paragraph 50).

17 Accordingly, if it is to fall within the scope of the prohibition under Article 101(1) TFEU, an agreement of undertakings must have the object or effect of perceptibly restricting competition within the common market and be capable of affecting trade between Member States (Case C-70/93 BMW v ALD [1995] ECR I-3439, paragraph 18; Case C-306/96 Javaco [1998] ECR I-1983, paragraph 12; and Case C-260/07 Pedro IV Servicios [2009] ECR I-2437, paragraph 68).

18 With regard to the role of Member State authorities in the enforcement of Union competition law, the first sentence of Article 3(1) of Regulation No 1/2003 establishes a close link between the prohibition of the agreements set out in Article 101 TFEU and the corresponding provisions of national competition law. Where the national competition authority applies provisions of national law prohibiting cartels to an agreement of undertakings which is capable of affecting trade between Member States within the meaning of Article 101 TFEU, the first sentence of Article 3(1) requires Article 101 TFEU also to be applied to it in parallel (Case C-17/10 Toshiba Corporation [2012] ECR, paragraph 77).
Under Article 3(2) of Regulation No 1/2003, the application of national competition law may not lead to the prohibition of such agreements if they do not restrict competition within the meaning of Article 101(1) TFEU.

It follows that the competition authorities of the Member States can apply the provisions of national law prohibiting cartels to an agreement of undertakings which is capable of affecting trade between Member States within the meaning of Article 101 TFEU only where that agreement perceptibly restricts competition within the common market.

The Court has held that the existence of such a restriction must be assessed by reference to the actual circumstances of such an agreement (Case 1/71 Cadillon [1971] ECR 351, paragraph 8). Regard must be had, inter alia, to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part (Joined Cases C-501/06 P, C-513/06 P, C-516/06 P and C-519/06 P GlaxoSmithKline Services and Others v Commission and Others [2009] ECR I-9291, paragraph 58). It is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question (see, to that effect, Asnef-Equifax and Administración del Estado, paragraph 49).

In its examination, the Court found, inter alia, that an exclusive dealing agreement, even with absolute territorial protection, has only an insignificant effect on the market in question, taking into account the weak position which the persons concerned have in that market, (Völk, paragraph 7, and Cadillon, paragraph 9). In other cases, however, it did not base its decision on the position of the persons concerned in the market in question. Accordingly, in paragraph 35 of Bagnasco and Others, it found that an agreement between the members of a banking association which excludes the right, with regard to the opening of current-account credit facilities, to adopt a fixed interest rate cannot have an appreciable restrictive effect on competition, since any variation of the interest rate depends on objective factors, such as changes occurring in the money market.

It is apparent from paragraphs 1 and 2 of the de minimis notice that the Commission intends to quantify therein, with the help of market share thresholds, what is not an appreciable restriction of competition within the meaning of Article 101 TFEU and the case-law cited in paragraphs 16 and 17 of the present judgment.

With regard to the wording of the de minimis notice, its non-binding nature, for both the competition authorities and the courts of the Member States, is emphasised in the third sentence of paragraph 4 thereof.

Furthermore, in the second and third sentences of paragraph 2 of that notice, the Commission states that market share thresholds used quantify what is not an appreciable restriction of competition within the meaning of Article 101 TFEU, but that the negative definition of the appreciability of such restriction does not imply that agreements of undertakings which exceed those thresholds appreciably restrict competition.

Moreover, contrary to the Commission notice on cooperation within the network of competition authorities (OH 2004 C 101, p. 43), the de minimis notice does not contain any reference to declarations by the competition authorities of the Member States that they acknowledge the principles set out therein and that they will abide by them.

It also follows from the objectives pursued by the de minimis notice, as mentioned in paragraph 4 thereof, that it is not intended to be binding on the competition authorities and the courts of the Member States.

It is apparent from that paragraph, first, that the purpose of that notice is to make transparent the manner in which the Commission, acting as the competition authority of the European Union, will itself apply Article 101 TFEU. Consequently, by the de minimis notice, the Commission imposes a limit on the exercise of its discretion and must not depart from the content of that notice without being in breach of the general principles of law, in particular the principles of equal treatment and the protection of legitimate expectations (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Danske Rerindustri and Others v Commission [2005] ECR I-5425, paragraph 211). Furthermore, it intends to give guidance to the courts and authorities of the Member States in their application of that article.
Consequently, and as the Court has already had occasion to point out, a Commission notice, such as the *de minimis* notice, is not binding in relation to the Member States (see, to that effect, Case C-360/09 Pfleiderer [2011] ECR I-5161, paragraph 21).

Accordingly, that notice was published in 2001 in the ‘C’ series of the *Official Journal of the European Union*, which, by contrast with the ‘L’ series of the *Official Journal*, is not intended for the publication of legally binding measures, but only of information, recommendations and opinions concerning the European Union (see, by analogy, Case C-410/09 Polska Telefonia Cyfrowa [2011] ECR I-3853, paragraph 35).

Consequently, in order to determine whether or not a restriction of competition is appreciable, the competition authority of a Member State may take into account the thresholds established in paragraph 7 of the *de minimis* notice but is not required to do so. Such thresholds are no more than factors among others that may enable that authority to determine whether or not a restriction is appreciable by reference to the actual circumstances of the agreement.

Contrary to what Expedia argued during the hearing, the proceedings brought and penalties imposed by the competition authority of a Member State, on undertakings that enter into an agreement that has not reached the thresholds defined in the *de minimis* notice, cannot infringe, as such, the principles of legitimate expectations and legal certainty, having regard to the wording of paragraph 4 of that notice.

Furthermore, as the Advocate General pointed out in point 33 of her Opinion, the principle of the lawfulness of penalties does not require the *de minimis* notice to be regarded as a legal measure binding on the national authorities. Cartels are already prohibited by the primary law of the European Union, that is, by Article 101(1) TFEU.

In so far as Expedia, the French Government and the Commission have, in their written observations or during the hearing, questioned the finding made by the national court that it is not disputed that the agreement at issue in the main proceedings had an anti-competitive object, it should be remembered that, in proceedings under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the main proceedings is a matter for the national court (Case C-409/06 Winner Wetten [2010] ECR I-8015, paragraph 49 and the case-law cited).

Moreover, it should be noted that, according to settled case-law, for the purpose of applying Article 101(1) TFEU, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (see, to that effect, Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299; Case C-272/09 P KME Germany and Others v Commission [2011] ECR I-12789, paragraph 65; and Case C-389/10 P KME Germany and Others v Commission [2011] ECR I-13125, paragraph 75).

In that regard, the Court has emphasised that the distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (Case C-209/07 Beef Industry Development Society and Barry Brothers (‘BIDS’) [2008] ECR I-8637, paragraph 17, and Case C-8/08 T-Mobile Netherlands and Others [2009] ECR I-4529, paragraph 29).

It must therefore be held that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

In light of the above, the answer to the question referred is that Article 101(1) TFEU and Article 3(2) of Regulation No 1/2003 must be interpreted as not precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings that may affect trade between Member States, but that does not reach the thresholds specified by the Commission in its *de minimis* notice, provided that that agreement constitutes an appreciable restriction of competition within the meaning of that provision.
On those grounds, the Court (Second Chamber) hereby rules:

Articles 101(1) TFUE and 3(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] must be interpreted as not precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings that may affect trade between Member States, but that does not reach the thresholds specified by the European Commission in its notice on agreements of minor importance which do not appreciably restrict competition under Article 81(l), [EC] (de minimis), provided that that agreement constitutes an appreciable restriction of competition within the meaning of that provision.

Registrar: H. von Holstein, Deputy Registrar,
after considering the written observations submitted on behalf of:
- Mr Wouters, by H. Gilliams and M. Wladimiroff, advocaten,
- Mr Savelbergh and Price Waterhouse Belastingadviseurs BV, by D. van Liedekerke and G.J. Kemper, advocaten,
- the Algemene Raad van de Nederlandse Orde van Advocaten, by O.W. Brouwer, F.P. Louis and S.C. van Es, advocaten,
- the Raad van de Balies van de Europese Gemeenschap, by P. Glazener, advocaat,
- the Netherlands Government, by M.A. Fierstra, acting as Agent,
- the Danish Government, by J. Molde, acting as Agent,
- the German Government, by A. Dittrich and W.-D. Plessing, acting as Agents,
- the French Government, by K. Rispal-Bellanger, R. Loosli-Surrans and F. Million, acting as Agents,
- the Austrian Government, by C. Stix-Hackl, acting as Agent,
- the Portuguese Government, by L. Fernandes, acting as Agent,
- the Swedish Government, by A. Kruse, acting as Agent,
- the Government of the Principality of Liechtenstein, by C. Büchel, acting as Agent,
- the Commission of the European Communities, by W. Wils and B. Mongin, acting as Agents,

having regard to the Report for the Hearing,
after hearing the oral observations of Mr Wouters, represented by H. Gilliams, of Mr Savelbergh and Price Waterhouse Belastingadviseurs BV, represented by D. van Liedekerke and G.J. Kemper, of the Algemene Raad van de Nederlandse Orde van Advocaten, represented by O.W. Brouwer and W. Knibbeler, advocaat, of the Raad van de Balies van de Europese Gemeenschap, represented by P. Glazener, of the Netherlands Government, represented by J.S. van den Oosterkamp, acting as Agent, of the German Government, represented by A. Dittrich, of the French Government, represented by F. Million, of the Luxembourg Government, represented by N. Mackel, acting as Agent, assisted by J. Welte, avocat, of the Swedish Government, represented by I. Simfors, acting as Agent, and of the Commission, represented by W. Wils, at the hearing on 12 December 2000, after hearing the Opinion of the Advocate General at the sitting on 10 July 2001, gives the following

Judgment

1. By judgment of 10 August 1999, received at the Court on 13 August 1999, the Raad van State (Netherlands Council of State) referred to the Court for a preliminary ruling under Article 234 EC nine questions on the interpretation of Articles 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), 5 of the EC Treaty (now Article 10 EC), 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC), and 85, 86 and 90 of the EC Treaty (now Articles 81 EC, 82 EC and 86 EC).

2. Those questions were raised in proceedings brought by members of the Bar, among others, against the refusal of the Arrondissementsrechtbank te Amsterdam (Amsterdam District Court, ‘the Rechtbank’) to set aside the decisions of the Nederlandse Orde van Advocaten (Bar of the Netherlands) refusing to set aside the decisions of the Supervisory Boards of the Amsterdam and Rotterdam Bars prohibiting them from practising as members of the Bar in full partnership with accountants.

The relevant national legislation

3. Article 134 of the Constitution of the Kingdom of the Netherlands deals with the establishment of, and the legal rules governing, public bodies. It provides that:

‘(1) Public professional bodies and other public bodies may be established and dissolved by or under statute.
(2) The duties and organisation of such public bodies, the composition and powers of the governing bodies and public access to their meetings shall be governed by statute. Powers to adopt regulations may be granted to the governing bodies by or under statute.
(3) Supervision of the governing bodies shall be governed by statute. Their decisions may be annulled only where they are contrary to law or to the public interest.’

The Advocatenwet

4.
Pursuant to that provision, a law was adopted on 23 June 1952 establishing the Bar of the Netherlands and laying down the internal regulations and the disciplinary rules applicable to ‘advocaten’ and ‘procureurs’ (‘the Advocatenwet’, the Law on the Bar).

5. Article 17 of the Advocatenwet provides that:

‘(1) The Bar of the Netherlands, based in The Hague, shall be composed of all members of the Bar registered in the Netherlands and shall be a public body within the meaning of Article 134 of the Constitution.

(2) All members of the Bar registered with the same court shall form the Bar of the district concerned.’

6. Articles 18(1) and 22(1) of the Advocatenwet provide that the governing bodies of the Bar of the Netherlands and the District Bars are to be the Algemene Raad van de Nederlandse Orde van Advocaten (General Council of the Bar of the Netherlands, ‘the General Council’) and the Raden van Toezicht van de Orden in de Arrondissementen (Supervisory Boards of the District Bars, the ‘Supervisory Boards’) respectively.

7. Articles 19 and 20 of the Advocatenwet regulate the election of the members of the General Council. They are elected by the College van Afgevaardigen (College of Delegates), who are themselves elected at meetings of the various District Bars.

8. Article 26 of the Advocatenwet states that:

‘[T]he General Council and the Supervisory Boards shall ensure the proper practice of the profession and have the power to adopt any measures which may contribute to that end. They shall defend the rights and interests of members of the Bar as such, ensure that the obligations of the latter are fulfilled and discharge the duties imposed on them by regulation.’

9. Article 28 of the Advocatenwet provides:

‘(1) The College of Delegates may adopt regulations in the interests of the proper practice of the profession, including regulations concerning provision for members of the Bar affected by old age or total or partial incapacity for work, and provision for the next-of-kin of deceased members. Furthermore, the College shall adopt the necessary regulations concerning the administration and organisation of the Bar.

(2) Draft regulations shall be submitted to the College of Delegates by the General Council or by at least five delegates. The General Council may invite the Supervisory Boards to state their views on a draft regulation before submitting it to the delegates.

(3) As soon as they have been adopted, regulations shall be communicated to the Ministry of Justice and published in the Official Gazette.’

10. Article 29 of the Advocatenwet states that:

‘(1) Regulations shall be binding on the members of the Bar of the Netherlands and on visiting lawyers ...

(2) They may not contain any provision relating to matters governed by or under statute, nor may they concern matters which, on account of the differing situations in each district, do not lend themselves to uniform regulation.

(3) Any provision in a regulation which applies to a matter governed by or under statute shall by operation of law cease to be valid.’

11. According to Article 16b and 16c of the Advocatenwet, the term ‘visiting lawyers’ means persons who are not registered as members of the Bar in the Netherlands but who are authorised to carry on their professional activity in another Member State of the European Union under the title of advocate or an equivalent title.

12. Article 30 of the Advocatenwet provides:

‘(1) Decisions adopted by the College of Delegates, the General Council or any other organs of the Bar of the Netherlands may be suspended or annulled by royal decree in so far as they are contrary to law or to the public interest.

(2) Such suspension or annulment shall be effected within six months of the communication referred to in Article 28(3) or, where the decision was adopted by the General Council or another body of the Bar of the Netherlands, within six months of its notification to the Minister for Justice, by reasoned decree prescribing, where relevant, the duration of the suspension.

(3) Suspension shall immediately cause the effects of the suspended provisions to lapse. The duration of the suspension may not be greater than one year, even after extension.

(4) If the suspended decision is not annulled by royal decree within the period prescribed it shall be deemed to be valid.

(5) Annulment shall entail annulment of all annulable effects of the annulled provisions, save as otherwise decided by royal decree.’

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The Samenwerkingsverordening 1993

13. Pursuant to Article 28 of the Advocatenwet, the College of Delegates adopted the Samenwerkingsverordening 1993 (Regulation on Joint Professional Activity 1993, ‘the 1993 Regulation’).

14. Article 1 of the 1993 Regulation defines ‘professional partnership’ (samenwerkingsverband) as being ‘any joint activity in which the participants practise their respective professions for their joint account and at their joint risk or by sharing control or final responsibility for that purpose’.

15. Article 2 of the 1993 Regulation provides:

'(1) Members of the Bar shall not be authorised to assume or maintain any obligations which might jeopardise the free and independent exercise of their profession, including the partisan defence of clients' interests and the corresponding relationship of trust between lawyer and client.

(2) The provision contained in subparagraph (1) shall also apply where members of the Bar do not work in professional partnership with colleagues or third parties.'

16. Under Article 3 of the 1993 Regulation:

‘Members of the Bar shall not be authorised to enter into or maintain any professional partnership unless the primary purpose of each partner's respective profession is the practice of the law.’

17. Article 4 of the 1993 Regulation provides:

‘Members of the Bar may enter into or maintain professional partnerships only with:

(a) other members of the Bar registered in the Netherlands;
(b) other lawyers not registered in the Netherlands, if the conditions laid down in Article 5 are satisfied;
(c) members of another professional category accredited for that purpose by the General Council in accordance with Article 6.’

18. According to Article 6 of the 1993 Regulation:

'(1) The authorisation referred to in Article 4(c) may be granted on condition that:

(a) the members of that other professional category practise a profession, and
(b) the exercise of that profession is conditional upon possession of a university degree or an equivalent qualification; and
(c) the members of that professional category are subject to disciplinary rules comparable to those imposed on members of the Bar; and
(d) entering into partnership with members of that other professional partnership is not contrary to Articles 2 or 3.

(2) Accreditation may also be granted to a specific branch of a professional category. In that case, the conditions set out in (a) to (d) above shall be applicable, without prejudice to the General Council's power to lay down further conditions.

(3) The General Council shall consult the College of Delegates before adopting any decision as mentioned in the preceding subparagraphs of this Article.’

19. Article 7(1) of the 1993 Regulation provides:

‘In their communications with other persons members of the Bar shall avoid giving any inaccurate, misleading or incomplete impression as to the nature of any form of joint activity in which they participate, including any professional partnership.’

20. In accordance with Article 8 of the 1993 Regulation:

'(1) Every professional partnership must have a collective name for all communications with other persons.
(2) The collective name must not be misleading.
(3) Members of the Bar who are members of professional partnerships shall be required to supply, on request, a list of the partners' names, their respective professions and place of establishment.
(4) Any written document produced by a professional partnership must include the name, status and place of establishment of the person who signs the document.’

21. Finally, Article 9(2) of the 1993 Regulation provides:

‘Members of the Bar shall not set up, or alter the constitution, of a professional partnership until the Supervisory Board has decided whether the conditions on which that partnership is formed or its constitution is altered, including the way in which it presents itself to other parties, satisfy the requirements imposed by or under this Regulation.’
According to the recitals of the 1993 Regulation, members of the Bar have already been authorised to enter into partnership with notaries, tax consultants and patent agents and authorisation for those three professional categories remains valid. On the other hand, accountants are mentioned as an example of a professional category with which members of the Bar are not authorised to enter into partnership.

The directives concerning professional partnerships between members of the Bar and other (authorised) practitioners

In addition to the 1993 Regulation, the Bar of the Netherlands has adopted directives concerning professional partnerships between members of the Bar and other (accredited) practitioners. Those directives are worded as follows:

1. Compliance with the rules of ethics and professional conduct
   Rule No 1
   Members of the Bar may not, as a result of participating in a professional partnership with a practitioner of another profession, limit or compromise compliance with the rules of ethics and professional practice applicable to them.

2. Separate files and separate management of files and archives
   Rule No 2
   Members of the Bar participating in a professional partnership with a practitioner of another profession are required, in respect of every case in which they act with that other practitioner, to open a separate file and to ensure, in relation to the professional partnership as such:
   - that the management of the case file is kept separate from financial management;
   - that files are kept in separate archives from those of practitioners of other professions.

3. Conflicts of interest
   Rule No 3
   Members of the Bar participating in a professional partnership with a practitioner of another profession may not defend the interests of a party where those interests are in conflict with those of a party who has been, or is being, assisted by that other practitioner or where there is a risk that such a conflict of interests may arise.

4. Professional secrecy and registration of documents
   Rule No 4
   Members of the Bar participating in a professional partnership with a practitioner of another profession are required, in respect of every case in which they act with that other practitioner, to keep an accurate register of all letters and documents which they bring to the attention of the practitioner of the other profession.

The disputes in the main proceedings

Mr Wouters, a member of the Amsterdam Bar, became a partner in the partnership Arthur Andersen & Co. Belastingadviseurs (tax consultants) in 1991. Late in 1994 Mr Wouters informed the Supervisory Board of the Rotterdam Bar of his intention to enrol at the Rotterdam Bar and to practise in that city under the name of ‘Arthur Andersen & Co., advocaten en belastingadviseurs’.

By decision of 27 July 1995, that Supervisory Board found that the members of the partnership Arthur Andersen & Co. Belastingadviseurs were in professional partnership, within the meaning of the 1993 Regulation, with the members of the partnership Arthur Andersen & Co. Accountants, that is to say with members of the profession of accountants. Accordingly, Mr Wouters was in breach of Article 4 of the 1993 Regulation. In addition, the Supervisory Board considered that Mr Wouters would contravene Article 8 of the 1993 Regulation if he entered into a partnership the collective name of which included the name of the natural person ‘Arthur Andersen’.

By decision of 29 November 1995 the General Council dismissed as unfounded the administrative appeals brought by Mr Wouters, Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants against the decision of 27 July 1995.

At the beginning of 1995 Mr Savelbergh, a member of the Amsterdam Bar, informed the Supervisory Board of the Amsterdam Bar of his intention to enter into partnership with the private company Price Waterhouse Belastingadviseurs BV, a subsidiary of the international undertaking Price Waterhouse, which includes both tax consultants and accountants.

By decision of 5 July 1995 the Supervisory Board declared that the proposed partnership was contrary to Article 4 of the 1993 Regulation.

By decision of 21 November 1995, the General Council dismissed the administrative appeal brought by Mr Savelbergh and Price Waterhouse Belastingadviseurs BV against that decision.
Mr Wouters, Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants, on the one hand, and Mr Savelbergh and Price Waterhouse Belastingadviseurs BV, on the other, then appealed to the Rechtbank. They claimed, *inter alia*, that the decisions of the General Council of 21 and 29 November 1995 were incompatible with the Treaty provisions on competition, right of establishment and freedom to provide services.

By judgment of 7 February 1997 the Rechtbank declared inadmissible the appeals brought by Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants, and dismissed as unfounded those brought by Mr Wouters, Mr Savelbergh and Price Waterhouse Belastingadviseurs BV.

The Rechtbank considered that the Treaty provisions on competition did not apply to the cases. It pointed out that the Bar of the Netherlands is a body governed by public law, established by statute in order to further a public interest. For that purpose it makes use of the regulatory power conferred on it by Article 28 of the Advocatenwet. The Bar of the Netherlands is required to guarantee, in the public interest, the independence and loyalty to the client of members of the Bar who provide legal assistance. In the Rechtbank’s view, the Bar of the Netherlands is not, therefore, an association of undertakings within the meaning of Article 85 of the Treaty, nor can it be regarded either as an undertaking or as an association of undertakings occupying a collective dominant position contrary to Article 86 of the Treaty.

Furthermore, according to the Rechtbank, Article 28 of the Advocatenwet does not transfer any powers to private operators in such a manner as to undermine the effectiveness of Articles 85 and 86 of the Treaty. As a result, that provision is not incompatible with the second paragraph of Article 5 of the Treaty, read in conjunction with Articles 3(g), 85 and 86 of the Treaty.

The Rechtbank also rejected the appellants’ argument that the 1993 Regulation is incompatible with the right of establishment and the freedom to provide services enshrined in Articles 52 and 59 of the Treaty. In its view, there is no cross-border element in the cases in point, so that those provisions are not applicable. In any event, the prohibition on partnerships of members of the Bar and accountants is justified by overriding reasons relating to the public interest and is not disproportionately restrictive. In the absence of specific Community provisions in that field, it is open to the Kingdom of the Netherlands to make the exercise of the legal profession on its territory subject to rules intended to guarantee the independence and loyalty to the client of members of the Bar who provide legal assistance.

The five appellants appealed against the decision of the Rechtbank to the Raad van State.

The Raad van de Balies van de Europese Gemeenschap (the Council of the Bars and Law Societies of the European Community, ‘the CCBE’), an association established under Belgian law, was granted leave to intervene in support of the forms of order sought by the General Council.

By judgment given on 10 August 1999, the Raad van State confirmed that the appeals brought by Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants were inadmissible. As regards the other appeals, it considered that the outcome of the dispute in the main proceedings depended on the interpretation of several provisions of Community law.

The Raad van State questions, first, whether by adopting the 1993 Regulation under its powers pursuant to Article 28 of the Advocatenwet, the College of Delegates has infringed Articles 85 and 86 of the Treaty and, second, whether by empowering that College under Article 28 of the Advocatenwet to adopt regulations, the national legislature has infringed Articles 5, 85 and 86 of the Treaty. In addition, it enquires whether the Regulation is compatible with the right of establishment laid down in Article 52 of the Treaty and with the freedom to provide services in Article 59 of the Treaty.

Consequently, the Raad van State decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1 (a) Is the term “association of undertakings” in Article 85(1) of the EC Treaty (now Article 81(1) EC) to be interpreted as meaning that there is such an association only if and in so far as it acts in the undertakings’ interest, so that in applying that provision a distinction must be drawn between activities of the association carried out in the public interest and other activities, or is the mere fact that an association can also act in the undertakings’ interest sufficient for it to be regarded as an association of undertakings within the meaning of the provision in respect of all its actions? Is the fact that the universally binding rules adopted by the relevant institution are adopted under a statutory power and in its capacity as a special legislature relevant as regards the application of Community competition law?
(b) If the answer to Question 1(a) is that there is an association of undertakings only if and in so far as it acts in the undertakings' interest, is the question of when the public interest is being pursued also governed by Community law?

(c) If the answer to Question 1(b) is that Community law is relevant, can the adoption under a statutory power by an institution such as the Bar of the Netherlands of universally binding rules, designed to safeguard the independence and loyalty to the client of members of the Bar who provide legal assistance, on the formation of multi-disciplinary partnerships between members of the Bar and members of other professions be regarded for the purposes of Community law as pursuing the public interest?

2. If the answers to the first question indicate that a rule such as [the 1993 Regulation] is to be regarded as a decision of an association of undertakings within the meaning of Article 85(1) of the EC Treaty (now Article 81(1) EC), is such a decision, in so far as it adopts universally binding rules, designed to safeguard the independence and loyalty to the client of members of the Bar who provide legal assistance, on the formation of multi-disciplinary partnerships such as the one in question to be regarded as having as its object or effect the restriction of competition within the common market and in that respect affecting trade between the Member States? What criteria of Community law are relevant to the determination of that issue?

3. Is the term “undertaking” in Article 86 of the EC Treaty (now Article 82 EC) to be interpreted as meaning that where an institution such as the Bar of the Netherlands must be regarded as an association of undertakings, that institution must also be considered to be an undertaking or group of undertakings for the purposes of that provision, even though it pursues no economic activity itself?

4. If the previous question is answered in the affirmative and it must be held that an institution such as the Bar of the Netherlands enjoys a dominant position, does such an institution abuse that position if it regulates the relationships between its members and others on the market in legal services in a manner which restricts competition?

5. If an institution such as the Bar of the Netherlands is to be regarded in its entirety as an association of undertakings for the purposes of Community competition law, is Article 90(2) of the EC Treaty (now Article 86(2) EC) to be interpreted as extending to an institution such as the Bar of the Netherlands which lays down universally binding rules, designed to safeguard the independence and loyalty to the client of its members who provide legal assistance, on cooperation between its members and members of other professions?

6. If an institution such as the Bar of the Netherlands is to be regarded as an association of undertakings or an undertaking or group of undertakings, do Article 3(g) (now, after amendment, Article 3(1)(g) EC), the second paragraph of Article 5 and Articles 85 and 86 of the EC Treaty (now Articles 10 EC, 81 EC and 82 EC) preclude a Member State from providing that that institution (or one of its agencies) may adopt rules concerning inter alia cooperation between its members and members of other professions when review by the relevant public authority of such rules is limited to the power to annul such a rule without the authority's being able to adopt a rule in its stead?

7. Are both the Treaty provisions on the right of establishment and those on the freedom to provide services applicable to a prohibition on cooperation between members of the Bar and accountants such as that in question, or is the EC Treaty to be interpreted as meaning that such a prohibition must comply, depending for example on the way in which those concerned actually wish to model their cooperation, with either the provisions on the right of establishment or with those relating to the freedom to provide services?

8. Does a prohibition on multi-disciplinary partnerships including members of the Bar and accountants such as the one in question constitute a restriction of the right of establishment or the freedom to provide services, or both?

9. If it follows from the answer to the previous question that one or both of the abovementioned restrictions exists, is the restriction in question justified on the ground that it constitutes merely a “selling arrangement” within the meaning of the judgment in Joined Cases C-267/91 and C-268/91 Kock and Mithouard [1993] ECR I-6097, and that therefore there is no discrimination, or on the ground that it satisfies the criteria that have been developed in that respect by the Court of Justice in other judgments, in particular Case C-55/94 Gebhard [1995] ECR I-4165?

Request for reopening of the oral procedure

40.

By document lodged at the Court Registry on 3 December 2001, the appellants in the main proceedings requested the Court to order the reopening of the oral procedure pursuant to Article 61 of the Rules of Procedure.

41.

In support of that request, the appellants in the main proceedings claim that in paragraphs 170 to 201 of his Opinion, delivered on 10 July 2001, the Advocate General gave his opinion on a question which had not been expressly raised by the national court.

42.

The Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, reopen the oral procedure, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks
sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see order in Case C-17/98 Emesa Sugar [2000] ECR I-665, paragraph 18).

43. In the circumstances of this case, however, the Court, after hearing the Advocate General, considers that it is in possession of all the facts necessary for it to answer the questions referred by the national court and observes that those facts were the subject of argument presented to it at the hearing.

**Question 1(a)**

44. By Question 1(a) the national court is in substance asking whether a regulation concerning partnerships between members of the Bar and other professionals, such as the 1993 Regulation, adopted by a body such as the Bar of the Netherlands, is to be regarded as a decision taken by an association of undertakings within the meaning of Article 85(1) of the Treaty. It seeks in particular to ascertain whether the fact that power was conferred by statute on the Bar of the Netherlands to adopt rules universally binding both on registered members of the Bar in the Netherlands and lawyers who are authorised to practise in other Member States and come to the Netherlands in order to provide services there has any bearing on the application of Community competition law. It also asks whether the mere fact that the Bar of the Netherlands may act in the interests of its members is sufficient for it to be regarded as an association of undertakings in respect of all its activities or whether, for Article 85(1) of the Treaty to be applicable, special treatment must be reserved for the Bar's public-interest activities.

45. In order to establish whether a regulation such as the 1993 Regulation is to be regarded as a decision of an association of undertakings within the meaning of Article 85(1) of the Treaty, the first matter to be considered is whether members of the Bar are undertakings for the purposes of Community competition law.

46. According to settled case-law, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Case C-41/90 Höffer and Eisler [1991] ECR I-1979, paragraph 21; Case C-244/94 Fédération française des sociétés d'assurances and Others [1995] ECR I-4013, paragraph 14; and Case C-55/96 Job Centre [1997] ECR I-7119, ‘Job Centre II’, paragraph 21).

47. It is also settled case-law that any activity consisting of offering goods and services on a given market is an economic activity (Case 118/85 Commission v Italy [1987] ECR 2599, paragraph 7; Case C-35/96 Commission v Italy [1998] ECR I-3851, ‘CNSD’, paragraph 36).

48. Members of the Bar offer, for a fee, services in the form of legal assistance consisting in the drafting of opinions, contracts and other documents and representation of clients in legal proceedings. In addition, they bear the financial risks attaching to the performance of those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves.

49. That being so, registered members of the Bar in the Netherlands carry on an economic activity and are, therefore, undertakings for the purposes of Articles 85, 86 and 90 of the Treaty. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion (see, to that effect, with regard to medical practitioners, Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451, paragraph 77).

50. The second point to be considered is the extent to which a professional body such as the Bar of the Netherlands is to be regarded as an association of undertakings, within the meaning of Article 85(1) of the Treaty, where it adopts a regulation such as the 1993 Regulation (see, to that effect, with regard to a professional body of customs agents, CNSD, paragraph 39).

51. The respondent in the main proceedings claims that, inasmuch as the Netherlands legislature created the Bar of the Netherlands as a body governed by public law and gave it regulatory powers in order to perform a task in the public interest, the Bar cannot be regarded as an association of undertakings within the meaning of Article 85 of the Treaty, particularly in connection with the exercise of its regulatory powers.

52. The intervener in the main proceedings and the German, Austrian and Portuguese Governments add that a body such as the Bar of the Netherlands exercises public authority and cannot, in consequence, fall within the scope of Article 85(1) of the Treaty.

53. According to the intervener in the main proceedings, a body may be treated as comparable to a public authority where the activity which it carries on constitutes a task in the public interest forming part of the essential functions
of the State. The Netherlands have made the Bar of the Netherlands responsible for ensuring that individuals have proper access to the law and to justice, which is indeed one of the essential functions of the State.

54. The German Government, for its part, points out that it is for the competent legislative bodies of a Member State to decide, within the framework of national sovereignty, how they organise the exercise of their rights and powers. Delegation of the power to adopt universally binding rules to a body possessing democratic legitimacy, such as a professional body, falls within the limits of that principle of institutional autonomy.

55. According to the German Government, were bodies entrusted with such regulatory duties to be treated as associations of undertakings within the meaning of Article 85 of the Treaty, this would frustrate the operation of that principle. The idea that national legislation is valid only if it is exempted by the Commission pursuant to Article 85(3) of the Treaty is a contradiction in terms. The consequence would be that the whole corpus of professional regulations would be called in question.

56. The question to be determined is whether, when it adopts a regulation such as the 1993 Regulation, a professional body is to be treated as an association of undertakings or, on the contrary, as a public authority.

57. According to the case-law of the Court, the Treaty rules on competition do not apply to activity which, by its nature, aims and the rules to which it is subject, does not belong to the sphere of economic activity (see, to that effect, Joined Cases C-159/91, C-160/91 Poucet and Pistre [1993] ECR I-637, paragraphs 18 and 19, concerning the management of the public social security system, or which is connected with the exercise of the powers of a public authority (see, to that effect, Case C-364/92 Sat Fluggesellschaft [1994] ECR I-43, paragraph 30, concerning the control and supervision of air space, and Case C-343/95 Diego Calì & Figli [1997] ECR I-1547, paragraphs 22 and 23, concerning anti-pollution surveillance of the maritime environment).

58. When it adopts a regulation such as the 1993 Regulation, a professional body such as the Bar of the Netherlands is neither fulfilling a social function based on the principle of solidarity, unlike certain social security bodies (Poucet and Pistre, cited above, paragraph 18), nor exercising powers which are typically those of a public authority (Sat Fluggesellschaft, cited above, paragraph 30). It acts as the regulatory body of a profession, the practice of which constitutes an economic activity.

59. In that respect, the fact that Article 26 of the Advocatenwet also entrusts the General Council with the task of protecting the rights and interests of members of the Bar cannot a priori exclude that professional organisation from the scope of application of Article 85 of the Treaty, even where it performs its role of regulating the practice of the profession of the Bar (see, to that effect, with regard to medical practitioners, Pavlov, cited above, paragraph 86).

60. Next, other indications support the conclusion that a professional organisation with regulatory powers, such as the Bar of the Netherlands, cannot escape the application of Article 85 of the Treaty.

61. First, it is clear from the Advocatenwet that the governing bodies of the Bar are composed exclusively of members of the Bar elected solely by members of the profession. The national authorities may not intervene in the appointment of the members of the Supervisory Boards, College of Delegates or the General Council (see, as regards a professional organisation of customs agents, CNSD, cited above, paragraph 42, and as regards a professional organisation of medical practitioners, Pavlov, paragraph 88).

62. Second, when it adopts measures such as the 1993 Regulation, the Bar of the Netherlands is not required to do so by reference to specified public-interest criteria. Article 28 of the Advocatenwet, which authorises it to adopt regulations, does no more than require that they should be in the interest of the ‘proper practice of the profession’ (see, as regards a professional organisation of customs agents, CNSD, paragraph 43).

63. Lastly, having regard to its influence on the conduct of the members of the Bar of the Netherlands on the market in legal services, as a result of its prohibition of certain multi-disciplinary partnerships, the 1993 Regulation does not fall outside the sphere of economic activity.

64. In light of the foregoing considerations, it appears that a professional organisation such as the Bar of the Netherlands must be regarded as an association of undertakings within the meaning of Article 85(1) of the Treaty where it adopts a regulation such as the 1993 Regulation. Such a regulation constitutes the expression of the intention of the delegates of the members of a profession that they should act in a particular manner in carrying on their economic activity.
It is, moreover, immaterial that the constitution of the Bar of the Netherlands is regulated by public law.

66. According to its very wording, Article 85 of the Treaty applies to agreements between undertakings and decisions by associations of undertakings. The legal framework within which such agreements are concluded and such decisions taken, and the classification given to that framework by the various national legal systems, are irrelevant as far as the applicability of the Community rules on competition, and in particular Article 85 of the Treaty, are concerned (Case 123/83 BNIC v Clair [1985] ECR 391, paragraph 17, and CNSD, paragraph 40).

67. That interpretation of Article 85(1) of the Treaty does not entail any breach of the principle of institutional autonomy as argued by the German Government (see paragraphs 54 and 55 above). On this point a distinction must be drawn between two approaches.

68. The first is that a Member State, when it grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings.

69. The second approach is that the rules adopted by the professional association are attributable to it alone. Certainly, in so far as Article 85(1) of the Treaty applies, the association must notify those rules to the Commission. That obligation is not, however, such as unduly to paralyse the regulatory activity of professional associations, as the German Government submits, since it is always open to the Commission inter alia to issue a block exemption regulation pursuant to Article 85(3) of the Treaty.

70. The fact that the two systems described in paragraphs 68 and 69 above produce different results with respect to Community law in no way circumscribes the freedom of the Member States to choose one in preference to the other.

71. In light of the foregoing considerations, the answer to be given to Question 1(a) must be that a regulation concerning partnerships between members of the Bar and other members of liberal professions, such as the 1993 Regulation, adopted by a body such as the Bar of the Netherlands, must be regarded as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the Treaty.

Question 1(b) and (c)

72. Having regard to the answer given to Question 1(a), there is no need to consider Question 1(b) and (c).

Question 2

73. By its second question the national court seeks, essentially, to ascertain whether a regulation such as the 1993 Regulation which, in order to guarantee the independence and loyalty to the client of members of the Bar who provide legal assistance in conjunction with members of other liberal professions, adopts universally binding rules governing the formation of multi-disciplinary partnerships, has the object or effect of restricting competition within the common market and is likely to affect trade between Member States.

74. By describing the successive versions of the rules on partnerships, the appellants in the main proceedings have set out to establish that the 1993 Regulation had the object of restricting competition.

75. Initially, the Samenwerkingsverordening 1972 (the 1972 Regulation) authorised members of the Bar to enter into multi-disciplinary partnerships subject to three conditions. First, the partners had to be members of other liberal professions with a university education or education of an equivalent standard. Next, they had to belong to an association or group the members of which were subject to disciplinary rules comparable to those applicable to members of the Bar. Finally, the proportion of members of the Bar belonging to that professional partnership and the size of their contributions to it had to be at least equivalent to that of the partners belonging to other professions, so far as both mutual relations between the partners and their relations with third parties were concerned.

76. In 1973 the General Council accredited the members of both the Netherlands association of patent agents and of the Netherlands association of tax consultants for the purposes of creating multi-disciplinary professional partnerships with members of the Bar. Subsequently, notaries were also accredited. According to the appellants in
the main proceedings, although, at the material time, members of the Netherlands institute of accountants were not formally accredited by the General Council, there was in principle no objection to this.

77. In 1991, faced for the first time with a request for authorisation of a partnership with an accountant, the Bar of the Netherlands, following an expedited procedure, amended the 1972 Regulation for the sole purpose, according to the appellants, of having a legal basis on which to prohibit professional partnerships between members of the Bar and accountants. Members of the Bar were thenceforth authorised to enter into multi-disciplinary partnerships only where ‘the free and independent exercise of their profession, including the defence of their clients’ interests, and the corresponding relationship of trust between lawyer and client cannot be jeopardised’.

78. The refusal to authorise partnerships between members of the Bar and accountants is, in the appellants' submission, based on the finding that firms of accountants had evolved and had in the meantime become gigantic organisations, so that a partnership of a law-firm with a firm of accountants would, as the then Algemene Deken (General Dean) of the Bar expressed it, have more resembled ‘the marriage of a mouse and an elephant than a union of partners of equal stature’.

79. The Bar of the Netherlands then adopted the 1993 Regulation. That measure recapitulated the amendment made in 1991 and added a further requirement to the effect that members of the Bar were no longer authorised to form part of a professional partnership ‘unless the primary purpose of each partner's respective profession is the practice of the law’ (Article 3 of the 1993 Regulation), which, in the appellants' submission, demonstrates the anticompetitive object of the national rules at issue in the main proceedings.

80. In the alternative, the appellants in the main proceedings claim that, irrespective of its object, the 1993 Regulation produces effects that are restrictive of competition.

81. They maintain that multi-disciplinary partnerships of members of the Bar and accountants would make it possible to respond better to the needs of clients operating in an ever more complex and international economic environment.

82. Members of the Bar, having a reputation as experts in many fields, would be best placed to offer their clients a wide range of legal services and would, as partners in a multi-disciplinary partnership, be especially attractive to other persons active on the market in legal services.

83. Conversely, accountants would be attractive partners for members of the Bar in a professional partnership. They are experts in fields such as legislation on company accounts, the tax system, the organisation and restructuring of undertakings, and management consultancy. There would be many clients interested in an integrated service, supplied by a single provider and covering the legal as well as financial, tax and accountancy aspects of a particular matter.

84. The prohibition at issue in the main proceedings prohibits all contractual arrangements between members of the Bar and accountants which provide in any way for shared decision-making, profit-sharing or for the use of a common name, and this makes any form of effective partnership difficult.

85. By contrast, the Luxembourg Government claimed at the hearing that a prohibition of multi-disciplinary partnerships such as that laid down in the 1993 Regulation had a positive effect on competition. It pointed out that, by forbidding members of the Bar to enter into partnership with accountants, the national rules in issue in the main proceedings made it possible to prevent the legal services offered by members of the Bar from being concentrated in the hands of a few large international firms and, consequently, to maintain a large number of operators on the market.

86. It appears to the Court that the national legislation in issue in the main proceedings has an adverse effect on competition and may affect trade between Member States.

87. As regards the adverse effect on competition, the areas of expertise of members of the Bar and of accountants may be complementary. Since legal services, especially in business law, more and more frequently require recourse to an accountant, a multi-disciplinary partnership of members of the Bar and accountants would make it possible to offer a wider range of services, and indeed to propose new ones. Clients would thus be able to turn to a single structure for a large part of the services necessary for the organisation, management and operation of their business (the 'one-stop shop' advantage).
Furthermore, a multi-disciplinary partnership of members of the Bar and accountants would be capable of satisfying the needs created by the increasing interpenetration of national markets and the consequent necessity for continuous adaptation to national and international legislation.

89. Nor, finally, is it inconceivable that the economies of scale resulting from such multi-disciplinary partnerships might have positive effects on the cost of services.

90. A prohibition of multi-disciplinary partnerships of members of the Bar and accountants, such as that laid down in the 1993 Regulation, is therefore liable to limit production and technical development within the meaning of Article 85(1)(b) of the Treaty.


92. On the other hand, the prohibition of conflicts of interest with which members of the Bar in all Member States are required to comply may constitute a structural limit to extensive concentration of law-firms and so reduce their opportunities of benefiting from economies of scale or of entering into structural associations with practitioners of highly concentrated professions.

93. In those circumstances, unreserved and unlimited authorisation of multi-disciplinary partnerships between the legal profession, the generally decentralised nature of which is closely linked to some of its fundamental features, and a profession as concentrated as accountancy, could lead to an overall decrease in the degree of competition prevailing on the market in legal services, as a result of the substantial reduction in the number of undertakings present on that market.

94. Nevertheless, in so far as the preservation of a sufficient degree of competition on the market in legal services could be guaranteed by less extreme measures than national rules such as the 1993 Regulation, which prohibits absolutely any form of multi-disciplinary partnership, whatever the respective sizes of the firms of lawyers and accountants concerned, those rules restrict competition.

95. As regards the question whether intra-Community trade is affected, it is sufficient to observe that an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about (Case 8/72 Vereniging van Cementhandelaren v Commission [1972] ECR 977, paragraph 29; Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 22; and CNSD, paragraph 48).

96. That effect is all the more appreciable in the present case because the 1993 Regulation applies equally to visiting lawyers who are registered members of the Bar of another Member State, because economic and commercial law more and more frequently regulates transnational transactions and, lastly, because the firms of accountants looking for lawyers as partners are generally international groups present in several Member States.

97. However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

98.
Account must be taken of the legal framework applicable in the Netherlands, on the one hand, to members of the
Bar and to the Bar of the Netherlands, which comprises all the registered members of the Bar in that Member State,
and on the other hand, to accountants.

As regards members of the Bar, it has consistently been held that, in the absence of specific Community rules in
the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory (Case
107/83 Kloppe [1984] ECR 2971, paragraph 17, and Reisebüro, paragraph 37). For that reason, the rules applicable to
that profession may differ greatly from one Member State to another.

The current approach of the Netherlands, where Article 28 of the Advocatenwet entrusts the Bar of the
Netherlands with responsibility for adopting regulations designed to ensure the proper practice of the profession, is
that the essential rules adopted for that purpose are, in particular, the duty to act for clients in complete
independence and in their sole interest, the duty, mentioned above, to avoid all risk of conflict of interest and the
duty to observe strict professional secrecy.

Those obligations of professional conduct have not inconsiderable implications for the structure of the market in
legal services, and more particularly for the possibilities for the practice of law jointly with other liberal professions
which are active on that market.

Thus, they require of members of the Bar that they should be in a situation of independence vis-à-vis the public
authorities, other operators and third parties, by whom they must never be influenced. They must furnish, in that
respect, guarantees that all steps taken in a case are taken in the sole interest of the client.

By contrast, the profession of accountant is not subject, in general, and more particularly, in the Netherlands, to
comparable requirements of professional conduct.

As the Advocate General has rightly pointed out in paragraphs 185 and 186 of his Opinion, there may be a degree
of incompatibility between the ‘advisory’ activities carried out by a member of the Bar and the ‘supervisory’ activities
carried out by an accountant. The written observations submitted by the respondent in the main proceedings show
that accountants in the Netherlands perform a task of certification of accounts. They undertake an objective
examination and audit of their clients’ accounts, so as to be able to impart to interested third parties their personal
opinion concerning the reliability of those accounts. It follows that in the Member State concerned accountants are
not bound by a rule of professional secrecy comparable to that of members of the Bar, unlike the position under
German law, for example.

The aim of the 1993 Regulation is therefore to ensure that, in the Member State concerned, the rules of
professional conduct for members of the Bar are complied with, having regard to
the prevailing perceptions of the
profession in that State. The Bar of the Netherlands was entitled to consider that members of the Bar might no
longer be in a position to advise and represent their clients independently and in the observance of strict
professional secrecy if they belonged to an organisation which is also responsible for producing an account of the
financial results of the transactions in respect of which their services were called upon and for certifying those
accounts.

Moreover, the concurrent pursuit of the activities of statutory auditor and of adviser, in particular legal adviser,
also raises questions within the accountancy profession itself, as may be seen from the Commission Green Paper
96/C/321/01 ‘The role, the position and the liability of the statutory auditor within the European Union’ (OJ 1996
C 321, p. 1; see, in particular, paragraphs 4.12 to 4.14).

A regulation such as the 1993 Regulation could therefore reasonably be considered to be necessary in order to
ensure the proper practice of the legal profession, as it is organised in the Member State concerned.

Furthermore, the fact that different rules may be applicable in another Member State does not mean that the rules
in force in the former State are incompatible with Community law (see, to that effect, Case C-108/96 Mac Quen and
Others [2001] ECR I-837, paragraph 33). Even if multi-disciplinary partnerships of lawyers and accountants are
allowed in some Member States, the Bar of the Netherlands is entitled to consider that the objectives pursued by the
1993 Regulation cannot, having regard in particular to the legal regimes by which members of the Bar and
accountants are respectively governed in the Netherlands, be attained by less restrictive means (see, to that effect,
with regard to a law reserving judicial debt-recovery activity to lawyers, Reisebüro, paragraph 41).
In light of those considerations, it does not appear that the effects restrictive of competition such as those resulting for members of the Bar practising in the Netherlands from a regulation such as the 1993 Regulation go beyond what is necessary in order to ensure the proper practice of the legal profession (see, to that effect, Case C-250/92 DLG [1994] ECR I-5641, paragraph 35).

Having regard to all the foregoing considerations, the answer to be given to the second question must be that a national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.

**Question 3**

111. By its third question the national court is asking, essentially, whether a body such as the Bar of the Netherlands is to be treated as an undertaking or group of undertakings for the purposes of Article 86 of the Treaty.

112. First, since it does not carry on any economic activity, the Bar of the Netherlands is not an undertaking within the meaning of Article 86 of the Treaty.

113. Second, it cannot be categorised as a group of undertakings for the purposes of that provision, inasmuch as registered members of the Bar of the Netherlands are not sufficiently linked to each other to adopt the same conduct on the market with the result that competition between them is eliminated (Case C-96/94 Centro Servizi Spediforto [1995] ECR I-2883, paragraphs 33 and 34).

114. The legal profession is not concentrated to any significant degree. It is highly heterogenous and is characterised by a high degree of internal competition. In the absence of sufficient structural links between them, members of the Bar cannot be regarded as occupying a collective dominant position for the purposes of Article 86 of the Treaty (see, to that effect, Joined Cases C-68/94 and C-30/95 France and Others v Commission [1998] ECR I-1375, paragraph 227, and Joined Cases C-395/96 P and C-396/96 P Compagnie maritime belge transports and Others v Commission [2000] ECR I-1365, paragraphs 36 and 42). Furthermore, as is clear from the documents before the Court, members of the Bar account for only 60% of turnover in the legal services sector in the Netherlands, a market share which, having regard to the large number of law firms, cannot of itself constitute conclusive evidence of the existence of a collective dominant position on the part of those undertakings (see, to that effect, France and Others v Commission, paragraph 226, and Compagnie maritime belge, paragraph 42).

115. In light of the foregoing considerations, the answer to be given to the third question must be that a body such as the Bar of the Netherlands does not constitute either an undertaking or group of undertakings for the purposes of Article 86 of the Treaty.

**Question 4**

116. Having regard to the answer given to the third question, there is no need to consider the fourth question.

**Question 5**

117. Having regard to the answer given to the second question, there is no need to consider the fifth question.

**Question 6**

118. Having regard to the answers given to the second and third questions, there is no need to consider the sixth question.

**Questions 7, 8 and 9**

119. By its seventh question, the national court seeks, essentially, to ascertain whether the compatibility with Community law of a prohibition of multi-disciplinary partnerships of members of the Bar and accountants, such as that laid down in the 1993 Regulation, must be assessed in light of both the Treaty provisions relating to the right of establishment and those relating to freedom to provide services. By its eighth and ninth questions, that court is asking, essentially, whether such a prohibition constitutes a restriction of the right of establishment and/or freedom to provide services and, if so, whether that restriction is justified.
It should be observed at the outset that compliance with Articles 52 and 59 of the Treaty is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services. The abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (Case 36/74 Walrave and Koch [1974] ECR 1405, paragraphs 17, 23 and 24; Case 13/76 Donà [1976] ECR 1333, paragraphs 17 and 18; Case C-415/93 Bosman [1995] ECR I-4921, paragraphs 83 and 84, and Case C-281/98 Angonese [2000] ECR I-4139, paragraph 32).

In those circumstances, the Court may be called upon to determine whether the Treaty provisions concerning the right of establishment and freedom to provide services are applicable to a regulation such as the 1993 Regulation.

On the assumption that the provisions concerning the right of establishment and/or freedom to provide services are applicable to a prohibition of any multi-disciplinary partnerships between members of the Bar and accountants such as that laid down in the 1993 Regulation and that that regulation constitutes a restriction on one or both of those freedoms, that restriction would in any event appear to be justified for the reasons set out in paragraphs 97 to 109 above.

The answer to be given to the seventh, eighth and ninth questions must therefore be that it is not contrary to Articles 52 and 59 of the Treaty for a national regulation such as the 1993 Regulation to prohibit any multi-disciplinary partnerships between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerned.

The costs incurred by the Netherlands, Danish, German, French, Luxembourg, Austrian, Portuguese and Swedish Governments, by the Government of the Principality of Liechtenstein and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. On those grounds,

THE COURT,

in answer to the questions referred to it by the Raad van State by judgment of 10 August 1999, hereby rules:

1. A regulation concerning partnerships between members of the Bar and other professionals, such as the Samenwerkingsverordening 1993 (1993 regulation on joint professional activity), adopted by a body such as the Nederlandse Orde van Advocaten (the Bar of the Netherlands), is to be treated as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the EC Treaty (now Article 81 EC).

2. A national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite effects restrictive of competition, that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.

3. A body such as the Bar of the Netherlands does not constitute either an undertaking or a group of undertakings for the purposes of Article 86 of the EC Treaty (now Article 82 EC).

4. It is not contrary to Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) for a national regulation such as the 1993 Regulation to prohibit any multi-disciplinary partnerships between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerned.

Delivered in open court in Luxembourg on 19 February 2002.
COMMISSION REGULATION (EU) No 330/2010

of 20 April 2010

on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices (1), and in particular Article 1 thereof,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

(a) ‘vertical agreement’ means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;

(b) ‘vertical restraint’ means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) of the Treaty;

(c) ‘competing undertaking’ means an actual or potential competitor; ‘actual competitor’ means an undertaking that is active on the same relevant market; ‘potential competitor’ means an undertaking that, in the absence of the vertical agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market;

(d) ‘non-compete obligation’ means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer’s total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its
purchases in the preceding calendar year;

(e) ‘selective distribution system’ means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system;

(f) ‘intellectual property rights’ includes industrial property rights, know how, copyright and neighbouring rights;

(g) ‘know-how’ means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, ‘secret’ means that the know-how is not generally known or easily accessible; ‘substantial’ means that the know-how is significant and useful to the buyer for the use, sale or resale of the contract goods or services; ‘identified’ means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

(h) ‘buyer’ includes an undertaking which, under an agreement falling within Article 101(1) of the Treaty, sells goods or services on behalf of another undertaking;

(i) ‘customer of the buyer’ means an undertaking not party to the agreement which purchases the contract goods or services from a buyer which is party to the agreement.

2. For the purposes of this Regulation, the terms ‘undertaking’, ‘supplier’ and ‘buyer’ shall include their respective connected undertakings.

‘Connected undertakings’ means:

(a) undertakings in which a party to the agreement, directly or indirectly:
   (i) has the power to exercise more than half the voting rights, or
   (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
   (iii) has the right to manage the undertaking’s affairs;

(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in point (a);

(c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);

(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);

(e) undertakings in which the rights or the powers listed in point (a) are jointly held by:
   (i) parties to the agreement or their respective connected undertakings referred to in points (a) to (d), or
   (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

Article 2

Exemption

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.

This exemption shall apply to the extent that such agreements contain vertical restraints.

2. The exemption provided for in paragraph 1 shall apply to vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if all its members are retailers of goods and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding EUR 50 million. Vertical agreements entered into by such associations shall be covered by this Regulation without prejudice to the application of Article 101 of the Treaty to horizontal agreements concluded between the members of the association or decisions adopted by the association.
3. The exemption provided for in paragraph 1 shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object as vertical restraints which are not exempted under this Regulation.

4. The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings. However, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and:
   (a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or
   (b) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

5. This Regulation shall not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation.

Article 3
Market share threshold

1. The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.

2. For the purposes of paragraph 1, where in a multi party agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the market share of the first undertaking must respect the market share threshold provided for in that paragraph both as a buyer and a supplier in order for the exemption provided for in Article 2 to apply.

Article 4
Restrictions that remove the benefit of the block exemption — hardcore restrictions

The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
   (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
   (b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:
      (i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
      (ii) the restriction of sales to end users by a buyer operating at the wholesale level of trade,
      (iii) the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system, and
      (iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
   (c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;
   (d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;
the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier’s ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

Article 5

Excluded restrictions

1. The exemption provided for in Article 2 shall not apply to the following obligations contained in vertical agreements:

(a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;
(b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;
(c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

For the purposes of point (a) of the first subparagraph, a non-compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.

2. By way of derogation from paragraph 1(a), the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.

3. By way of derogation from paragraph 1(b), the exemption provided for in Article 2 shall apply to any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services where the following conditions are fulfilled:

(a) the obligation relates to goods or services which compete with the contract goods or services;
(b) the obligation is limited to the premises and land from which the buyer has operated during the contract period;
(c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer;
(d) the duration of the obligation is limited to a period of one year after termination of the agreement.

Paragraph 1(b) is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain.

Article 6

Non-application of this Regulation

Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than 50% of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.

Article 7

Application of the market share threshold

For the purposes of applying the market share thresholds provided for in Article 3 the following rules shall apply:

(a) the market share of the supplier shall be calculated on the basis of market sales value data and the market share of the buyer shall be calculated on the basis of market purchase value data. If market sales value or market purchase value data are not available, estimates based on other reliable market information, including market sales and purchase volumes, may be used to establish the market share of the undertaking concerned;
(b) the market shares shall be calculated on the basis of data relating to the preceding calendar year;
(c) the market share of the supplier shall include any goods or services supplied to vertically integrated distributors for the purposes of sale;
(d) if a market share is initially not more than 30% but subsequently rises above that level without exceeding 35%,
the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 30% market share threshold was first exceeded;

(e) if a market share is initially not more than 30% but subsequently rises above 35%, the exemption provided for in Article 2 shall continue to apply for one calendar year following the year in which the level of 35% was first exceeded;

(f) the benefit of points (d) and (e) may not be combined so as to exceed a period of two calendar years;

(g) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of the second subparagraph of Article 1(2).

Article 8
Application of the turnover threshold

1. For the purpose of calculating total annual turnover within the meaning of Article 2(2), the turnover achieved during the previous financial year by the relevant party to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the vertical agreement and its connected undertakings or between its connected undertakings.

2. The exemption provided for in Article 2 shall remain applicable where, for any period of two consecutive financial years, the total annual turnover threshold is exceeded by no more than 10%.

Article 9
Transitional period

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 June 2010 to 31 May 2011 in respect of agreements already in force on 31 May 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 31 May 2010, satisfied the conditions for exemption provided for in Regulation (EC) No 2790/1999.

Article 10
Period of validity

This Regulation shall enter into force on 1 June 2010.

It shall expire on 31 May 2022.
This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 April 2010.

For the Commission
The President
José Manuel BARROSO
IN CASE 27/76

UNITED BRANDS COMPANY, A CORPORATION REGISTERED IN NEW JERSEY, UNITED STATES OF AMERICA,

AND

UNITED BRANDS CONTINENTAL B.V., A NETHERLANDS COMPANY HAVING ITS REGISTERED OFFICE AT 3 VAN VOLLENHOVENSTRAAT, 3002 ROTTERDAM, REPRESENTED AND ASSISTED BY IVO VAN BAEL AND JEAN-FRANCOIS BELLIS OF THE BRUSSELS BAR, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF MR ELVINGER AND MR HOSS, 84 GRAND RUE,

APPLICANTS

V

COMMISSION OF THE EUROPEAN COMMUNITIES, REPRESENTED BY ITS LEGAL ADVISERS, ANTONIO MARCHINI-CAMIA AND JOHN TEMPLE LANG, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF MR MARIO CERVINO, BATIMENT JEAN MONNET,

DEFENDANT,


Grounds

1UNITED BRANDS COMPANY (HEREINAFTER REFERRED TO AS "UBC") OF NEW YORK AND ITS REPRESENTATIVE UNITED BRANDS CONTINENTAL B.V. (HEREINAFTER REFERRED TO AS "UBCV") BY AN APPLICATION REGISTERED AT THE COURT ON 15 MARCH 1976 PETITIONED THE COURT TO SET ASIDE THE COMMISSION DECISION OF 17 DECEMBER 1975 WHICH WAS LATER PUBLISHED IN OFFICIAL JOURNAL L 95 OF 9 APRIL 1976 TO WHICH THE QUOTATIONS IN THIS JUDGMENT REFER.

2FOR PRACTICAL REASONS IN THE ARGUMENTATION WHICH FOLLOWS THE SINGLE EXPRESSION UBC WILL BE USED TO REFER TO THE APPLICANTS.

3ARTICLE 1 OF THE DECISION DECLARES THAT UBC HAS INFRINGED ARTICLE 86 OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY:

(A) BY REQUIRING ITS DISTRIBUTOR/RIPENERS IN THE BELGO-LUXEMBOURG ECONOMIC UNION, DENMARK, GERMANY, IRELAND AND THE NETHERLANDS TO REFRAIN FROM RESELLING ITS BANANAS WHILE STILL GREEN;
(B) BY, IN RESPECT OF ITS SALES OF CHIQUITA BANANAS, CHARGING OTHER TRADING PARTIES, NAMELY DISTRIBUTOR/RIPENERS OTHER THAN THE SCIPIO GROUP IN THE MEMBER STATES REFERRED TO ABOVE, DISSIMILAR PRICES FOR EQUIVALENT TRANSACTIONS;
(C) BY IMPOSING UNFAIR PRICES FOR THE SALE OF CHIQUITA BANANAS ON ITS CUSTOMERS IN THE BELGO-LUXEMBOURG ECONOMIC UNION, DENMARK, THE NETHERLANDS AND GERMANY (OTHER THAN THE SCIPIO GROUP);
(D) BY REFUSING FROM 10 OCTOBER 1973 TO 11 FEBRUARY 1975 TO SUPPLY CHIQUITA BANANAS TO TH. OLESEN A/S, VALBY, COPENHAGEN, DENMARK.

4UNDER ARTICLE 2 A FINE OF ONE MILLION UNITS OF ACCOUNT IS IMPOSED ON UBC IN RESPECT OF THE INFRINGEMENT REFERRED TO IN ARTICLE 1.

5ARTICLE 3 ORDERS UBC:
(A) TO BRING TO AN END WITHOUT DELAY THE INFRINGEMENTS REFERRED TO IN ARTICLE 1 HEREOF, UNLESS IT HAS ALREADY DONE SO OF ITS OWN ACCORD.
(B) (I) TO INFORM ALL ITS DISTRIBUTOR/RIPENERS IN THE BELGO-LUXEMBOURG ECONOMIC UNION, DENMARK, GERMANY, IRELAND AND THE NETHERLANDS THAT IT HAS CEASED TO APPLY THE PROHIBITION ON THE RESALE OF GREEN BANANAS AND INFORM THE COMMISSION THAT IT HAS DONE SO BY NOT LATER THAN 1 FEBRUARY 1976;
(II) TO INFORM THE COMMISSION BY 20 APRIL 1976 AND THEREAFTER TWICE YEARLY NOT LATER THAN 20 JANUARY AND 20 JULY FOR A PERIOD OF TWO YEARS OF THE PRICES CHARGED DURING THE PREVIOUS SIX MONTHS TO CUSTOMERS IN THE BELGO-LUXEMBOURG ECONOMIC UNION, DENMARK, GERMANY, IRELAND AND THE NETHERLANDS.

6UBC’S MAIN CLAIMS IN ITS APPLICATION ARE THAT THE COURT SHOULD SET ASIDE THE DECISION OF 17 DECEMBER 1975 AND ORDER THE COMMISSION TO PAY UBC MORAL DAMAGES IN THE AMOUNT OF ONE UNIT OF ACCOUNT AND, IN THE ALTERNATIVE, SHOULD, IF THE DECISION BE UPHeld, CANCEL OR AT LEAST REDUCE THE FINE.

7IT PUTS FORWARD EIGHT SUBMISSIONS IN SUPPORT OF ITS CONCLUSIONS:
(1) IT CHALLENGES THE ANALYSIS MADE BY THE COMMISSION OF THE RELEVANT MARKET, AND ALSO OF THE PRODUCT MARKET AND THE GEOGRAPHIC MARKET;
(2) IT DENIES THAT IT IS IN A DOMINANT POSITION ON THE RELEVANT MARKET WITHIN THE MEANING OF ARTICLE 86 OF THE TREATY;
(3) IT CONSIDERS THAT THE CLAUSE RELATING TO THE CONDITIONS OF SALE OF GREEN BANANAS IS JUSTIFIED BY THE NEED TO SAFEGUARD THE QUALITY OF THE PRODUCT SOLD TO THE CONSUMER;
(4) IT INTENDS TO SHOW THAT THE REFUSAL TO CONTINUE TO SUPPLY THE DANISH FIRM TH. OLESEN WAS JUSTIFIED;
(5) IT TAKES THE VIEW THAT IT HAS NOT CHARGED DISCRIMINATORY PRICES;
(6) IT TAKES THE VIEW THAT IT HAS NOT CHARGED UNFAIR PRICES;
(7) IT COMPLAINS THAT THE ADMINISTRATIVE PROCEDURE WAS IRREGULAR;
(8) IT DISPUTES THE IMPOSITION OF THE FINE AND, IN THE ALTERNATIVE, ASKS THE COURT TO REDUCE IT.

8UBC, AFTER BRINGING THIS ACTION, BY A SEPARATE DOCUMENT MADE AN APPLICATION DATED 18 MARCH 1976 FOR THE ADOPTION OF AN INTERIM MEASURE UNDER ARTICLE 185 OF THE TREATY REQUESTING THE PRESIDENT OF THE COURT TO SUSPEND THE ENFORCEMENT OF ARTICLE 3 (A) AND (B), PARAGRAPH 1 OF THE DECISION UNTIL A DECISION ON THE APPLICATION FOR ANNULMENT PENDING BEFORE THE COURT HAS BEEN MADE.

9BY AN ORDER OF 5 APRIL 1976 THE PRESIDENT TOOK NOTE OF THE PARTIES’ STATEMENTS CONCERNING THE AMENDMENT OF THE CLAUSE RELATING TO THE RESALE OF BANANAS WHILE STILL GREEN AND MADE THE FOLLOWING ORDER:
**THE SUSPENSION OF THE OPERATION OF ARTICLE 3 (A) AND THE FIRST INDENT OF ARTICLE 3 (B) OF THE DECISION OF THE COMMISSION OF 17 DECEMBER 1975 (IV / 26699) IS GRANTED UNTIL JUDGMENT IS GIVEN ON THE SUBSTANCE OF CASE 27/76, IN SO FAR AS THE APPLICANTS HAVE NOT ALREADY OF THEIR OWN ACCORD BROUGHT TO AN END THE INFRINGEMENTS REFERRED TO BY THE COMMISSION IN ARTICLE 1 OF THE SAID DECISION**.

CHAPTER I - THE EXISTENCE OF A DOMINANT POSITION
SECTION 1 - THE RELEVANT MARKET

10IN ORDER TO DETERMINE WHETHER UBC HAS A DOMINANT POSITION ON THE BANANA MARKET IT IS NECESSARY TO DEFINE THIS MARKET BOTH FROM THE STANDPOINT OF THE PRODUCT AND FROM THE GEOGRAPHIC POINT OF VIEW.
The opportunities for competition under Article 86 of the Treaty must be considered having regard to the particular features of the product in question and with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated.

Paragraph 1. The Product Market

As far as the product market is concerned it is first of all necessary to ascertain whether, as the applicant maintains, bananas are an integral part of the fresh fruit market, because they are reasonably interchangeable by consumers with other kinds of fresh fruit such as apples, oranges, grapes, peaches, strawberries, etc. or whether the relevant market consists solely of the banana market which includes both branded bananas and unlabelled bananas and is a market sufficiently homogeneous and distinct from the market of other fresh fruit.

The applicant submits in support of its argument that bananas compete with other fresh fruit in the same shops, on the same shelves, at prices which can be compared, satisfying the same needs: consumption as a dessert or between meals.

The statistics produced show that consumer expenditure on the purchase of bananas is at its lowest between June and December when there is a plentiful supply of domestic fresh fruit on the market.

Studies carried out by the Food and Agriculture Organization (FAO) (especially in 1975) confirm that banana prices are relatively weak during the summer months and that the price of apples for example has a statistically appreciable impact on the consumption of bananas in the Federal Republic of Germany.

Again according to these studies some easing of prices is noticeable at the end of the year during the "orange season".

The seasonal peak periods when there is a plentiful supply of other fresh fruit exert an influence not only on the prices but also on the volume of sales of bananas and consequently on the volume of imports thereof.

The applicant concludes from these findings that bananas and other fresh fruit form only one market and that UBC's operations should have been examined in this context for the purpose of any application of Article 86 of the Treaty.

The Commission maintains that there is a demand for bananas which is distinct from the demand for other fresh fruit especially as the banana is a very important part of the diet of certain sections of the community.

The specific qualities of the banana influence customer preference and induce him not to readily accept other fruits as a substitute.

The Commission draws the conclusion from the studies quoted by the applicant that the influence of the prices and availabilities of other types of fruit on the prices and availabilities of bananas on the relevant market is very ineffective and that these effects are too brief and too spasmodic for such other fruit to be regarded as forming part of the same market as bananas or as a substitute therefor.

For the banana to be regarded as forming a market which is sufficiently differentiated from other fruit markets it must be possible for it to be singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible.

The ripening of bananas takes place the whole year round without any season having to be taken into account.

Throughout the year production exceeds demand and can satisfy it at any time.

Owing to this particular feature the banana is a privileged fruit and its production and marketing can be adapted to the seasonal fluctuations of other fresh fruit which are known and can be computed.
THERE IS NO UNAVOIDABLE SEASONAL SUBSTITUTION SINCE THE CONSUMER CAN OBTAIN THIS FRUIT ALL THE YEAR ROUND.

SINCE THE BANANA IS A FRUIT WHICH IS ALWAYS AVAILABLE IN SUFFICIENT QUANTITIES THE QUESTION WHETHER IT CAN BE REPLACED BY OTHER FRUITS MUST BE DETERMINED OVER THE WHOLE OF THE YEAR FOR THE PURPOSE OF ASCERTAINING THE DEGREE OF COMPETITION BETWEEN IT AND OTHER FRESH FRUIT.

THE STUDIES OF THE BANANA MARKET ON THE COURT’ S FILE SHOW THAT ON THE LATTER MARKET THERE IS NO SIGNIFICANT LONG TERM CROSS-ELASTICITY ANY MORE THAN AS HAS BEEN MENTIONED - THERE IS ANY SEASONAL SUBSTITUTABILITY IN GENERAL BETWEEN THE BANANA AND ALL THE SEASONAL FRUITS, AS THIS ONLY EXISTS BETWEEN THE BANANA AND TWO FRUITS ( PEACHES AND TABLE GRAPES ) IN ONE OF THE COUNTRIES ( WEST GERMANY ) OF THE RELEVANT GEOGRAPHIC MARKET.

AS FAR AS CONCERNS THE TWO FRUITS AVAILABLE THROUGHOUT THE YEAR ( ORANGES AND APPLES ) THE FIRST ARE NOT INTERCHANGEABLE AND IN THE CASE OF THE SECOND THERE IS ONLY A RELATIVE DEGREE OF SUBSTITUTABILITY.

THIS SMALL DEGREE OF SUBSTITUTABILITY IS ACCOUNTED FOR BY THE SPECIFIC FEATURES OF THE BANANA AND ALL THE FACTORS WHICH INFLUENCE CONSUMER CHOICE.


AS FAR AS PRICES ARE CONCERNED TWO FAO STUDIES SHOW THAT THE BANANA IS ONLY AFFECTED BY THE PRICES - FALLING PRICES - OF OTHER FRUITS ( AND ONLY OF PEACHES AND TABLE GRAPES ) DURING THE SUMMER MONTHS AND MAINLY IN JULY AND THEN BY AN AMOUNT NOT EXCEEDING 20%.

ALTHOUGH IT CANNOT BE DENIED THAT DURING THESE MONTHS AND SOME WEEKS AT THE END OF THE YEAR THIS PRODUCT IS EXPOSED TO COMPETITION FROM OTHER FRUITS, THE FLEXIBLE WAY IN WHICH THE VOLUME OF IMPORTS AND THEIR MARKETING ON THE RELEVANT GEOGRAPHIC MARKET IS ADJUSTED MEANS THAT THE CONDITIONS OF COMPETITION ARE EXTREMELY LIMITED AND THAT ITS PRICE ADAPTS WITHOUT ANY SERIOUS DIFFICULTIES TO THIS SITUATION WHERE SUPPLIES OF FRUIT ARE PLENTIFUL.

IT FOLLOWS FROM ALL THESE CONSIDERATIONS THAT A VERY LARGE NUMBER OF CONSUMERS HAVING A CONSTANT NEED FOR BANANAS ARE NOT NOTICEABLY OR EVEN APPRECIABLY ENTICED AWAY FROM THE CONSUMPTION OF THIS PRODUCT BY THE ARRIVAL OF OTHER FRESH FRUIT ON THE MARKET AND THAT EVEN THE PERSONAL PEAK PERIODS ONLY AFFECT IT FOR A LIMITED PERIOD OF TIME AND TO A VERY LIMITED EXTENT FROM THE POINT OF VIEW OF SUBSTITUTABILITY.

CONSEQUENTLY THE BANANA MARKET IS A MARKET WHICH IS SUFFICIENTLY DISTINCT FROM THE OTHER FRESH FRUIT MARKETS.

PARAGRAPH 2. THE GEOGRAPHIC MARKET

THE COMMISSION HAS TAKEN THE FEDERAL REPUBLIC OF GERMANY, DENMARK, IRELAND, THE NETHERLANDS AND THE BLEU AS THE GEOGRAPHIC MARKET AND IT IS IN RESPECT OF THIS MARKET THAT IT IS NECESSARY TO CONSIDER WHETHER UBC HAS THE POWER TO HINDER EFFECTIVE COMPETITION.

IT TAKES THE VIEW THAT THE ECONOMIC CONDITIONS IN THIS PART OF THE COMMUNITY ALLOW IMPORTER/DISTRIBUTORS OF BANANAS TO MARKET THEIR PRODUCTS THERE IN THE ORDINARY COURSE WITHOUT THERE BEING ANY SIGNIFICANT ECONOMIC BARRIERS FOR UBC TO OVERCOME COMPARED WITH OTHER IMPORTER/DISTRIBUTORS.

THE OTHER MEMBER STATES OF THE COMMUNITY ( FRANCE, ITALY, THE UNITED KINGDOM ) MUST HOWEVER BE EXCLUDED FROM THIS GEOGRAPHIC DEFINITION OF THE MARKET NOTWITHSTANDING THE SIGNIFICANT PRESENCE OF UBC IN THESE STATES, BECAUSE OF THE SPECIAL CIRCUMSTANCES RELATING TO IMPORT ARRANGEMENTS AND TRADING CONDITIONS AND THE FACT THAT BANANAS OF VARIOUS TYPES AND ORIGIN ARE SOLD THERE.

THE APPLICANT POINTS OUT THAT THE GEOGRAPHIC MARKET WHERE AN UNDERTAKING’ S ECONOMIC AND COMMERCIAL POWER IS TAKEN INTO CONSIDERATION SHOULD ONLY COM普RISE AREAS WHERE THE CONDITIONS OF COMPETITION ARE HOMOGENEOUS.

ALTHOUGH THE COMMISSION HAD GOOD REASON TO EXCLUDE FRANCE, ITALY AND THE UNITED KINGDOM FROM THE SAID MARKET IT FAILED TO TAKE ACCOUNT OF THE DIFFERENCES IN THE CONDITIONS OF COMPETITION IN THE OTHER MEMBER STATES WHICH
SHOULD HAVE LED IT TO COME TO THE SAME CONCLUSIONS WITH REGARD TO THE LATTER
AS IT CAME TO IN THE CASE OF THE THREE COUNTRIES REFERRED TO ABOVE.

41IN FACT THREE SUBSTANTIALLY DIFFERENT SYSTEMS OF CUSTOMS DUTY APPLY IN THE
MEMBER STATES CONCERNED: A ZERO TARIFF IN GERMANY COVERING A BANANA QUOTA
WHICH MEETS MOST OF THIS COUNTRY’S REQUIREMENTS, A TRANSITIONAL TARIFF IN
IRELAND AND DENMARK AND THE COMMON CUSTOMS TARIFF OF 20% FOR IMPORTS INTO
BENELUX.

42THE COMMISSION HAS NOT EITHER TAKEN ACCOUNT OF THE CONSUMER HABITS OF THE
MEMBER STATES CONCERNED THE ANNUAL CONSUMPTION OF FRESH FRUITS PER CAPITA IN
GERMANY IS EQUAL TO 2.5 TIMES THAT OF IRELAND AND TWICE THAT OF DENMARK),
DIFFERING COMMERCIAL PATTERNS, CONCENTRATIONS AND MONETARY POINTS OF VIEW.

43THE APPLICANT DRAWS THE CONCLUSION FROM ALL THESE FINDINGS THAT THE
GEOGRAPHIC MARKET TAKEN BY THE COMMISSION INCLUDES AREAS IN WHICH THE
CONDITIONS OF COMPETITION ARE SO DIFFERENT THAT THEY CANNOT BE CONSIDERED AS
CONSTITUTING A SINGLE MARKET.

44THE CONDITIONS FOR THE APPLICATION OF ARTICLE 86 TO AN UNDERTAKING IN A
DOMINANT POSITION PRESUPPOSE THE CLEAR DELIMITATION OF THE SUBSTANTIAL PART
OF THE COMMON MARKET IN WHICH IT MAY BE ABLE TO ENGAGE IN ABUSES WHICH HINDER
EFFECTIVE COMPETITION AND THIS IS AN AREA WHERE THE OBJECTIVE CONDITIONS OF
COMPETITION APPLYING TO THE PRODUCT IN QUESTION MUST BE THE SAME FOR ALL
TRADERS.

45THE COMMUNITY HAS NOT ESTABLISHED A COMMON ORGANIZATION OF THE
AGRICULTURAL MARKET IN BANANAS.

46CONSEQUENTLY IMPORT ARRANGEMENTS VARY CONSIDERABLY FROM ONE MEMBER
STATE TO ANOTHER AND REFLECT A SPECIFIC COMMERCIAL POLICY PECULIAR TO THE
STATES CONCERNED.

47THIS EXPLAINS WHY FOR EXAMPLE THE FRENCH MARKET OWING TO ITS NATIONAL
ORGANIZATION IS RESTRICTED UPSTREAM BY A PARTICULAR IMPORT ARRANGEMENT AND
OBLITGERATED DOWNSTREAM BY A RETAIL PRICE MONITORED BY THE ADMINISTRATION.

48THIS MARKET, IN ADDITION TO ADOPTING CERTAIN MEASURES RELATING TO A “TARGET
PRICE” (“PRIX OBJECTIF”), FIXED EACH YEAR AND TO PACKAGING AND GRADING
STANDARDS AND THE MINIMUM QUALITIES REQUIRED, RESERVES ABOUT TWO THIRDS OF
THE MARKET FOR THE PRODUCTION OF THE OVERSEAS DEPARTMENTS AND ONE THIRD TO
THAT OF CERTAIN COUNTRIES ENJOYING PREFERENTIAL RELATIONS WITH FRANCE (IVORY
COAST, MADAGASCAR, CAMEROON) THE BANANAS WHEREOF ARE IMPORTED DUTY-
FREE, AND IT INCLUDES A SYSTEM THE RUNNING OF WHICH IS ENTRUSTED TO THE “COMITE
INTERPROFESSIONNEL BANANIER” (“C.I.B.”).

49THE UNITED KINGDOM MARKET ENJOYS “COMMONWEALTH PREFERENCES”, A SYSTEM
OF WHICH THE MAIN FEATURE IS THE MAINTENANCE OF A LEVEL OF PRODUCTION
FAVOURING THE DEVELOPING COUNTRIES OF THE COMMONWEALTH AND OF A PRICE PAID
TO THE ASSOCIATIONS OF PRODUCERS DIRECTLY LINKED TO THE SELLING PRICE OF THE
GREEN BANANA CHARGED IN THE UNITED KINGDOM.

50ON THE ITALIAN MARKET, SINCE THE ABOLITION IN 1965 OF THE STATE MONOPOLY
RESPONSIBLE FOR MARKETING BANANAS, A NATIONAL SYSTEM OF QUOTA RESTRICTIONS
HAS BEEN INTRODUCED, THE MINISTRY FOR SHIPPING AND THE EXCHANGE CONTROL
OFFICE SUPERVISING THE IMPORTS AND THE CHARTER PARTIES RELATING TO THE FOREIGN
SHIPS WHICH CARRY THE BANANAS.

51THE EFFECT OF THE NATIONAL ORGANIZATION OF THESE THREE MARKETS IS THAT THE
APPLICANT’S BANANAS DO NOT COMPETE ON EQUAL TERMS WITH THE OTHER BANANAS
SOLD IN THESE STATES WHICH BENEFIT FROM A PREFERENTIAL SYSTEM AND THE
COMMISSION WAS RIGHT TO EXCLUDE THESE THREE NATIONAL MARKETS FROM THE
GEOGRAPHIC MARKET UNDER CONSIDERATION.

52ON THE OTHER HAND THE SIX OTHER STATES ARE MARKETS WHICH ARE COMPLETELY
FREE, ALTHOUGH THE APPLICABLE TARIFF PROVISIONS AND TRANSPORT COSTS ARE OF
NECESSITY DIFFERENT BUT NOT DISCRIMINATORY, AND IN WHICH THE CONDITIONS OF
COMPETITION ARE THE SAME FOR ALL.

53FROM THE STANDPOINT OF BEING ABLE TO ENGAGE IN FREE COMPETITION THESE SIX
STATES FORM AN AREA WHICH IS SUFFICIENTLY HOMOGENEOUS TO BE CONSIDERED IN ITS
ENTIRETY.
54 UBC has arranged for its subsidiary in Rotterdam - UBCBV - to market its products. UBCBV is for this purpose a single centre for the whole of this part of the community.

55 Transport costs do not in fact stand in the way of the distribution policy chosen by UBC which consists in selling F.O.R. Rotterdam and Bremerhaven, the two ports where the bananas are unloaded.

56 These are factors which go to make relevant market a single market.

57 It follows from all these considerations that the geographic market as determined by the Commission which constitutes a substantial part of the common market must be regarded as the relevant market for the purpose of determining whether the applicant may be in a dominant position.

Section 2 - UBC's position on the relevant market

58 The Commission bases its view that UBC has a dominant position on the relevant market on a series of factors which, when taken together, give UBC unchallengeable ascendency over all its competitors: its market share compared with that of its competitors, the diversity of its sources of supply, the homogeneous nature of its product, the organization of its production and transport, its marketing system and publicity campaigns, the diversified nature of its operations and finally its vertical integration.

59 Having regard to all these factors the Commission takes the view that UBC is an undertaking in a dominant position enjoying a degree of general independence in its behaviour on the relevant market which enables it to hinder to a large extent any effective competition from competitors who can only if need be secure the same advantages after great exertions spread over several years, a prospect which does not encourage them to embark upon such a course, especially after failing several times to obtain these advantages.

60 UBC does not accept this conclusion and states that it stems from an assertion unsupported by any evidence.

61 It states that it only engages in fair competition in terms of price, quality and services.

62 According to UBC an objective evaluation of its market share, the opportunities for procuring supplies, the "aggressive" competition of other undertakings, their resources, their methods and degree of integration, the relative freedom of distributor/ripeners, the appearance of new competitors on the market, the strength and size of certain customers, the low price and indeed the fall in the price of the banana, the losses which it has made for the last five years, would have permitted the conclusion to be drawn that, on the basis of a proper analysis, neither the set up nor the behaviour of its undertaking present the particular features of a firm in a dominant position on the relevant market.

63 Article 86 is an application of the general objective of the activities of the Community laid down by Article 3 (F) of the Treaty: the institution of a system ensuring that competition in the common market is not distorted.

64 This article prohibits any abuse by an undertaking of a dominant position in a substantial part of the common market so far as it may affect trade between Member States.

65 The dominant position referred to in this article 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 giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

66 In general a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative.

67 In order to find out whether UBC is an undertaking in a dominant position on the relevant market it is necessary first of all to examine its structure and then the situation on the said market as far as competition is concerned.

68 In doing so it may be advisable to take account if need be of the facts put forward as acts amounting to abuses without necessarily having to acknowledge that they are abuses.

Paragraph 1. The structure of UBC
IT IS ADVISABLE TO EXAMINE IN TURN UBC'S RESOURCES FOR AND METHODS OF PRODUCING, PACKAGING, TRANSPORTING, SELLING AND DISPLAYING ITS PRODUCT.

UBC IS AN UNDERTAKING VERTICALLY INTEGRATED TO A HIGH DEGREE.

THIS INTEGRATION IS EVIDENT AT EACH OF THE STAGES FROM THE PLANTATION TO THE LOADING ON WAGONS OR LORRIES IN THE PORTS OF DELIVERY AND AFTER THOSE STAGES, AS FAR AS RIPENING AND SALE PRICES ARE CONCERNED, UBC EVEN EXTENDS ITS CONTROL TO RIPENER/DISTRIBUTORS AND WHOLESALERS BY SETTING UP A COMPLETE NETWORK OF AGENTS.

AT THE PRODUCTION STAGE UBC OWNS LARGE PLANTATIONS IN CENTRAL AND SOUTH AMERICA.

IN SO FAR AS UBC'S OWN PRODUCTION DOES NOT MEET ITS REQUIREMENTS IT CAN OBTAIN SUPPLIES WITHOUT ANY DIFFICULTY FROM INDEPENDENT PLANTERS SINCE IT IS AN ESTABLISHED FACT THAT UNLESS CIRCUMSTANCES ARE EXCEPTIONAL THERE IS A PRODUCTION SURPLUS.

FURTHERMORE SEVERAL INDEPENDENT PRODUCERS HAVE LINKS WITH UBC THROUGH CONTRACTS FOR THE GROWING OF BANANAS WHICH HAVE CAUSED THEM TO GROW THE VARIETIES OF BANANAS WHICH UBC HAS ADVISED THEM TO ADOPT.

THE EFFECTS OF NATURAL DISASTERS WHICH COULD JEOPARDIZE SUPPLIES ARE GREATLY REDUCED BY THE FACT THAT THE PLANTATIONS ARE SPREAD OVER A WIDE GEOGRAPHIC AREA AND BY THE SELECTION OF VARIETIES NOT VERY SUSCEPTIBLE TO DISEASES.

THIS SITUATION WAS BORN OUT BY THE WAY IN WHICH UBC WAS ABLE TO REACT TO THE CONSEQUENCES OF HURRICANE 'FIFI' IN 1974.

AT THE PRODUCTION STAGE UBC THEREFORE KNOWS THAT IT CAN COMPLY WITH ALL THE REQUESTS WHICH IT RECEIVES.

AT THE STAGE OF PACKAGING AND PRESENTATION ON ITS PREMISES UBC HAS AT ITS DISPOSAL FACTORIES, MANPOWER, PLANT AND MATERIAL WHICH ENABLE IT TO HANDLE THE GOODS INDEPENDENTLY.

THE BANANAS ARE CARRIED FROM THE PLACE OF PRODUCTION TO THE PORT OF SHIPMENT BY ITS OWN MEANS OF TRANSPORT INCLUDING RAILWAYS.

AT THE CARRIAGE BY SEA STAGE IT HAS BEEN ACKNOWLEDGED THAT UBC IS THE ONLY UNDERTAKING OF ITS KIND WHICH IS CAPABLE OF CARRYING TWO THIRDS OF ITS EXPORTS BY MEANS OF ITS OWN BANANA FLEET.

UBC KNOWS THAT IT IS ABLE TO TRANSPORT REGULARLY, WITHOUT RUNNING THE RISK OF ITS OWN SHIPS NOT BEING USED AND WHATSOEVER THE MARKET SITUATION MAY BE, TWO THIRDS OF ITS AVERAGE VOLUME OF SALES AND IS ALONE ABLE TO ENSURE THAT THREE REGULAR CONSIGNMENTS REACH EUROPE EACH WEEK, AND ALL THIS GUARANTEES IT COMMERCIAL STABILITY AND WELL BEING.

THE FIELD OF TECHNICAL KNOWLEDGE AND AS A RESULT OF CONTINUAL RESEARCH UBC KEEPS ON IMPROVING THE PRODUCTIVITY AND YIELD OF ITS PLANTATIONS BY IMPROVING THE DRAINING SYSTEM, MAKING GOOD SOIL DEFICIENCIES AND COMBATING EFFECTIVELY PLANT DISEASE.

UBC HAS PERFECTED NEW RIPENING METHODS IN WHICH ITS TECHNICIANS INSTRUCT THE DISTRIBUTOR/RIPENERS OF THE CHIQUITA BANANA.

THAT IS ANOTHER FACTOR TO BE BORNE IN MIND WHEN CONSIDERING UBC'S POSITION SINCE COMPETING FIRMS CANNOT DEVELOP RESEARCH AT A COMPARABLE LEVEL AND ARE IN THIS RESPECT AT A DISADVANTAGE COMPARED WITH THE APPLICANT.

IT IS ACKNOWLEDGED THAT AT THE STAGE WHERE THE GOODS ARE GIVEN THE FINAL FINISH AND UNDERGO QUALITY CONTROL UBC NOT ONLY CONTROLS THE DISTRIBUTOR/RIPENERS WHICH ARE DIRECT CUSTOMERS BUT ALSO THOSE WHO WORK FOR THE ACCOUNT OF ITS IMPORTANT CUSTOMERS SUCH AS THE SCIPIO GROUP.

EVEN IF THE OBJECT OF THE CLAUSE PROHIBITING THE SALE OF GREEN BANANAS WAS ONLY STRICT QUALITY CONTROL, IT IN FACT GIVES UBC ABSOLUTE CONTROL OF ALL TRADE IN ITS GOODS SO LONG AS THEY ARE MARKETABLE WHOLESALE, THAT IS TO SAY BEFORE THE RIPENING PROCESS BEGINS WHICH MAKES AN IMMEDIATE SALE UNAVOIDABLE.

THIS GENERAL QUALITY CONTROL OF A HOMOGENEOUS PRODUCT MAKES THE ADVERTISING OF THE BRAND NAME EFFECTIVE.

SINCE 1967 UBC HAS BASED ITS GENERAL POLICY IN THE RELEVANT MARKET ON THE QUALITY OF ITS CHIQUITA BRAND BANANA.
99 THERE IS NO DOUBT THAT THIS POLICY GIVES UBC CONTROL OVER THE TRANSFORMATION OF THE PRODUCT INTO BANANAS FOR CONSUMPTION EVEN THOUGH MOST OF THIS PRODUCT NO LONGER BELONGS TO IT.

90 THIS POLICY HAS BEEN BASED ON A THOROUGH REORGANIZATION OF THE ARRANGEMENTS FOR PRODUCTION, PACKAGING, CARRIAGE, RIPENING (NEW PLANT WITH VENTILATION AND A COOLING SYSTEM) AND SALE (A NETWORK OF AGENTS).

91 UBC HAS MADE THIS PRODUCT DISTINCTIVE BY LARGE-SCALE REPEATED ADVERTISING AND PROMOTION CAMPAIGNS WHICH HAVE INDUCED THE CONSUMER TO SHOW A PREFERENCE FOR IT IN SPITE OF THE DIFFERENCE BETWEEN THE PRICE OF LABELLED AND UNLABELLED BANANAS (IN THE REGION OF 30 TO 40%) AND ALSO OF CHIQUITA BANANAS AND THOSE WHICH HAVE BEEN LABELLED WITH ANOTHER BRAND NAME (IN THE REGION OF 7 TO 10%).

92 IT WAS THE FIRST TO TAKE FULL ADVANTAGE OF THE OPPORTUNITIES PRESENTED BY LABELLING IN THE TROPICS FOR THE PURPOSE OF LARGE-SCALE ADVERTISING AND THIS, TO USE UBC 'S OWN WORDS, HAS 'REVOLUTIONIZED THE COMMERCIAL EXPLOITATION OF THE BANANA'" (ANNEX II A TO THE APPLICATION, P. 10).

93 IT HAS THEREFORE ATTAINED A PRIVILEGED POSITION BY MAKING CHIQUITA THE PREMIER BANANA BRAND NAME ON THE RELEVANT MARKET WITH THE RESULT THAT THE DISTRIBUTOR CANNOT AFFORD NOT TO OFFER IT TO THE CONSUMER.

94 AT THE SELLING STAGE THIS DISTINGUISHING FACTOR - JUSTIFIED BY THE UNCHANGING QUALITY OF THE BANANA BEARING THIS LABEL - ENSURES THAT IT HAS REGULAR CUSTOMERS AND CONSOLIDATES ITS ECONOMIC STRENGTH.

95 THE EFFECT OF ITS SALES NETWORKS ONLY COVERING A LIMITED NUMBER OF CUSTOMERS, LARGE GROUPS OR DISTRIBUTOR/RIPENERS, IS A SIMPLIFICATION OF ITS SUPPLY POLICY AND ECONOMIES OF SCALE.

96 SINCE UBC 'S SUPPLY POLICY CONSISTS - IN SPITE OF THE PRODUCTION SURPLUS - IN ONLY MEETING THE REQUESTS FOR CHIQUITA BANANAS PARSIMONIOUSLY AND SOMETIMES INCOMPLETELY UBC IS IN A POSITION OF STRENGTH AT THE SELLING STAGE.

PARAGRAPH 2. THE SITUATION WITH REGARD TO COMPETITION

97 UBC IS THE LARGEST BANANA GROUP HAVING ACCOUNTED IN 1974 FOR 35% OF ALL BANANA EXPORTS ON THE WORLD MARKET.

98 IN THIS CASE HOWEVER ACCOUNT MUST ONLY BE TAKEN OF ITS OPERATIONS ON THE RELEVANT MARKET.

99 AS FAR AS THIS MARKET IS CONCERNED THE PARTIES DISAGREE AS TO THE EXTENT OF UBC 'S MARKET SHARE IN THE FEDERAL REPUBLIC OF GERMANY AND AS TO THE APPLICANT 'S ENTIRE SHARE OF THE WHOLE OF THE RELEVANT MARKET.

100 IN THE FIRST PLACE UBC DOES NOT INCLUDE IN ITS ENTIRE SHARE OF THE WHOLE OF THE RELEVANT MARKET THE PERCENTAGE ATTRIBUTED TO THE SCIPIO UNDERTAKING WHICH BUYS ITS BANANAS F.O.B. IN CENTRAL AMERICA.

101 HOWEVER IT MUST BE INCLUDED, BECAUSE ALMOST ALL THE BANANAS RIPENED BY SCIPIO ARE "CHIQUITA" BANANAS THE SHIPMENT OF WHICH TO EUROPE IS COORDINATED BY THE SVEN SaleNE COMPANY, BECAUSE SCIPIO SUBMITS TO UBC 'S TECHNICAL SUPERVISION, BECAUSE THESE TWO GROUPS HAVE ENTERED INTO SUPPLY AND PRICE AGREEMENTS WITH EACH OTHER, BECAUSE SCIPIO ABIDES BY THE OBLIGATION NOT TO RESELL "CHIQUITA BANANAS" WHILE STILL GREEN AND BECAUSE FOR THE LAST 30 YEARS IT HAS NEVER ATTEMPTED TO ACT INDEPENDENTLY OF UBC.

102 THERE ARE WORKING ARRANGEMENTS BETWEEN SCIPIO AND UBC AND THERE IS JOINT ACTION ON PRICES AND ALSO ON MAKING POINTS OF SALE ATTRACTIVE AND IN CONNEXION WITH ADVERTISING CAMPAIGNS.

103 IT MUST FURTHERMORE BE RECORDED THAT THE SALE PRICES CHARGED BY SCIPIO ARE THE SAME AS THOSE OF THE OTHER SUPPLIERS SUPPLIED BY UBC.

104 CONSEQUENTLY UBC AND SCIPIO ARE NOT IN COMPETITION WITH EACH OTHER.

105 IN THE SECOND PLACE THE COMMISSION STATES THAT IT ESTIMATES UBC 'S MARKET SHARE AT 45%.

106 HOWEVER UBC POINTS OUT THAT THIS SHARE DROPPED TO 41% IN 1975.

107 A TRADER CAN ONLY BE IN A DOMINANT POSITION ON THE MARKET FOR A PRODUCT IF HE HAS SUCCEEDED IN WINNING A LARGE PART OF THIS MARKET.

108 WITHOUT GOING INTO A DISCUSSION ABOUT PERCENTAGES, WHICH WHEN FIXED ARE BOUND TO BE TO SOME EXTENT APPROXIMATIONS, IT CAN BE CONSIDERED TO BE AN
ESTABLISHED FACT THAT UBC 'S SHARE OF THE RELEVANT MARKET IS ALWAYS MORE THAN 40% AND NEARLY 45%.  
109 THIS PERCENTAGE DOES NOT HOWEVER PERMIT THE CONCLUSION THAT UBC AUTOMATICALLY CONTROLS THE MARKET.  
110 IT MUST BE DETERMINED HAVING REGARD TO THE STRENGTH AND NUMBER OF THE COMPETITORS.  
111 IT IS NECESSARY FIRST OF ALL TO ESTABLISH THAT ON THE WHOLE OF THE RELEVANT MARKET THE SAID PERCENTAGE REPRESENTS GROSSO MODO A SHARE SEVERAL TIMES GREATER THAN THAT OF ITS COMPETITOR CASTLE AND COOKE WHICH IS THE BEST PLACED OF ALL THE COMPETITORS, THE OTHERS COMING FAR BEHIND.  
112 THIS FACT TOGETHER WITH THE OTHERS TO WHICH ATTENTION HAS ALREADY BEEN DRAWN MAY BE REGARDED AS A FACT WHICH AFFORDS EVIDENCE OF UBC 'S PREPONDERANT STRENGTH.  
113 HOWEVER AN UNDERTAKING DOES NOT HAVE TO HAVE ELIMINATED ALL OPPORTUNITY FOR COMPETITION IN ORDER TO BE IN A DOMINANT POSITION.  
114 IN THIS CASE THERE WAS IN FACT A VERY LIVELY COMPETITIVE STRUGGLE ON SEVERAL OCCASIONS IN 1973 AS CASTLE AND COOKE HAD MOUNTED A LARGE-SCALE ADVERTISING AND PROMOTION CAMPAIGN WITH PRICE REBATES ON THE DANISH AND GERMAN MARKETS.  
115 AT THE SAME TIME ALBA CUT PRICES AND OFFERED PROMOTIONAL MATERIAL.  
116 RECENTLY THE COMPETITION OF THE VILLEMAN ET TAS FIRM ON THE NETHERLANDS MARKET HAS BEEN SO LIVELY THAT PRICES HAVE DROPPED BELOW THOSE ON THE GERMAN MARKET WHICH ARE TRADITIONALLY THE LOWEST.  
117 IT MUST HOWEVER BE RECORDED THAT IN SPITE OF THEIR EXERTIONS THESE FIRMS HAVE NOT SUCCEEDED IN INCREASING THEIR MARKET SHARE APPRECIABLE ON THE NATIONAL MARKETS WHERE THEY LAUNCHED THEIR ATTACKS.  
118 IT MUST BE NOTED THAT THESE PERIODS OF COMPETITION LIMITED IN TIME AND SPACE DID NOT COVER THE WHOLE OF THE RELEVANT MARKET.  
119 EVEN IF THE LOCAL ATTACKS OF SOME COMPETITORS CAN BE DESCRIBED AS ''FIERCE'' IT CAN ONLY BE PLACED ON RECORD THAT UBC HELD OUT AGAINST THEM SUCCESSFULLY EITHER BY ADAPTING ITS PRICES FOR THE TIME BEING (IN THE NETHERLANDS IN ANSWER TO THE CHALLENGE FROM VILLEMAN ET TAS) OR BY BRINGING INDIRECT PRESSURE TO BEAR ON THE INTERMEDIARIES.  
120 FURTHERMORE IF UBC 'S POSITION ON EACH OF THE NATIONAL MARKETS CONCERNED IS CONSIDERED IT EMERGES THAT, EXCEPT IN IRELAND, IT SELLS DIRECT AND ALSO, AS FAR AS CONCERNS GERMANY, INDIRECTLY THROUGH SCIPIO, ALMOST TWICE AS MANY BANANAS AS THE BEST PLACED COMPETITOR AND THAT THERE IS NO APPRECIABLE FALL IN ITS SALES FIGURES EVEN WHEN NEW COMPETITORS APPEAR ON THESE MARKETS.  
121 UBC 'S ECONOMIC STRENGTH HAS THUS ENABLED IT TO ADOPT A FLEXIBLE OVERALL STRATEGY DIRECTED AGAINST NEW COMPETITORS ESTABLISHING THEMSELVES ON THE WHOLE OF THE RELEVANT MARKET.  
123 THUS, ALTHOUGH, AS UBC HAS POINTED OUT, IT IS TRUE THAT COMPETITORS ARE ABLE TO USE THE SAME METHODS OF PRODUCTION AND DISTRIBUTION AS THE APPLICANT, THEY COME UP AGAINST ALMOST INSUPERABLE PRACTICAL AND FINANCIAL OBSTACLES.  
124 THAT IS ANOTHER FACTOR PECULIAR TO A DOMINANT POSITION.  
125 HOWEVER UBC TAKES INTO ACCOUNT THE LOSSES WHICH ITS BANANA DIVISION MADE FROM 1971 TO 1976 - WHEREAS DURING THIS PERIOD ITS COMPETITORS MADE PROFITS - FOR THE PURPOSE OF INFERRING THAT, SINCE DOMINANCE IS IN ESSENCE THE POWER TO FIX
PRICES, MAKING LOSSES IS INCONSISTENT WITH THE EXISTENCE OF A DOMINANT POSITION.

126 AN UNDERTAKING'S ECONOMIC STRENGTH IS NOT MEASURED BY ITS PROFITABILITY; A REDUCED PROFIT MARGIN OR EVEN LOSSES FOR A TIME ARE NOT INCOMPATIBLE WITH A DOMINANT POSITION, JUST AS LARGE PROFITS MAY BE COMPATIBLE WITH A SITUATION WHERE THERE IS EFFECTIVE COMPETITION.

127 THE FACT THAT UBC'S PROFITABILITY IS FOR A TIME MODERATE OR NON-EXISTENT MUST BE CONSIDERED IN THE LIGHT OF THE WHOLE OF ITS OPERATIONS.

128 THE FINDING THAT, WHATEVER LOSSES UBC MAY MAKE, THE CUSTOMERS CONTINUE TO BUY MORE GOODS FROM UBC WHICH IS THE DEAREST VENDOR, IS MORE SIGNIFICANT AND THIS FACT IS A PARTICULAR FEATURE OF THE DOMINANT POSITION AND ITS VERIFICATION IS DETERMINATIVE IN THIS CASE.

129 THE CUMULATIVE EFFECT OF ALL THE ADVANTAGES ENJOYED BY UBC THUS ENSURES THAT IS HAS A DOMINANT POSITION ON THE RELEVANT MARKET.

CHAPTER II - ABUSE OF THIS DOMINANT POSITION

SECTION 1 CONDUCT VIS-A-VIS THE RIPENERS

PARAGRAPH 1. THE CLAUSE PROHIBITING THE RESALE OF BANANAS WHILE STILL GREEN

130 THE COMMISSION TAKES THE VIEW THAT THE APPLICANT HAS ABUSED ITS DOMINANT POSITION VIS-A-VIS RIPENER/DISTRIBUTORS IN THE FIRST PLACE BY USING A CLAUSE INCORPORATED IN ITS GENERAL CONDITIONS OF SALE FORBIDDING ITS DISTRIBUTOR/RIPENER TO RESELL ITS BANANAS WHILE STILL GREEN, TO SELL BANANAS OTHER THAN THOSE SUPPLIED BY UBC WHILE THEY WERE DISTRIBUTORS OF UBC'S BANANAS AND TO RESELL UBC'S BANANAS TO COMPETING RIPENERS.

131 THE COMMISSION IN THE SECOND PLACE BLAMES UBC FOR HAVING INSISTED THAT ITS RIPENER/DISTRIBUTORS SHOULD NOT SELL BANANAS TO DEALERS FROM OTHER COUNTRIES AND GIVING THEM AN ASSURANCE THAT IT HAD IMPOSED THE SAME REQUIREMENT ON ITS DISTRIBUTOR/RIPENER IN OTHER COUNTRIES.

132 THIS ABUSE WAS BROUGHT INTO PRACTICE IN JANUARY 1967 WHEN UBC WAS ENDEAVOURING TO LAUNCH IN EUROPE THE NEW "CAVENDISH VALERY" BANANA UNDER THE "CHIQUITA" BRAND NAME WHICH WAS TAKING THE PLACE OF THE GROS MICHEL VARIETY KNOWN UNDER THE "FYFFES" LABEL.

133 THE PROHIBITION ON RESELLING OF BANANAS WHILE STILL GREEN HAS BEEN APPLIED STRICTLY SINCE 1967, ALTHOUGH IT DOES NOT ALWAYS APPEAR IN A WRITTEN DOCUMENT, IN ALL THE MEMBER STATES FORMING THE RELEVANT MARKET TO UBC'S IMPORTER/RIPENER/DISTRIBUTORS INCLUDING THE SCIPIO GROUP.

134 THERE WAS AN EXAMPLE OF THIS PROHIBITION IN DECEMBER 1973 WHEN UBC REFUSED TO SELL TO THE DANISH FIRM OLESEN WHICH FOUND THAT ALL THE DISTRIBUTORS (INCLUDING THE SCIPIO GROUP) WHOM IT HAD REQUESTED TO SUPPLY IT WITH GREEN BANANAS TURNED DOWN ITS REQUESTS BECAUSE THEY WERE PREVENTED FROM DOING SO UNDER THEIR CONTRACTS.

135 A PART FROM THE FACT THAT THIS OBLIGATION INDIRECTLY HELPS TO STRENGTHEN AND CONSOLIDATE UBC'S DOMINANT POSITION, IT MAKES ANY TRADE IN UBC'S GREEN BANANAS WHETHER BRANDED OR NOT, EITHER WITHIN A SINGLE STATE OR BETWEEN MEMBER STATES, ALMOST IMPOSSIBLE. THUS THIS CLAUSE HAS A SIMILAR EFFECT AS A PROHIBITION OF EXPORTS.

136 THE EFFECT OF THIS CLAUSE IS FURTHER INCREASED BY THE POLICY ADOPTED BY UBC OF ONLY SUPPLYING ITS CUSTOMERS WITH SMALLER QUANTITIES OF BANANAS THAN THOSE WHICH THEY HAVE ORDERED AND THIS MAKES IT IMPOSSIBLE FOR THEM TO TAKE ANY COMPETITIVE ACTION AGAINST THE DIFFERENCE IN PRICES FROM ONE MEMBER STATE TO ANOTHER AND FORCES THEM TO CONFINE THEMSELVES TO THEIR ROLE OF RIPENERS.

137 ACCORDING TO THE COMMISSION THESE PROHIBITIONS AND PRACTICES ARE BOTH THE ESSENTIAL CONSTITUENT OF AN OVERALL SYSTEM ENABLING THE APPLICANT TO CONTROL THE ENTIRE MARKETING OF ITS PRODUCT AND TO RESTRICT COMPETITION AND ALSO FORM THE BASIS OF THE THREE OTHER ABUSES FOR WHICH UBC IS BLAMED.

138 IT WAS NOT UNTIL THE MONTH (31 JANUARY 1976) FOLLOWING THE DECISION OF 17 DECEMBER 1975, WHICH FOUND THAT THE APPLICANT HAD INFRINGED ARTICLE 86 OF THE TREATY, (AND THEREFORE BEFORE 1 FEBRUARY 1976, THE LAST DATE FIXED BY THE COMMISSION BY WHICH THE APPLICANT HAD TO INFORM IT THAT IT HAD CEASED TO APPLY THE PROHIBITION ON THE RESALE OF GREEN BANANAS) THAT THE APPLICANT SENT A CIRCULAR LETTER TO ALL ITS ESTABLISHED CUSTOMERS ON THE RELEVANT MARKET TO THE
EFFECT THAT THE OBJECT OF THE CLAUSE HAD NEVER BEEN TO FORBID THE SALE BY A DULY APPOINTED RIPENER TO ANOTHER CHIQUITA RIPENER OF GREEN CHIQUITA BANANAS OR THE RESALE OF UNBRANDED GREEN BANANAS.

139THE APPLICANT OUTS IN ANSWER TO THESE COMPLAINTS THAT THE CLAUSE AT ISSUE WAS WORDED AS FOLLOWS FOR BELGIUM, DENMARK AND THE NETHERLANDS: "BANANAS CAN ONLY BE RESOLD WHEN THEY ARE RIPE" (THE DANISH CLAUSE STATES THAT ONLY BANANAS OF PICTURE NO 3 CAN BE RESOLD).

140THE CLAUSE RELATING TO THE NETHERLANDS WAS NOTIFIED TO THE COMMISSION ON 15 NOVEMBER 1968 AS FOLLOWS: "THE SALE OF BANANAS SUPPLIED BY US TO COMPETING RIPENERS IS NOT ALLOWED".

141THE APPLICANT IS SURPRISED THAT THE COMMISSION DID NOT REQUEST IT TO GIVE THE WORDING OF THE CONDITIONS OF SALE AND IF NECESSARY AMEND IT FOR THE PURPOSE OF CONSIDERING WHETHER THE APPLICANT COULD BE EXEMTED UNDER ARTICLE 85/3 AND THAT IT TOOK THE COMMISSION SEVEN YEARS TO PREPARE AND FINALIZE ITS DECISION FINDING THAT THERE HAD BEEN AN INFRINGEMENT.

142THE ONLY PURPOSE OF THIS CLAUSE WAS TO PROTECT THE BRAND NAME AND THEREFORE ULTIMATELY THE CONSUMERS BY ENSURING THAT THE QUALITY OF THE PRODUCTS - SELECTED AND LABELLED IN THE TROPICS - IS EXEMPLARY, BY RESERVING THEM FOR EXPERIENCED RIPENERS WHO HAVE ADEQUATE RIPENING INSTALLATIONS, APPLY ADVANCED TECHNICAL METHODS PERFECTED BY UBC'S ENGINEERS AND ACCEPT THEIR SUPERVISION, AND TO BRING "CHIQUITA" BANANAS ON TO THE MARKET WHEN THEIR QUALITY IS AT ITS PEAK.

143THE CLAUSE HAS NEVER BEEN UNDERSTOOD AS BEING A PROHIBITION OF EXPORTS AND HAS NEVER BEEN APPLIED NOR ENFORCED AS SUCH.

144THE APPLICANT NEVER INTENDED TO IMPOSE SANCTIONS IN THE EVENT OF NON-COMPLIANCE.

145FURTHERMORE DEALERS IN BANANAS SELL AN EXTREMELY PERISHABLE SEMI-FINISHED PRODUCT WHICH OWING TO ITS NATURE MUST BE RIPENED IMMEDIATELY RATHER THAN DEALT IN HORIZONTALLY AND TRADE IN RIPE BANANAS - IF THERE WAS ANY - COULD ONLY BE MARGINAL.

146THE RIPENER'S FUNCTION IS ONLY TO RIPEN THE BANANAS AND DISTRIBUTE THEM TO THE RETAILERS.

147MOREOVER THE RIPENER'S GROSS PROFIT MARGIN IS GREATER THAN THE PROFITS WHICH HE COULD MAKE BY SPECULATING ON THE AVERAGE PRICE DIFFERENCES BETWEEN THE VARIOUS MARKETS EXCEPT FOR SOME WEEKS EACH YEAR AND IT IS NOT THEREFORE IN HIS INTEREST TO EFFECT HORIZONTAL SALES OF GREEN BANANAS.

148THE OLESEN CASE IS THE ONLY ONE IN WHICH IT WOULD APPEAR THAT THE CLAUSE WAS INVOKED.

149THIS WAS AN EXCEPTIONAL CASE WHICH AROSE OUT OF A DISPUTE BETWEEN UBC AND THIS DANISH RIPENER IN CIRCUMSTANCES DIFFERENT FROM THOSE IN WHICH THE PROHIBITION OF THE SALE OF GREEN BANANAS IS APPLIED.

150IN ANY CASE THE ORDER TO DELETE THE CLAUSE, WHICH WAS IMPOSED ON THE APPLICANT, APPEARS TO IT TO BE "UNREASONABLE AND UNJUSTIFIED", BECAUSE, SINCE IT DOES NOT HAVE ANY RIPENING INSTALLATION OF ITS OWN - EXCEPT SPIERS IN BELGIUM REPRESENTING 3.3% OF THE RIPENING CAPACITY OF THE "RELEVANT MARKET" - IT WOULD BE UNABLE TO GUARANTEE THE QUALITY OF ITS BANANAS TO THE CONSUMER AND THIS WOULD LEAD TO THE COLLAPSE OF ITS ENTIRE COMMERCIAL POLICY.

151THE COURT'S EXAMINATION MUST BE LIMITED TO THE CLAUSE RELATING TO THE PROHIBITION OF THE RESALE OF GREEN BANANAS IN THE FORM IN WHICH IT WAS NOTIFIED TO THE COMMISSION ON 15 NOVEMBER 1968 WITHOUT IT BEING NECESSARY TO CONSIDER THE CLAUSE AS DRAWN UP BY UBC ON 31 JANUARY 1976, THAT IS TO SAY AT A DATE SUBSEQUENT TO THE COMMISSION'S DECISION.

152THE CLAUSE APPLIED IN BELGIUM, DENMARK AND THE NETHERLANDS, IN SO FAR AS IT HAS BEEN DRAWN UP IN WRITING, PROHIBITED THE RESALE OF BANANAS WHILE STILL GREEN WHETHER BRANDED OR UNBRANDED AND EVEN BETWEEN RIPENERS OF CHIQUITA BANANAS.

153SINCE UBC THOUGHT IT SHOULD STATE IN THE CIRCULAR LETTER OF 31 JANUARY 1976, WHICH IT SENT TO ALL RIPENER/DISTRIBUTORS INCLUDING THOSE ESTABLISHED IN GERMANY, THAT THE CLAUSE HAD NOT BEEN PUT IN WRITING FOR GERMANY, IT THEREBY
IMPLIEDLY ACKNOWLEDGES THAT THE SAID CLAUSE WAS IN FORCE ON THE GERMAN MARKET, SINCE IT HAD CLEARLY BEEN IMPLIED OR MENTIONED ORALLY.

154UNDER THE TERMS OF THE CLAUSE UBC ' REQUIRED THEIR CUSTOMERS TO ENSURE FORTHWITH THAT THE BANANAS IN THEIR POSSESSION ARE NOT RESOLD TO FOREIGN DEALERS; IT HAD IMPOSED THE SAME REQUIREMENT ON ITS FOREIGN CUSTOMERS AS FAR AS THE NETHERLANDS ARE CONCERNED. IT WOULD NOT HESITATE TO TAKE SUCH STEPS AS IT DEEMS TO BE NECESSARY IF THE FOREGOING IS NOT COMPLIED WITH IN SOME WAY OR OTHER ''.

155THIS WORDING IMPLIES THAT UBC , FAR FROM REJECTING THE IDEA OF IMPOSING SANCTIONS ON DULY APPOINTED RIPENER/DISTRIBUTORS WHICH DO NOT COMPLY WITH ITS DIRECTIONS , HELD OUT THIS POSSIBILITY AS A THREAT .

156MOREOVER OLESEN UNQUESTIONABLY EXPERIENCED THE HARSH EFFECTS OF THIS CLAUSE AFTER UBC REFUSED TO SUPPLY IT AND IT WANTED TO OBTAIN SUPPLIES OF CHIQUITA BANANAS FROM SCPIO AND THE DULY APPOINTED DANISH DISTRIBUTORS .

157TO IMPOSE ON THE RIPENER THE OBLIGATION NOT TO RESELL BANANAS SO LONG AS HE HAS NOT HAD THEM RIPENED AND TO CUT DOWN THE OPERATIONS OF SUCH A RIPENER TO CONTACTS ONLY WITH RETAILERS IS A RESTRICTION OF COMPETITION .

158ALTHOUGH IT IS COMMENDABLE AND LAWFUL TO PURSUE A POLICY OF QUALITY, ESPECIALLY BY CHOOSING SELLERS ACCORDING TO OBJECTIVE CRITERIA RELATING TO THE QUALIFICATIONS OF THE SELLER, HIS STAFF AND HIS FACILITIES, SUCH A PRACTICE CAN ONLY BE JUSTIFIED IF IT DOES NOT RAISE OBSTACLES, THE EFFECT OF WHICH GOES BEYOND THE OBJECTIVE TO BE ATTAINED .


160THUS UBC ' S ORGANIZATION OF THE MARKET CONFINED THE RIPENERS TO THE ROLE OF SUPPLIERS OF THE LOCAL MARKET AND PREVENTED THEM FROM DEVELOPING THEIR CAPACITY TO TRADE VIS-A-VIS UBC, WHICH MOREOVER TIGHTENED ITS ECONOMIC HOLD ON THEM BY SUPPLYING LESS GOODS THAN THEY ORDERED .

161IT FOLLOWS FROM ALL THESE CONSIDERATIONS THAT THE CLAUSE AT ISSUE FORBIDDING THE SALE OF GREEN BANANAS INFRINGES ARTICLE 86 OF THE TREATY .

162ON THIS POINT THE CONTESTED DECISION IS THEREFORE JUSTIFIED .

163THE COMMISSION IS OF THE OPINION THAT UBC HAS INFRINGED ARTICLE 86 OF THE TREATY BY REFUSING TO CONTINUE SUPPLIES OF CHIQUITA BANANAS TO OLESEN FROM 10 OCTOBER 1973 TO 11 FEBRUARY 1975.

164ACCORDING TO A TELEX MESSAGE OF 11 OCTOBER 1973 FROM UBC TO OLESEN THESE SUPPLIES WERE DISCONTINUED BECAUSE THE RIPENER/DISTRIBUTOR TOOK PART IN AN ADVERTISING CAMPAIGN MOUNTED DURING OCTOBER 1973 IN DENMARK FOR DOLE BANANAS .

165FOLLOWING THIS DISCONTINUANCE OF SUPPLIES OLESEN APPLIED IN VAIN TO UBC ’ S SEVEN OTHER RIPENER/DISTRIBUTORS IN DENMARK AND ALSO TO A COMPANY OF THE SCPIO GROUP IN HAMBURG FOR GREEN CHIQUITA BANANAS .

166IT HAS SUFFERED CONSIDERABLE DAMAGE AS A RESULT OF THIS SITUATION DUE TO LOSSES OF SALES AND SEVERAL IMPORTANT CUSTOMERS INCLUDING L ’ ASSOCIATION DES COOPERATEURS (F.D.B.) WHICH BOUGHT 50% OF ITS BANANAS .

167ON 11 FEBRUARY 1975 UBC AND OLESEN ENTERED INTO AN AGREEMENT UNDER WHICH UBC UNDERTOOK TO RESUME SUPPLIES OF BANANAS TO OLESEN AND THE LATTER WITHDREW THE COMPLAINT WHICH IT HAD LODGED WITH THE COMMISSION .

168THE COMMISSION REGARDS THIS REFUSAL TO CONTINUE SUPPLIES TO OLESEN, WHICH CANNOT BE JUSTIFIED OBJECTIVELY, AS AN ARBITRARY INTERFERENCE IN THE MANAGEMENT OF THE OLESEN BUSINESS WHICH HAS CAUSED IT TO SUFFER DAMAGE AND WAS DESIGNED TO DISSUADE UBC ’ S RIPENERS FROM SELLING BANANAS BEARING COMPETING BRAND NAMES OR AT LEAST FROM ADVERTISING THEM AND THESE ARE FACTS WHICH AMOUNT TO AN INFRINGEMENT OF ARTICLE 86 OF THE TREATY .

103
THE APPLICANT CLAIMS THAT THE MARKETING POLICY IT PURSUES IS MORE LIBERAL THAN THAT OF ITS COMPETITORS.

ITS RIPENERS ARE FREE TO SELL PRODUCTS BEARING COMPETING BRAND NAMES, TO ADVERTISE THESE PRODUCTS, TO REDUCE THEIR ORDERS, TO CANCEL THEM AND TO TERMINATE THEIR RELATIONS WHEN THEY THINK FIT.

THE OLESEN INCIDENT MUST BE SEEN IN THIS SETTING.

IN 1967, SINCE THE LATTER HAD BECOME THE LARGEST IMPORTER OF "CHIQUITA" BANANAS IN DENMARK, IT PUT PRESSURE ON UBC TO GIVE IT PREFERENTIAL TREATMENT COMPARED WITH THE SEVEN OTHER DANISH RIPENERS DULY APPOINTED BY THE APPLICANT.

WHEN UBC REFUSED TO DO SO, OLESEN BECAME IN 1969 THE EXCLUSIVE IMPORTER/DISTRIBUTOR OF THE STANDARD FRUIT COMPANY.

STANDARD FRUIT ANNOUNCED AT A PRESS CONFERENCE THAT THE DOLE BANANA WAS GOING TO OUST THE "CHIQUITA" BANANA THROUGHOUT THE WORLD.

OLESEN THEN SOLD LESS AND LESS CHIQUITA BANANAS AND DELIBERATELY PUSHED THE SALE OF DOLE BANANAS. IT DID NOT TAKE THE SAME AMOUNT OF TROUBLE WHEN RIPENING CHIQUITA BANANAS AS IT DID WHEN RIPENING BANANAS BEARING OTHER BRAND NAMES.

THE BREACH, WHICH WAS NOT UNEXPECTED AND UNFORESEEABLE, AROSE IN THESE CIRCUMSTANCES, PUNCTUATED BY DISCUSSIONS SPREAD OVER A LONG PERIOD.

THIS BREACH WAS THEREFORE FULLY JUSTIFIED BY THE FACT THAT IF A FIRM IS DIRECTLY ATTACKED BY ITS MAIN COMPETITOR WHO HAS SUCCEEDED IN MAKING ONE OF THAT FIRM'S MOST IMPORTANT LONG STANDING CUSTOMERS HIS EXCLUSIVE DISTRIBUTOR FOR THE WHOLE OF THE COUNTRY, THAT FIRM IN ITS OWN INTEREST AND THAT OF COMPETITION HAS NO OPTION BUT TO FIGHT BACK OR ELSE DISAPPEAR FROM THIS NATIONAL MARKET.

THE APPLICANT GOES ON TO SAY THAT THIS REFUSAL TO SELL TO OLESEN, WHICH WAS JUSTIFIED, WAS NOT AN ABUSE, BECAUSE IT DID NOT AFFECT THE ACTUAL COMPETITION ON THE DANISH MARKET WHICH RECORDED A FALL OF 40% IN TWO WEEKS AT THE END OF 1974 IN THE RETAIL PRICE OF CHIQUITA BANANAS AS A RESULT OF THE COMPETITION BETWEEN COMPETITORS WHICH WAS GENERATED BY THESE CIRCUMSTANCES.

FINALLY THE REFUSAL TO SELL TO OLESEN DID NOT AFFECT TRADE BETWEEN MEMBER STATES, BECAUSE DOLE BANANAS ONLY PASS THROUGH GERMANY FROM HAMBURG AND CHIQUITA BANANAS FROM BREMERHAVEN.

THESE TRANSACTIONS ARE NOT THEREFORE INTRA-COMMUNITY TRADE BUT ARE IN FACT TRADE BETWEEN DENMARK AND THE THIRD COUNTRIES WHERE THE BANANAS COME FROM.

FOR ALL THESE REASONS, SINCE THE REFUSAL TO SELL TO OLESEN IS NOT IN ITSELF A SPECIFIC BREACH, THE APPLICANT TAKES THE VIEW THAT THE FINDING OF AN INFRINGEMENT UNDER THIS HEAD IS UNJUSTIFIED.

IN VIEW OF THESE CONFLICTING ARGUMENTS IT IS ADVISABLE TO ASSERT POSITIVELY FROM THE OUTSET THAT AN UNDERTAKING IN A DOMINANT POSITION FOR THE PURPOSE OF MARKETING A PRODUCT - WHICH CASHES IN ON THE REPUTATION OF A BRAND NAME KNOWN TO AND VALUED BY THE CONSUMERS - CANNOT STOP SUPPLYING A LONG STANDING CUSTOMER WHO ABIDES BY REGULAR COMMERCIAL PRACTICE, IF THE ORDERS PLACED BY THAT CUSTOMER ARE IN NO WAY OUT OF THE ORDINARY.

SUCH CONDUCT IS INCONSISTENT WITH THE OBJECTIVES LAID DOWN IN ARTICLE 3 (F) OF THE TREATY, WHICH ARE SET OUT IN DETAIL IN ARTICLE 86, ESPECIALLY IN PARAGRAPHS (B) AND (C), SINCE THE REFUSAL TO SELL WOULD LIMIT MARKETS TO THE PREJUDICE OF CONSUMERS AND WOULD AMOUNT TO DISCRIMINATION WHICH MIGHT IN THE END ELIMINATE A TRADING PARTY FROM THE RELEVANT MARKET.

IT IS THEREFORE NECESSARY TO ASCERTAIN WHETHER THE DISCONTINUANCE OF SUPPLIES BY UBC IN OCTOBER 1973 WAS JUSTIFIED.

THE REASON GIVEN IS IN THE APPLICANT'S LETTER OF 11 OCTOBER 1973 IN WHICH IT UPBRAIDED OLESEN IN NO UNCERTAIN MANNER FOR HAVING PARTICIPATED IN AN ADVERTISING CAMPAIGN FOR ONE OF ITS COMPETITORS.

LATER ON UBC ADDED TO THIS REASON A NUMBER OF COMPLAINTS, FOR EXAMPLE, THAT OLESEN WAS THE EXCLUSIVE REPRESENTATIVE OF ITS MAIN COMPETITOR ON THE DANISH MARKET.

THIS WAS NOT A NEW SITUATION SINCE IT GOES BACK TO 1969 AND WAS NOT IN ANY CASE INCONSISTENT WITH FAIR TRADE PRACTICES.
188FINALLY UBC HAS NOT PUT FORWARD ANY RELEVANT ARGUMENT TO JUSTIFY THE REFUSAL OF SUPPLIES.

189ALTHOUGH IT IS TRUE, AS THE APPLICANT POINTS OUT, THAT THE FACT THAT AN UNDERTAKING IS IN A DOMINANT POSITION CANNOT DISENTITLLE IT FROM PROTECTING ITS OWN COMMERCIAL INTERESTS IF THEY ARE ATTACKED, AND THAT SUCH AN UNDERTAKING MUST BE CONCEDED THE RIGHT TO TAKE SUCH REASONABLE STEPS AS IT DEEMS APPROPRIATE TO PROTECT ITS SAID INTERESTS, SUCH BEHAVIOUR CANNOT BE COUNTERENANCED IF ITS ACTUAL PURPOSE IS TO STRENGTHEN THIS DOMINANT POSITION AND ABUSE IT.

190EVEN IF THE POSSIBILITY OF A COUNTER-ATTACK IS ACCEPTABLE THAT ATTACK MUST STILL BE PROPORTIONATE TO THE THREAT TAKING INTO ACCOUNT THE ECONOMIC STRENGTH OF THE UNDERTAKINGS CONFRONTING EACH OTHER.

191THE SANCTION CONSISTING OF A REFUSAL TO SUPPLY BY AN UNDERTAKING IN A DOMINANT POSITION WAS IN EXCESS OF WHAT MIGHT, IF SUCH A SITUATION WERE TO ARISE, REASONABLY BE CONTEMPLATED AS A SANCTION FOR CONDUCT SIMILAR TO THAT FOR WHICH UBC BLAMED OLESEN.

192IN FACT UBC COULD NOT BE UNAWARE OF THAT FACT THAT BY ACTING IN THIS WAY IT WOULD DISCOURAGE ITS OTHER RIPENER/DISTRIBUTORS FROM SUPPORTING THE ADVERTISING OF OTHER BRAND NAMES AND THAT THE DETERRENT EFFECT OF THE SANCTION IMPOSED UPON ONE OF THEM WOULD MAKE ITS POSITION OF STRENGTH ON THE RELEVANT MARKET THAT MUCH MORE EFFECTIVE.

193SUCH A COURSE OF CONDUCT AMOUNTS THEREFORE TO A SERIOUS INTERFERENCE WITH THE INDEPENDENCE OF SMALL AND MEDIUM SIZED FIRMS IN THEIR COMMERCIAL RELATIONS WITH THE UNDERTAKING IN A DOMINANT POSITION AND THIS INDEPENDENCE IMPLIES THE RIGHT TO GIVE PREFERENCE TO COMPETITORS' GOODS.

194IN THIS CASE THE ADOPTION OF SUCH A COURSE OF CONDUCT IS DESIGNED TO HAVE A SERIOUS ADVERSE EFFECT ON COMPETITION ON THE RELEVANT BANANA MARKET BY ONLY ALLOWING FIRMS DEPENDANT UPON THE DOMINANT UNDERTAKING TO STAY IN BUSINESS.

195THE APPLICANT'S ARGUMENT THAT IN ITS VIEW THE 40% FALL IN THE PRICE OF BANANAS ON THE DANISH MARKET SHOWS THAT COMPETITION HAS NOT BEEN AFFECTED BY THE REFUSAL TO SUPPLY OLESEN CANNOT BE UPHELD.

196IN FACT THIS FALL IN PRICES WAS ONLY DUE TO THE VERY LIVELY COMPETITION CALLED AT THE TIME THE 'BANANA WAR' IN WHICH THE TWO TRANSNATIONAL COMPANIES UBC AND CASTLE AND COOKE ENGAGED.

197THE APPLICANT SUBMITS THAT THE REFUSAL TO SUPPLY OLESEN COULD NOT HAVE ANY EFFECT ON INTRA-COMMUNITY TRADE BECAUSE IN ITS VIEW ALL THOSE BANANAS COMING FROM THIRD COUNTRIES (LATIN AMERICA) AND MERELY TRANSITING THE COMMON MARKET COUNTRIES BEFORE THEY REACH THE MEMBER STATE WHERE THEY ARE CONSUMED ARE NOT PART OF INTRA-COMMUNITY TRADE.

198IF THIS ARGUMENT WAS VALID THE WHOLE OF UBC'S EUROPEAN TRADE IN GOODS OF THIRD COUNTRIES WOULD NOT BE GOVERNED BY COMMUNITY LAW.

199IN FACT WHEN OLESEN'S SUPPLIES WERE CUT OFF IT WAS UNABLE TO BUY CHIQUITA BANANAS AT BREMBERHAVEN AND THEREFORE HAD TO IMPORT INTO DENMARK THE SAME QUANTITIES OF BANANAS AS IT DID BEFORE THIS STEP WAS TAKEN.

200IT WAS FORCED TO BUY BANANAS BEARING OTHER BRAND NAMES OUTSIDE DENMARK AND TO IMPORT THEM INTO DENMARK.

201FURTHERMORE, IF THE OCCUPIER OF A DOMINANT POSITION, ESTABLISHED IN THE COMMON MARKET, AIMS AT ELIMINATING A COMPETITOR WHO IS ALSO ESTABLISHED IN THE COMMON MARKET, IT IS IMMATERIAL WHETHER THIS BEHAVIOUR RELATES TO TRADE BETWEEN MEMBER STATES ONCE IT HAS BEEN SHOWN THAT SUCH ELIMINATION WILL HAVE REPERCUSSIONS ON THE PATTERNS OF COMPETITION IN THE COMMON MARKET.

202CONSEQUENTLY THE REFUSAL TO SUPPLY A LONG STANDING REGULAR CUSTOMER WHO BUYS WITH A VIEW TO RESELLING IN ANOTHER MEMBER STATE HAS AN INFLUENCE ON THE NORMAL MOVEMENT OF TRADE AND AN APPRECIABLE EFFECT ON TRADE BETWEEN MEMBER STATES.

203THE FINDING IN THE DECISION THAT UBC HAS INFRINGED ARTICLE 86 OF THE TREATY BY REFUSING TO SUPPLY OLESEN IS THEREFORE JUSTIFIED.

SECTION 2 - THE PRICING PRACTICE

PARAGRAPH 1. DISCRIMINATORY PRICES
204 All the bananas marketed by UBC under the brand name "Chiquita" on the relevant market have the same geographic origin, belong to the same variety (Cavendish Valery) and are of almost the same quality.
205 They are unloaded in two ports, Rotterdam and Bremerhaven, where unloading costs only differ by a few cents in the dollar per box of 20 kilogrammes, and are resold, except to Scipio and in Ireland, subject to the same conditions of sale and terms of payment after they have been loaded on the buyers' wagons or lorries, the price of a box amounting on average to between 3 and 4 dollars and going up to 5 dollars in 1974.
206 The costs of carriage from the unloading ports to the ripening installations and the amount of any duty payable under the common customs tariff are borne by the purchaser except in Ireland.
207 This being so all those customers going to Rotterdam and Bremerhaven to obtain their supplies might be expected to find that UBC offers them all the same selling price for "Chiquita" bananas.
208 The commission blames the applicant for charging each week for the sale of its branded bananas - without objective justification - a selling price which differs appreciably according to the Member State where its customers are established.
209 This policy of charging differing prices according to the Member States for which the bananas are intended has been applied at least since 1971 in the case of customers of the Federal Republic of Germany, the Netherlands and the BLEU and was extended in January 1973 to customers in Denmark and in November 1973 to customers in Ireland.
210 The maximum weekly differences recorded between two destinations were on average during the whole of 1971, 17.6% - in 1972, 11.3% - in 1973, 14.5% - in 1974, 13.5%.
211 The highest weekly differences (per box) were respectively between customers in Germany on the one hand and Belgo-Luxembourg and Netherlands customers on the other hand:
- In 1971: 32% and 37%
- In 1972: 21% and 30%
- In 1973: 18% and 43%
- In 1974: 25% and 54%

And between customers in Denmark on the one hand and Belgo-Luxembourg and Netherlands customers on the other hand:
- In 1973: 24% and 54%
- In 1974: 16% and 12%
212 The price customers in Belgium are asked to pay is on average 80% higher than that paid by customers in Ireland.
213 The greatest difference in price is 138% between the delivered Rotterdam price charged by UBC to its customers in Ireland and the F.O.R. Bremerhaven price charged by UBC to its customers in Denmark, that is to say the price paid by Danish customers is 2.38 times the price paid by Irish customers.
214 The commission treats these facts as an abuse of a dominant position in that UBC has applied dissimilar conditions to equivalent transactions with the other trading parties, thereby placing them at a competitive disadvantage.
215 The applicant states that its prices are determined by market forces and cannot therefore be discriminatory.
216 Further the average difference in the price of "Chiquita" bananas between the national markets in question was only 5% in 1975.
217 The price in any given week is calculated so as to reflect as much as possible the anticipated yellow market price in the following week for each national market.
218 This price is fixed by the Rotterdam management after discussions and negotiations between the applicant's local representatives and the ripener / distributors must perform take into account the different competitive context in which ripener/distributors in the different countries are operating.
219 It finds its objective justification in the average anticipated market price.
220. These price differences are in fact due to fluctuating market factors such as the weather, different availability of seasonal competing fruit, holidays, strikes, government measures, currency denominations.
221. In short, the applicant has been asked by the Commission to take appropriate steps to establish a single banana market at a time when it has in fact been unable to do so.
222. According to the applicant, as long as the community institutions have not set up the machinery for a single banana market and the various markets remain national and respond to their individual supply/demand situations, differences in prices between them cannot be prevented.
223. UBC's answers to the Commission's requests for particulars (the letters of 14 May, 13 September, 10 and 11 December 1974 and 13 February 1975) show that UBC charges its customers each week for its bananas sold under the Chiquita brand name a different selling price depending on the member state where the latter carry on their business as ripener/distributors according to the ratios to which the Commission has drawn attention.
224. These price differences can reach 30 to 50% in some weeks, even though products supplied under the transactions are equivalent (with the exception of the Scipio Group, subject to this observation that the bananas from Scipio's ripening installations are sold at the same price as those sold by independent ripeners).
225. In fact, the bananas sold by UBC are all freighted in the same ships, are unloaded at the same cost in Rotterdam or Bremerhaven and the price differences relate to substantially similar quantities of bananas of the same variety, which have been brought to the same degree of ripening, are of similar quality and sold under the same 'Chiquita' brand name under the same conditions of sale and payment for loading on to the purchaser's own means of transport and the latter have to pay customs duties, taxes and transport costs from these ports.
226. This policy of discriminatory prices has been applied by UBC since 1971 to customers of Germany, the Netherlands and the Bleu and was extended at the beginning of 1973 to customers in Denmark and in November 1973 to customers in Ireland.
227. Although the responsibility for establishing the single banana market does not lie with the applicant, it can only endeavour to take 'what the market can bear' provided that it complies with the rules for the regulation and coordination of the market laid down by the Treaty.
228. Once it can be grasped that differences in transport costs, taxation, customs duties, the wages of the labour force, the conditions of marketing, the differences in the parity of currencies, the density of competition may eventually culminate in different retail selling price levels according to the member states, then it follows that those differences are factors which UBC only has to take into account to a limited extent since it sells a product which is always the same and at the same place to ripener/distributors who alone, bear the risks of the consumers' market.
229. The interplay of supply and demand should, owing to its nature, only be applied to each stage where it is really manifest.
230. The mechanisms of the market are adversely affected if the price is calculated by leaving out one stage of the market and taking into account the law of supply and demand as between the vendor and the ultimate consumer and not as between the vendor (UBC) and the purchaser (the ripener/distributors).
231. Thus, by reason of its dominant position UBC, fed with information by its local representatives, was in fact able to impose its selling price on the intermediate purchaser. This price and also the 'weekly quota allocated' is only fixed and notified to the customer four days before the vessel carrying the bananas berths.
232. These discriminatory prices, which varied according to the circumstances of the member states, were just so many obstacles to the free movement of goods and their effect was intensified by the clause forbidding the resale of
BANANAS WHILE STILL GREEN AND BY REDUCING THE DELIVERIES OF THE QUANTITIES ORDERED.

233 A RIGID PARTITIONING OF NATIONAL MARKETS WAS THUS CREATED AT PRICE LEVELS, WHICH WERE ARTIFICIALLY DIFFERENT, PLACING CERTAIN DISTRIBUTOR/RIPENERS AT A COMPETITIVE DISADVANTAGE, SINCE COMPARED WITH WHAT IT SHOULD HAVE BEEN COMPETITION HAD THEREBY BEEN DISTORTED.

234 CONSEQUENTLY THE POLICY OF DIFFERING PRICES ENABLING UBC TO APPLY DISSIMILAR CONDITIONS TO EQUIVALENT TRANSACTIONS WITH OTHER TRADING PARTIES, THEREBY PLACING THEM AT A COMPETITIVE DISADVANTAGE, WAS AN ABUSE OF A DOMINANT POSITION.

PARAGRAPH 2. UNFAIR PRICES

235 THE COMMISSION IS OF THE OPINION THAT UBC HAS ALSO ABUSED ITS DOMINANT POSITION BY CHARGING ITS CUSTOMERS IN GERMANY (OTHER THAN THE SCIPIO GROUP), DENMARK, THE NETHERLANDS AND THE BLEU UNFAIR PRICES, WHICH IN THE CIRCUMSTANCES IT CONSIDERS ARE 'EXCESSIVE IN RELATION TO THE ECONOMIC VALUE OF THE PRODUCT SUPPLIED'.

236 THE POLICY OF PARTITIONING THE RELEVANT MARKET HAS ENABLED UBC TO CHARGE PRICES FOR CHIQUITA BANANAS WHICH ARE SHELTERED FROM EFFECTIVE COMPETITION AND WHICH, BEARING IN MIND THAT BANANAS ARE A FOOD PRODUCT THAT IS WIDELY CONSUMED, OFTEN AMOUNT TO WIDE DIFFERENCES IN PRICE WHICH CANNOT BE JUSTIFIED OBJECTIVELY.

237 THESE PRICE DIFFERENCES SHOW THAT THE HIGHEST PRICES ARE EXCESSIVE COMPARED WITH THE LOWEST PRICES, MORE ESPECIALLY AS THE LATTER YIELD A PROFIT.


239 THE PRICES CHARGED BY UBC TO ITS CUSTOMERS IN GERMANY (OTHER THAN THE SCIPIO GROUP), DENMARK, THE NETHERLANDS AND THE BLEU ARE CONSIDERABLY HIGHER, SOMETIMES BY AS MUCH AS 100%, THAN THE PRICES CHARGED TO CUSTOMERS IN IRELAND AND PRODUCE FOR IT A SUBSTANTIAL AND EXCESSIVE PROFIT IN RELATION TO THE ECONOMIC VALUE OF THE PRODUCT SUPPLIED.

240 THE SIGNIFICANCE OF THESE OBSERVATIONS IS ACCENTUATED BY THE FACT THAT THERE IS A 20 TO 40% DIFFERENCE BETWEEN THE PRICE OF CHIQUITA AND UNBRANDED BANANAS, EVEN THOUGH THE QUALITY OF THE LATTER IS ONLY SLIGHTLY LOWER THAN THAT OF LABELLED BANANAS AND BY THE FACT THAT THE PRICE OF UNBRANDED BANANAS OF SIMILAR QUALITY SOLD BY ITS PRINCIPAL COMPETITORS IS LOWER EVEN THOUGH THEIR UNDERTAKINGS ARE RUNNING AT A PROFIT.

241 HAVING REGARD TO THIS SITUATION THE COMMISSION CONSIDERS A REDUCTION BY UBC OF ITS PRICE LEVELS TO PRICES AT LEAST 15% BELOW THE PRICES IT CHARGES ITS CUSTOMERS IN THE RELEVANT MARKET, EXCEPT IN IRELAND, TO BE APPROPRIATE, SINCE THE UNFAIR PRICES CHARGED CURRENTLY ARE AN ABUSE BY UBC OF ITS DOMINANT POSITION.

242 THE APPLICANT, WHICH DOES NOT ACCEPT THE COMMISSION'S ARGUMENT, LAYS STRESS ON THE VERY LOW PRICE OF BANANAS AT ALL STAGES OF THE BANANA CHAIN AND ILLUSTRATES THIS BY THE EXAMPLE OF A METRIC TON OF BANANAS WHICH COULD BE IMPORTED INTO GERMANY IN 1956 FOR DM 697, THE PRICE WHEREOF FELL IN 1973 TO DM 458, THE DIFFERENCE CORRESPONDING TO A 50% REDUCTION IN REAL TERMS.

243 THE ARGUMENT PUT FORWARD BY THE COMMISSION TO PROVE THAT UBC CHARGES EXCESSIVE PRICES IS WRONG BECAUSE IT IS BASED ON THE LETTER OF 10 DECEMBER 1974 POINTING OUT 'THAT UBC SOLD BANANAS TO IRISH RIPENERS AT PRICES ALLOWING IT A CONSIDERABLY SMALLER MARGIN THAN IN SOME OTHER MEMBER STATES', THE WORDING OF WHICH, SETTLED BEFORE 31 DECEMBER 1974, THE DATE OF THE END OF THE FINANCIAL YEAR, HAS BEEN RETRACTED ON TWO DIFFERENT OCCASIONS BY THE APPLICANT AND IT APPEARS FROM A DOCUMENT ANNEXED TO THE APPLICATION THAT THE PRICES CHARGED IN IRELAND PRODUCED A LOSS FOR UBC.

244 IT IS THEREFORE ARBITRARY FOR THE COMMISSION TO PROCEED ON THE BASIS OF THE PRICES CHARGED IN IRELAND FOR A FEW MONTHS FOR THE PURPOSE OF ACCESS TO THE
IRISH MARKET, WHICH ONLY REPRESENTED 1.6% OF THE TOTAL VOLUME OF BANANAS IMPORTED DURING 1974 INTO THE WHOLE OF THE RELEVANT MARKET, IN ORDER TO CALCULATE THE PROFITS WHICH HAVE BEEN MADE ON THE REMAINDER OF THE RELEVANT MARKET AND DURING THE PREVIOUS YEARS WHEN THE PRICES CHARGED DID NOT ALLOW ANY PROFITS TO BE MADE FROM 1970 TO 1974 INCLUSIVE ON THE RELEVANT MARKET.

245THE APPLICANT TAKES THE VIEW THAT THE DIFFERENCE IN THE PRICE OF BRANDED AND UNLABELLED BANANAS IS JUSTIFIED, BECAUSE THE PRECAUTIONS TAKEN BETWEEN CUTTING AND SALE TO THE CONSUMER FULLY EXPLAIN THIS DIFFERENCE.

246IT ENDEAVOURS TO PROVE BY ANOTHER WAY THAT THERE ARE GENUINE DIFFERENCES IN THE QUALITY OF CHIQUITA BANANAS AND THOSE BEARING OTHER BRAND NAMES AND THAT THE PRICE DIFFERENCE - AVERAGING 7.4% BETWEEN 1970 AND 1974 - IS JUSTIFIED.

247IT SUBMITS THAT THE ORDER TO REDUCE ITS PRICES BY 15% IS UNINTELLIGIBLE, SINCE THE PRICES IN QUESTION VARY EACH WEEK ON THE WHOLE OF THE RELEVANT MARKET, AND UNWORKABLE, BECAUSE A REDUCTION OF THIS SIZE WOULD CAUSE IT TO SELL A BANANA OF A HIGHER QUALITY THAN ITS COMPETITORS BELOW THE PRICES WHICH THEY CHARGE FOR THEIRS.

248THE IMPOSITION BY AN UNDERTAKING IN A DOMINANT POSITION DIRECTLY OR INDIRECTLY OF UNFAIR PURCHASE OR SELLING PRICES IS AN ABUSE TO WHICH EXCEPTION CAN BE TAKEN UNDER ARTICLE 86 OF THE TREATY.

249IT IS ADVISABLE THEREFORE TO ASCERTAIN WHETHER THE DOMINANT UNDERTAKING HAS MADE USE OF THE OPPORTUNITIES ARISING OUT OF ITS DOMINANT POSITION IN SUCH A WAY AS TO REAP TRADING BENEFITS WHICH IT WOULD NOT HAVE REAPED IF THERE HAD BEEN NORMAL AND SUFFICIENTLY EFFECTIVE COMPETITION.

250IN THIS CASE CHARGING A PRICE WHICH IS EXCESSIVE BECAUSE IT HAS NO REASONABLE RELATION TO THE ECONOMIC VALUE OF THE PRODUCT SUPPLIED WOULD BE SUCH AN ABUSE.

251THIS EXCESS COULD, INTER ALIA, BE DETERMINED OBJECTIVELY IF IT WERE POSSIBLE FOR IT TO BE CALCULATED BY MAKING A COMPARISON BETWEEN THE SELLING PRICE OF THE PRODUCT IN QUESTION AND ITS COST OF PRODUCTION, WHICH WOULD DISCLOSE THE AMOUNT OF THE PROFIT MARGIN; HOWEVER THE COMMISSION HAS NOT DONE THIS SINCE IT HAS NOT ANALYSED UBC’S COST STRUCTURE.

252THE QUESTIONS THEREFORE TO BE DETERMINED ARE WHETHER THE DIFFERENCE BETWEEN THE COSTS ACTUALLY INCURRED AND THE PRICE ACTUALLY CHARGED IS EXCESSIVE, AND, IT THE ANSWER TO THIS QUESTION IS IN THE AFFIRMATIVE, WHETHER A PRICE HAS BEEN IMPOSED WHICH IS EITHER UNFAIR IN ITSELF OR WHEN COMPARED TO COMPETING PRODUCTS.

253OTHER WAYS MAY BE DEVISED - AND ECONOMIC THEORISTS HAVE NOT FAILED TO THINK UP SEVERAL - OF SELECTING THE RULES FOR DETERMINING WHETHER THE PRICE OF A PRODUCT IS UNFAIR.

254WHILE APPRECIATING THE CONSIDERABLE AND AT TIMES VERY GREAT DIFFICULTIES IN WORKING OUT PRODUCTION COSTS WHICH MAY SOMETIMES INCLUDE A DISCRETIONARY APPORTIONMENT OF INDIRECT COSTS AND GENERAL EXPENDITURE AND WHICH MAY VARY SIGNIFICANTLY ACCORDING TO THE SIZE OF THE UNDERTAKING, ITS OBJECT, THE COMPLEX NATURE OF ITS SET UP, ITS TERRITORIAL AREA OF OPERATIONS, WHETHER IT MANUFACTURES ONE OR SEVERAL PRODUCTS, THE NUMBER OF ITS SUBSIDIARIES AND THEIR RELATIONSHIP WITH EACH OTHER, THE PRODUCTION COSTS OF THE BANANA DO NOT SEEM TO PRESENT ANY INSUPERABLE PROBLEMS.

255IN THIS CASE IT EMERGES FROM A STUDY BY THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT OF 10 FEBRUARY 1975 THAT THE PATTERN OF THE PRODUCTION, PACKAGING, TRANSPORTATION, MARKETING AND DISTRIBUTION OF BANANAS COULD HAVE MADE IT POSSIBLE TO COMPUTE THE APPROXIMATE PRODUCTION COST OF THIS FRUIT AND ACCORDINGLY TO CALCULATE WHETHER ITS SELLING PRICE TO RIPENER/DISTRIBUTORS WAS EXCESSIVE.

256THE COMMISSION WAS AT LEAST UNDER A DUTY TO REQUIRE UBC TO PRODUCE PARTICULARS OF ALL THE CONSTITUENT ELEMENTS OF ITS PRODUCTION COSTS.

257THE ACCURACY OF THE CONTENTS OF THE DOCUMENTS PRODUCED BY UBC COULD HAVE BEEN CHALLENGED BUT THAT WOULD HAVE BEEN A QUESTION OF PROOF.

258THE COMMISSION BASES ITS VIEW THAT PRICES ARE EXCESSIVE ON AN ANALYSIS OF THE DIFFERENCES - IN ITS VIEW EXCESSIVE - BETWEEN THE PRICES CHARGED IN THE DIFFERENT
MEMBER STATES AND ON THE POLICY OF DISCRIMINATORY PRICES WHICH HAS BEEN CONSIDERED ABOVE.

259THE FOUNDATION OF ITS ARGUMENT HAS BEEN THE APPLICANT’S LETTER OF 10 DECEMBER 1974 WHICH ACKNOWLEDGED THAT THE MARGIN ALLOWED BY THE SALE OF BANANAS TO IRISH RIPENERS WAS MUCH SMALLER THAN IN SOME OTHER MEMBER STATES AND IT CONCLUDED FROM THIS THAT THE AMOUNT BY WHICH THE ACTUAL PRICES F.O.R. BREMERHAVEN AND ROTTERDAM EXCEED THE DELIVERED ROTTERDAM PRICES FOR BANANAS TO BE SOLD TO IRISH CUSTOMERS C.I.F. DUBLIN MUST REPRESENT A PROFIT OF THE SAME ORDER OF MAGNITUDE.

260HAVING FOUND THAT THE PRICES CHARGED TO RIPENERS OF THE OTHER MEMBER STATES WERE CONSIDERABLY HIGHER, SOMETIMES BY AS MUCH AS 100%, THAN THE PRICES CHARGED TO CUSTOMERS IN IRELAND IT CONCLUDED THAT UBC WAS MAKING A VERY SUBSTANTIAL PROFIT.

261NEVERTHELESS THE COMMISSION HAS NOT TAKEN INTO ACCOUNT IN ITS REASONING SEVERAL OF UBC’S LETTERS IN WHICH WERE ENCLOSED A CONFIDENTIAL DOCUMENT RETRACTING WHAT IS SAID IN ITS LETTER OF 10 DECEMBER 1974 AND POINTING OUT THAT THE PRICES CHARGED IN IRELAND HAD PRODUCED A LOSS.

262THE APPLICANT ALSO STATES THAT THE PRICES CHARGED ON THE RELEVANT MARKET DID NOT ALLOW IT TO MAKE ANY PROFITS DURING THE LAST FIVE YEARS, EXCEPT IN 1975.

263THESE Assertions BY THE APPLICANT ARE NOT SUPPORTED BY ANY ACCOUNTING DOCUMENTS WHICH PROVE THE CONSOLIDATED ACCOUNTS OF THE UBC GROUP OR EVEN BY THE CONSOLIDATED ACCOUNTS FOR THE RELEVANT MARKET.

264HOWEVER UNRELIABLE THE PARTICULARS SUPPLIED BY UBC MAY BE (AND IN PARTICULAR THE DOCUMENT MENTIONED PREVIOUSLY WHICH WORKS OUT THE "LOSSES" ON THE IRISH MARKET IN 1974 WITHOUT ANY SUPPORTING EVIDENCE), THE FACT REMAINS THAT IT IS FOR THE COMMISSION TO PROVE THAT THE APPLICANT CHARGED UNFAIR PRICES.

265UBC’S RETRACTION, WHICH THE COMMISSION HAS NOT EFFECTIVELY REFUTED, ESTABLISHES BEYOND DOUBT THAT THE BASIS FOR THE CALCULATION ADOPTED BY THE LATTER TO PROVE THAT UBC’S PRICES ARE EXCESSIVE IS OPEN TO CRITICISM AND ON THIS PARTICULAR POINT THERE IS DOUBT WHICH MUST BENEFIT THE APPLICANT, ESPECIALLY AS FOR NEARLY 20 YEARS BANANA PRICES, IN REAL TERMS, HAVE NOT RISEN ON THE RELEVANT MARKET.

266ALTHOUGH IT IS ALSO TRUE THAT THE PRICE OF CHIQUITA BANANAS AND THOSE OF ITS PRINCIPAL COMPETITORS IS DIFFERENT, THAT DIFFERENCE IS ABOUT 7%, A PERCENTAGE WHICH HAS NOT BEEN CHALLENGED AND WHICH CANNOT AUTOMATICALLY BE REGARDED AS EXCESSIVE AND CONSEQUENTLY UNFAIR.

267IN THESE CIRCUMSTANCES IT APPEARS THAT THE COMMISSION HAS NOT ADDUCED ADEQUATE LEGAL PROOF OF THE FACTS AND EVALUATIONS WHICH FORMED THE FOUNDATION OF ITS FINDING THAT UBC HAD INFRINGED ARTICLE 86 OF THE TREATY BY DIRECTLY AND INDIRECTLY IMPOSING UNFAIR SELLING PRICES FOR BANANAS.

268ARTICLE 1 (C) OF THE DECISION MUST THEREFORE BE ANNULLED.

CHAPTER III - PROCEDURAL VALIDITY

SECTION 1 - COMPLAINTS RELATING TO DENIAL OF DUE PROCESS


272UBC HAD TWO MONTHS (FROM 11 APRIL 1975 TO 12 JUNE 1975) WITHIN WHICH TO SUBMIT ITS OBSERVATIONS AND IT IS UBC WHICH ASKED FOR THE HEARING WHICH TOOK PLACE ON

273IT IS EVIDENT FROM THESE DATES THAT THE PROCEDURE WAS CARRIED OUT WITHIN NORMAL TIME PERIODS AND CANNOT BE CRITICIZED ON THE GROUND THAT IT WAS RUSHED.

274AS FAR AS CONCERNS THE ALLEGATION THAT THE STATEMENT OF THE REASONS UPON WHICH THE OBJECTIONS WERE BASED WAS INADEQUATE ARTICLE 4 OF THE SAID REGULATION NO 99/63 PROVIDES THAT THE COMMISSION IN ITS DECISIONS SHALL DEAL ONLY WITH THOSE OBJECTIONS RAISED UNDERTAKINGS IN RESPECT OF WHICH THEY HAVE BEEN AFFORDED THE OPPORTUNITY OF MAKING KNOWN THEIR VIEWS.

275THE STATEMENT OF OBJECTIONS SATISFIES THIS REQUIREMENT SINCE IT SETS OUT, SUMMARILY INDEED BUT CLEARLY, THE PRINCIPAL FACTS UPON WHICH THE COMMISSION RELIES.

276IN ITS COMMUNICATION OF 19 MARCH 1975 THE LATTER CLEARLY STATED THE PRINCIPAL FACTS UPON WHICH IT BASED THE OBJECTIONS MADE AND INDICATED TO WHAT EXTENT UBC IS IN A DOMINANT POSITION AND HAS ABUSED IT.

277IT DOES NOT THEREFORE SEEM THAT DURING THE PROCEDURE BEFORE THE COMMISSION THERE WAS ANY BREACH OF THE PRINCIPLE OF DUE PROCESS.

278AS FAR AS THE OTHER OBJECTIONS ARE CONCERNED THEY RELATE TO THE SUBSTANCE OF THE CASE.

279CONSEQUENTLY THIS SUBMISSION IS UNFOUNDED.

SECTION 2 - THE APPLICANT’S CLAIM FOR DAMAGES

280THE APPLICANT COMPLAINS THAT THE COMMISSION’S APPROACH TO THIS PROCEEDING WAS PERMEATED WITH BIAS.

281IN AN ENDEAVOUR TO JUSTIFY THIS COMPLAINT IT MENTIONS: THE EXAGGERATION OF THE DIFFERENCES IN PRICE BETWEEN THE STATES IN THE COMMISSION’S FINDING, THE DESCRIPTION, WHICH UBC ASSERTS IS INCORRECT, OF UBC’S PROGRESS ON THE IRISH MARKET, A MISLEADING PRESENTATION OF AN FAO STUDY ON COMPETITION BETWEEN BANANAS AND SUMMER FRUIT, THE ASSERTION THAT ‘‘BANANAS CAN ONLY BE TRANSPORTED WHILE STILL GREEN’’, THE WRONG PRESENTATION OF THE REDUCTION OF SUPPLIES TO OLESEN.

282CONSIDERATION OF THE CORRECTNESS OF THESE COMPLAINTS GOES TO THE SUBSTANCE OF THE CASE AND THE PARTIES HAVE DEVELOPED THEIR VIEWS ON THEM AT GREAT LENGTH.

283THERE IS NO GROUND FOR SAYING THAT THE COMMISSION MENTIONED THESE MATTERS TENDENTIUSLY.

284THE APPLICANT STATES THAT IT HAS SUFFERED MORAL DAMAGES OWING TO THE FACT THAT BEFORE THE COMMISSION ADOPTED THE DECISION, ONE OF ITS OFFICIALS MADE DENIGRATING COMMENT TO A NEWSPAPER ON UBC’S COMMERCIAL CONDUCT WHICH WAS REPRODUCED BY THE WORLD PRESS AND GAVE THE IMPRESSION THAT THE ALLEGED INFRINGEMENTS HAD BEEN PROVED, WHEN IN FACT THE PARTIES CONCERNED HAD NOT YET DELIVERED THEIR DEFENCES.

285FOR THIS REASON THE COMMISSION WAS NO LONGER ABLE TO EVALUATE IMPARTIALLY THE FACTS OF THE CASE AND THE ARGUMENTS SUBMITTED BY THE APPLICANT.

286THERE IS NOTHING ON THE COURT’S FILE TO JUSTIFY THE PRESUMPTION THAT THE CONTESTED DECISION WOULD NOT HAVE BEEN ADOPTED OR WOULD HAVE BEEN DIFFERENT HAD IT NOT BEEN FOR THESE DISPUTED STATEMENTS WHICH ARE IN THEMSELVES REGRETTABLE.

287HOWEVER THERE IS NOTHING TO INDICATE THAT THE COMMISSION’S CONDUCT WAS SUCH AS TO HAVE AN ADVERSE EFFECT ON THE WAY THE PROCEDURE IS NORMALLY CARRIED OUT.

288IN THESE CIRCUMSTANCES THE CLAIM AGAINST THE COMMISSION FOR DAMAGES MUST BE REJECTED.

CHAPTER IV - THE SANCTIONS

289THE COMMISSION, FOR THE PURPOSE OF IMPOSING A FINE OF ONE MILLION UNITS OF ACCOUNT FOR THE FOUR INFRINGEMENTS WHICH IT FOUND UBC HAD COMMITTED, STATING THAT THE LATTER ‘‘WERE AT THE VERY LEAST NEGLIGENT’’, HAD REGARD TO THEIR GRAVITY AND DURATION AND TO THE SIZE OF THE UNDERTAKING.

290AS FAR AS THEIR GRAVITY IS CONCERNED THE COMMISSION CONSIDERED THEM IN THEIR ECONOMIC AND LEGAL SETTING BY TAKING ACCOUNT OF THEIR COMBINED EFFECT AND
OF THEIR CONSEQUENCES WHICH ARE MANIFESTLY INCONSISTENT WITH THE TREATY
OBJECTIVES OF INTEGRATING MARKETS AND OF THE FACT THAT THE BANANA IS A
PRODUCT WHICH IS WIDELY CONSUMED.

291 AS FAR AS THE DURATION OF THE INFRINGEMENTS IS CONCERNED THE COMMISSION
TOOK THE VIEW THAT THE PROHIBITION ON THE SALE OF BANANAS WHILE STILL GREEN
ONLY HAD TO BE TAKEN INTO CONSIDERATION FROM JANUARY 1967 TO 15 NOVEMBER 1968
BEING THE DATE WHEN UBC NOTIFIED THE GENERAL CONDITIONS OF SALE FOR THE
NETHERLANDS TO THE COMMISSION.

292 IT FOLLOWS FROM THIS THAT, BY REASON OF UBC'S ACTS AFTER 15 NOVEMBER 1968
WHICH HAVE REMAINED WITHIN THE SCOPE OF THE ACTIVITY DESCRIBED THEREIN, THERE
HAS ACCORDINGLY BEEN NO NEGLIGENCE ON THE PART OF UBC AND NO FINE HAS BEEN
IMPOSED ON ACCOUNT OF THESE LATER ACTS.

293 FURTHERMORE DURING THE PROCEDURE FOR THE ADOPTION OF AN INTERIM MEASURE
ON 5 APRIL 1976 THE COMMISSION TOOK NOTE OF THE AMENDMENT OF THE CLAUSE AT
ISSUE WHILE EXPRESSING THE VIEW THAT IT SHOULD HAVE TAKEN ACTION EARLIER.

294 ACCORDING TO THE COMMISSION THE REFUSAL BY UBC TO CONTINUE SUPPLIES TO
OLESEN LASTED FROM 10 OCTOBER 1973 TO 11 FEBRUARY 1975 AND THE COMMISSION STATES
THAT IT TOOK ACCOUNT OF THE FACT THAT UBC PUT AN END TO THIS INFRINGEMENT OF
ITS OWN ACCORD.

295 THE PRICING POLICY HAS BEEN APPLIED SINCE AT LEAST 1971 TO UBC'S CUSTOMERS IN
GERMANY, THE NETHERLANDS AND THE BLEU, SINCE JANUARY 1973 TO CUSTOMERS IN
DENMARK AND SINCE NOVEMBER 1973 TO CUSTOMERS IN IRELAND.

296 FURTHERMORE ACCORDING TO THE COMMISSION THE AMOUNT OF THE FINE WAS FIXED AT
ONE MILLION UNITS OF ACCOUNT IN THE LIGHT OF UBC'S TOTAL ANNUAL TURNOVER OF
ABOUT TWO THOUSAND MILLION DOLLARS AND ITS ANNUAL TURNOVER IN BANANAS OF
FIFTY MILLION DOLLARS ON THE RELEVANT MARKET AND ALSO OF THE HIGH PROFITS
MADE AS A RESULT OF ITS PRICING POLICY.

297 FURTHERMORE IN ORDER TO COMPEL UBC TO PUT AN END TO THESE INFRINGEMENTS,
IN SO FAR AS IT HAD NOT DONE SO OF ITS OWN ACCORD, THE COMMISSION ORDERED UBC,
SUBJECT TO A PENALTY PAYMENT, TO INFORM ALL ITS DISTRIBUTOR/RIPENERS IN GERMANY,
DENMARK, IRELAND, THE NETHERLANDS AND THE BLEU THAT IT HAS CEASED TO APPLY
THE PROHIBITION ON THE RESALE OF GREEN BANANAS BY NOT LATER THAN 1 FEBRUARY
1976 AND TO INFORM THE COMMISSION TWICE YEARLY FOR A PERIOD OF TWO YEARS OF THE
PRICES CHARGED DURING THE PRECEDING SIX MONTHS TO THE SAME CUSTOMERS.

298 THE APPLICANT SUBMITS THAT IT DID NOT KNOW THAT IT WAS IN A DOMINANT POSITION,
STILL LESS THAT IT HAD ABUSED IT, ESPECIALLY AS, ACCORDING TO THE CASE-LAW OF THE
COURT TO DATE, ONLY UNDERTAKINGS WHICH WERE PURE MONOPOLIES OR CONTROLLED
AN OVERWHELMING SHARE OF THE MARKET HAVE BEEN HELD TO BE IN A DOMINANT
POSITION.

299 UBC IS AN UNDERTAKING WHICH, HAVING ENGAGED FOR A VERY LONG TIME IN
INTERNATIONAL AND NATIONAL TRADE, HAS SPECIAL KNOWLEDGE OF ANTI-TRUST LAWS
AND HAS ALREADY EXPERIENCED THEIR SEVERITY.

300 UBC, BY SETTING UP A COMMERCIAL SYSTEM COMBINING THE PROHIBITION OF THE SALE
OF BANANAS WHILE STILL GREEN, DISCRIMINATORY PRICES, DELIVERIES LESS THAN THE
AMOUNTS ORDERED, ALL OF WHICH WAS TO END IN STRICT PARTITIONING OF NATIONAL
MARKETS, ADOPTED MEASURES WHICH IT KNEW OR OUGHT TO HAVE KNOWN
CONTRAVENED THE PROHIBITION SET OUT IN ARTICLE 86 OF THE TREATY.

301 THE COMMISSION THEREFORE HAD GOOD REASON TO FIND THAT UBC'S
INFRINGEMENTS WERE AT THE VERY LEAST NEGLIGENCE.

302 THE AMOUNT OF THE FINE IMPOSED DOES NOT SEEM TO BE OUT OF PROPORTION TO
THE GRAVITY AND DURATION OF THE INFRINGEMENTS (AND ALSO TO THE SIZE OF THE
UNDERTAKING).

303 ACCOUNT MUST HOWEVER BE TAKEN OF THE PARTIAL ANNULMENT OF THE DECISION
AND THE AMOUNT FIXED BY THE COMMISSION REDUCED ACCORDINGLY.

304 A REDUCTION OF THE FINE TO 850 000 (EIGHT HUNDRED AND FIFTY THOUSAND) UNITS
OF ACCOUNT, TO BE PAID IN THE NATIONAL CURRENCY OF THE APPLICANT UNDERTAKING
WHOSE REGISTERED OFFICE IS SITUATE IN THE COMMUNITY, THAT IS TO SAY 3 077 000
NETHERLANDS GUILDERS (THREE MILLION SEVENTY SEVEN THOUSAND NETHERLANDS
GUILDERS), APPEARS TO BE JUSTIFIED.

Decision on costs
COSTS
305 UNDER ARTICLE 69 (2) OF THE RULES OF PROCEDURE THE UNSUCCESSFUL PARTY SHALL BE ORDERED TO PAY THE COSTS IF THEY HAVE BEEN ASKED FOR IN THE SUCCESSFUL PARTY'S PLEADING.
306 UNDER PARAGRAPH (3) OF THIS ARTICLE WHEN EACH PARTY SUCCEEDS ON SOME AND FAILS ON OTHER HEADS OR WHERE THE CIRCUMSTANCES ARE EXCEPTIONAL THE COURT MAY ORDER THAT THE PARTIES BEAR THEIR OWN COSTS IN WHOLE OR IN PART.
308 EACH PARTY SHALL BEAR ITS OWN COSTS.
309 FURTHERMORE AN ORDER MUST BE MADE FOR PAYMENT OF THE COSTS OF THE APPLICATION FOR THE ADOPTION OF AN INTERIM MEASURE.

Operative part

ON THOSE GROUNDS,

THE COURT

HEREBY;

1. ANNULS ARTICLE 1 (C) OF COMMISSION DECISION OF 17 DECEMBER 1975 'IV/26699 - CHIQUITA', (OFFICIAL JOURNAL L 95 OF 9 APRIL 1976).
2. REDUCES THE AMOUNT OF THE FINE IMPOSED ON UBC AND UBCBV TO 850 000 (EIGHT HUNDRED AND FIFTY THOUSAND) UNITS OF ACCOUNT, TO BE PAID IN THE NATIONAL CURRENCY OF THE APPLICANT UNDERTAKING WHOSE REGISTERED OFFICE IS SITUATE IN THE COMMUNITY, THAT IS TO SAY 3 077 000 NETHERLANDS GUILDERS (THREE MILLION SEVENTY SEVEN THOUSAND NETHERLANDS GUILDERS).
3. DISMISSES THE REST OF THE APPLICATION.
4. ORDERS EACH PARTY TO BEAR ITS OWN COSTS INCLUDING THE COSTS OF THE APPLICATION FOR THE ADOPTION OF AN INTERIM MEASURE.
JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

23 October 2003 (1)

(Action for annulment - Competition - Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC) - Ice creams intended for immediate consumption - Supply of freezer cabinets to retailers - Exclusivity clause - Barriers to entry to the market - Property rights - Article 222 of the EC Treaty (now Article 295 EC))

In Case T-65/98,

**Van den Bergh Foods Ltd**, formerly HB Ice Cream Ltd, established in Dublin (Ireland), represented by M. Nicholson and M. Rowe, solicitors, with an address for service in Luxembourg,

applicant,

v

**Commission of the European Communities**, represented by W. Wils and A. Whelan, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by
Masterfoods Ltd, established in Dublin (Ireland), represented by P.G.H. Collins, solicitor, with an address for service in Luxembourg, and by Richmond Frozen Confectionery Ltd, formerly Treats Frozen Confectionery Ltd, established in Northallerton (United Kingdom), represented by I.S. Forrester QC, with an address for service in Luxembourg, interveners,


THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: R. García-Valdecasas, President, P. Lindh and J.D. Cooke, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 3 October 2002,

gives the following

Judgment

Facts

1. This action is for the annulment of Commission Decision 98/531/EC of 11 March 1998 relating to a proceeding under Articles 85 and 86 of the EC Treaty (Case Nos IV/34.073, IV/34.395 and IV/35.436 - Van den Bergh Foods Limited) (OJ 1998 L 246, p. 1, hereinafter ‘the contested decision’).

2. Van den Bergh Foods Ltd (hereinafter ‘HB’), a wholly-owned subsidiary of Unilever plc, is the principal manufacturer of ice-cream products in Ireland, particularly single-wrapped ice creams for immediate consumption (hereinafter ‘impulse ice-creams’). For a number of years HB has supplied ice-cream retailers with freezer cabinets, in which it retains ownership, and which are supplied free of charge or at a nominal rent, provided that they are used exclusively for HB ice creams (hereinafter ‘the exclusivity clause’). Pursuant to the standard terms of the freezer agreements, they can be terminated at any time on two months’ notice on either side. HB maintains the cabinets at no cost to the retailer, save in cases of negligence.


4. In the summer of 1989 many retailers with freezer cabinets supplied by HB began to stock and display Mars products. This led to a demand by HB that they comply with the exclusivity clause.

5. In March 1990, Mars brought an action in the Irish High Court seeking, inter alia, a declaration that the exclusivity clause was void under domestic law and under Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC). In a separate cross action HB claimed injunctions restraining Mars from inducing or procuring breaches of the exclusivity clause.

6. In April 1990, the High Court granted an interlocutory injunction in favour of HB.
On 28 May 1992, the High Court gave judgment in the actions brought by Mars and HB. It dismissed the action brought by Mars, and granted HB a permanent injunction restraining Mars from inducing retailers to stock Mars ice cream in freezer cabinets belonging to HB.

Mars appealed against that judgment to the Irish Supreme Court on 4 September 1992. The Supreme Court decided to stay proceedings and to refer to the Court of Justice three questions for a preliminary ruling (see paragraph 30 below). That reference was the subject of the judgment of the Court of Justice in Case C-344/98 Masterfoods and HB [2000] ECR I-11369. At the date of the present judgment, the proceedings before the Supreme Court are still pending.

In parallel to those proceedings before the Irish courts, on 18 September 1991 Mars lodged a complaint with the Commission under Article 3 of 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). The complaint related to the provision by HB, to large numbers of retailers, of freezer cabinets to be used exclusively for HB products.

On 22 July 1992, Valley Ice Cream (Ireland) Ltd also lodged a complaint against HB with the Commission.

On 29 July 1993, the Commission issued a statement of objections to HB in which it concluded that HB’s distribution arrangements infringed Articles 85 and 86 of the Treaty (hereinafter ‘the 1993 statement of objections’).

Following negotiations with the Commission, HB, while contesting the Commission’s view, proposed changes to its distribution arrangements, with a view to qualifying for an exemption under Article 85(3) of the Treaty. Those changes were notified to the Commission on 8 March 1995 and in a press release of 10 March 1995 the Commission stated that, at first sight, the new distribution arrangements might enable HB to obtain an exemption. On 15 August 1995 a notice pursuant to Article 19(3) of Regulation 17 was published in the Official Journal of the European Communities (OJ 1995 C 211, p. 4).

On 22 January 1997 the Commission sent HB a new statement of objections in which it expressed the view that the changes had not achieved the expected results of free access to sales outlets (hereinafter ‘the 1997 statement of objections’). HB replied to those objections.

On 11 March 1998 the Commission adopted the contested decision.

The contested decision

In the contested decision the Commission states that HB’s distribution agreements containing the exclusivity clause are incompatible with Articles 85 and 86 of the Treaty. It defines the relevant product market as the market for single-wrapped items of impulse ice cream and the relevant geographic market as Ireland (recitals 138 and 140). It states that HB’s position on the relevant market is particularly strong, as is shown by its market share over many years (see paragraph 21 below). That strength is further illustrated by the degree of both numeric (79%) and weighted distribution (94%) of the relevant HB products during August and September 1995 and by the strength of the brand and the breadth and popularity of its range of products. HB’s position on that market is further reinforced by the strength of Unilever’s position, not only on the other ice-cream markets in Ireland (take-home and catering), but also in the international ice-cream markets and the markets for frozen foods and consumer products generally (recital 141).

The Commission observes that the network of HB’s distribution agreements relating to freezer cabinets installed in outlets has the effect of restricting the ability of retailers who are parties to those agreements to stock and offer for sale in their outlets impulse products from competing suppliers, in circumstances where the only freezer cabinet or cabinets for the storage of impulse ice cream in place in their outlets have been provided by HB, where the HB freezer cabinet or cabinets is or are unlikely to be replaced by a cabinet owned by the retailer and/or supplied by a competitor, and where it is not economically viable to allocate space to the installation of an additional cabinet. It considers that the effect of this restriction is that the competing suppliers are precluded from selling their products to those outlets, thereby restricting
competition between suppliers in the relevant market (recital 143). The Commission did not take into consideration the restrictive effect of each individual agreement, but rather the effect produced by the category of agreements fulfilling the abovementioned conditions and constituting an identifiable part of the network of HB's freezer cabinet agreements as a whole. According to the Commission, the assessment of the restrictive effect of that part of HB's network then applies equally to each of the agreements comprising that part. The assessment of this restrictive effect was made against the background of the effect of all similar networks of freezer cabinet agreements operated by other ice-cream suppliers in the relevant market, as well as in the light of any further relevant market conditions (recitals 144 and 145).

The Commission then quantified the restrictive effect of HB's distribution agreements in order to show their significance. It observes that the restrictive effect of the networks of agreements for the supply of freezer cabinets reserved exclusively for the supplier's products are the result of the space constraints inevitably experienced by retail outlets. The average number of cabinets in place in outlets is 1.5, according to the survey carried out by Lansdowne Market Research Ltd in 1996 (hereinafter ‘the Lansdowne survey’), while the retailers consider that the optimal number of freezer cabinets to have in place in an outlet at the height of the season would be 1.57 (recital 147).

The Commission states that only a small proportion of retail outlets in Ireland, 17% according to the Lansdowne survey, have freezer cabinets which are not subject to an exclusivity clause. It maintains that those outlets may be referred to as ‘open’ outlets, in the sense that retailers are free to stock in them the impulse ice-cream of any supplier (recital 148). As regards the other outlets, 83% according to the Lansdowne survey, in which the suppliers have installed freezer cabinets, the Commission considers that other suppliers cannot have direct access to them for sale of their products without first overcoming substantial barriers. It submits that ‘newcomers to the outlet are foreclosed’ from them and that ‘although this foreclosure is not absolute, in the sense that the retailer is not contractually precluded from selling other suppliers’ products, the outlet can be said to be foreclosed in so far as entry thereto by competing suppliers is rendered very difficult’ (recital 149).

The Commission finds that in some 40% of all outlets in Ireland the only freezer cabinet/s for the storage of impulse ice-cream in place in the outlet has or have been provided by HB (recital 156). It observes that ‘a supplier who wishes to gain access for the sale of his impulse ice-cream products to a retail outlet (that is, a new entrant to the outlet) in which at least one supplier-exclusive freezer cabinet is in place can only do so if that outlet has a non-exclusive cabinet ... or if he can persuade the retailer either to replace an in situ supplier-exclusive freezer cabinet or to install an additional freezer cabinet alongside the in situ supplier-exclusive cabinet/s’ (recital 157). It considers (recitals 158 to 183), on the basis of the Lansdowne survey, that it is unlikely that retailers will adopt one or other of those measures if they have one (or more) freezers supplied by HB and concludes that 40% of the outlets in question are de facto tied to HB (recital 184). Other suppliers are therefore foreclosed from access to those outlets, contrary to Article 85(1) of the Treaty.

The contested decision also finds that the agreements containing the exclusivity clause cannot be exempted under Article 85(3) of the Treaty, as they do not contribute to an improvement in the distribution of the products (recitals 222 to 238), do not allow consumers a fair share of the resulting benefit (recitals 239 and 240), are not indispensable to the attainment of those benefits (recital 241) and afford HB the possibility of eliminating a substantial part of competition on the relevant market (recitals 242 to 246).

As regards the application of Article 86 of the Treaty, the Commission takes the view that HB has a dominant position on the relevant market, in particular because it has for a long time had a share in volume and value of over 75% of that market (recitals 259 and 261).

The Commission states that ‘HB abuses its dominant position in the relevant market ... in that it induces retailers ... who do not have a freezer cabinet for the storage of impulse ice-cream either procured by themselves or provided by another ice-cream supplier than HB to enter into freezer-cabinet agreements subject to a condition of exclusivity’ and that ‘the inducement takes the form of an offer to supply the freezer cabinets to retailers, and to maintain them, at no direct charge to the retailer’ (recital 263).

By the contested decision the Commission:
declares that the exclusivity clause in the freezer-cabinet agreements concluded between HB and retailers in Ireland, for the placement of cabinets in retail outlets which have only one or more freezer cabinets supplied by HB for the stocking of single-wrapped items of impulse ice-cream, and not having a freezer cabinet either procured by themselves or provided by an ice-cream manufacturer other than HB, constitutes an infringement of Article 85(1) of the EC Treaty (Article 1 of the operative part);

- rejects the request by HB for an exemption of the exclusivity clause described in Article 1 pursuant to Article 85(3) of the Treaty (Article 2 of the operative part);

- declares that HB's inducement to retailers in Ireland not having a freezer cabinet either procured by themselves or provided by an ice-cream manufacturer other than HB, to enter into freezer-cabinet agreements subject to a condition of exclusivity by offering to supply to them one or more freezer cabinets for the stocking of single-wrapped items of impulse ice-cream, and to maintain the cabinets, free of any direct charge, constitutes an infringement of Article 86 of the Treaty (Article 3 of the operative part);

- requires HB immediately to cease the infringements set out in Articles 1 and 3, and to refrain from taking any measure having the same object or effect (Article 4 of the operative part);

- requires HB, within three months of notification of the contested decision, to inform retailers with whom it currently has freezer-cabinet agreements constituting infringements of Article 85(1) of the Treaty, as described in Article 1, of the full wording of Articles 1 and 3, and to notify them that the exclusivity provisions in question are void (Article 5 of the operative part).

**Procedure and forms of order sought**

24. By application lodged at the Registry of the Court on 21 April 1998, HB brought an action under the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC) for the annulment of the contested decision.

25. By separate document received by the Registry on the same day, HB also applied, under Article 185 of the EC Treaty (now Article 242 EC), for suspension of the operation of that decision until the Court had ruled on the merits.

26. By applications lodged on 29 April and 8 May 1998 respectively, Mars and Treats Frozen Confectionery Ltd, which changed its name in the course of the proceedings to Richmond Frozen Confectionery Ltd (hereinafter 'Richmond'), sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.

27. The applications to intervene were served on the parties in accordance with Article 116(1) of the Rules of Procedure of the Court of First Instance.

28. By fax dated 13 May 1998, HB stated that it had no objection to the application by Mars for leave to intervene, but objected to the application by Richmond on the ground that it did not have a sufficient interest in the outcome of the case. HB requested that only a non-confidential version of its application and of the contested decision should be furnished to the applicants for leave to intervene. For that purpose, it listed the information which it considered to be secret or confidential.

29. By separate document lodged at the Registry on 14 May 1998, the Commission stated that it had no objection to the two applications for leave to intervene. With regard to HB's request for confidential treatment, it expressed certain reservations on 18 May 1998.

30. By order of 16 June 1998, received at the Court of Justice on 21 September 1998, the Supreme Court referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Articles 85, 86 and 222 of the EC Treaty (now Article 295 EC). That case was registered as Case C-344/98.
By Order of 7 July 1998 in Case T-65/98 Van den Bergh Foods v Commission [1998] ECR II-2641, the President of the Court of First Instance suspended the application of the contested decision until delivery of final judgment of the Court in the present case and reserved the costs.

32. By order of the President of the Fifth Chamber of the Court of 2 March 1999, Mars and Richmond were given leave to intervene in the present case in support of the form of order sought by the Commission. In that same order, he granted, in part, the request for confidential treatment submitted by HB. A non-confidential version of the pleadings was served on the interveners.

33. By order of 28 April 1999, the President of the Fifth Chamber of the Court stayed the proceedings in the present case pursuant to Article 47(3) of the Statute of the Court of Justice pending delivery of judgment in Case C-344/98.

34. On 14 December 2000 the Court of Justice gave judgment in Masterfoods and HB. By letters of 1 February 2001 the Registrar of the Court of First Instance invited the parties to lodge observations on the implications, if any, to be drawn in the present proceedings from that judgment. The Commission and HB lodged their observations at the Registry on 15 and 27 February 2001 respectively. On 13 March 2001 Mars lodged at the Registry its statement in intervention in the present case and also its observations on the implications to be drawn from the judgment of the Court of Justice. Richmond did not lodge a statement in intervention.

35. On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure.

36. The parties presented oral argument and answered questions put by the Court at the hearing on 3 October 2002.

37. HB claims that the Court should:

- annul the contested decision in its entirety;
- in the alternative, annul those parts of the contested decision that the Court finds erroneous or unsafe;
- order the Commission to pay the costs.

38. The Commission contends that the Court should:

- dismiss the application as unfounded;
- order HB to pay the costs.

39. Mars claims that the Court should:

- dismiss the application as unfounded;
- order HB to pay Mars' costs.

40. At the hearing Richmond claimed that the Court should:

- dismiss the application;
- order HB to pay the costs.

Law
In support of its action for annulment HB raises seven pleas in law: first, manifest errors of assessment of the facts, resulting in errors of law; second, infringement of Article 85(1) of the Treaty; third, infringement of Article 85(3) of the Treaty; fourth, infringement of Article 86 of the Treaty; fifth, infringement of the right to property, by failing to observe general principles of law and Article 222 of the EC Treaty; sixth, infringement of Article 190 of the EC Treaty (now Article 253 EC); and, seventh, failure to observe fundamental principles of Community law and infringement of essential procedural requirements. The Court will examine the first and second pleas together.

The first and second pleas: manifest errors of assessment of the facts and infringement of Article 85(1) of the Treaty

Arguments of the parties

HB maintains that the contested decision is vitiated by manifest errors of assessment of the facts, resulting in errors of law. It considers that the parties disagree not as to the facts themselves but rather as to the conclusions to be drawn from them.

HB submits that freezer-cabinet exclusivity cannot be regarded as outlet exclusivity (recital 184 of the contested decision) because the retailers are entitled to terminate the contract with HB or to install new freezers not belonging to HB alongside HB's freezer if new and attractive products are offered or if they are no longer satisfied with HB's range of products or level of service. It is clear from the judgment in Case T-7/93 Langnese-Iglo v Commission [1995] ECR II-1533 that the duration of a contractual tie is significant when assessing the degree of foreclosure of the market. According to HB, its freezer agreements are not of indefinite duration, as the retailers are able to terminate them at any time. The fact that its freezer cabinets are rarely replaced merely proves that retailers with those freezers are satisfied with the arrangement and does not imply that the outlets in question are tied.

According to HB, all the evidence suggests that the overwhelming majority of retailers alleged by the Commission to be foreclosed as a consequence of HB freezer-cabinet exclusivity have in fact positively chosen such exclusivity in preference to any of the alternative configurations available to them for the storage and sale of impulse ice-cream. It follows that the Commission should not have concluded that the freezer exclusivity clause leads to a foreclosure of the relevant market contrary to Articles 85 and 86 of the Treaty. The Commission has failed to make out any causal connection between HB freezer-cabinet exclusivity and HB's continuing popularity as reflected in the relatively limited market penetration by rival brands on the relevant market. The retailers are thus willing to stock new products where there is consumer demand for them. However, the facts show that the limited penetration of HB's competitors is not due to any foreclosure of the market resulting from the exclusivity clause but rather to the fact that their products have not proved sufficiently attractive to consumers.

HB claims that the Commission has incorrectly analysed the question of market foreclosure. It ought to have distinguished between sales outlets which are deprived of any freedom of choice because of the provisions of a distribution agreement and sales outlets which enjoy commercial freedom of choice and have exercised it only after assessing the merits of the offers made by the competitors on the market. Only the first group may be regarded as foreclosed. In fact the Commission assumed that sales outlets which have only HB freezer cabinets, regardless of their number, are foreclosed. HB explains that it is not seeking to justify absolute territorial protection or any other alleged restriction of competition at issue in the present case, but that it is submitting that all the evidence shows that the limited market penetration by its competitors is due to the fact that HB satisfies the needs of retailers and of consumers. The Commission has not sought to find any other explanation for the failure of HB's competitors.

HB considers that another factor shows that the Commission's reasoning in regard to foreclosure of the relevant market is flawed. If a 'tie' resulting from the freezer agreements between HB and the retailers were to be established, HB submits that it would then be necessary to take account of the fact that the degree of foreclosure of the market is not 40%, as submitted in the Lansdowne survey, but at most 6%. In any event, when the degree of foreclosure of the relevant market is calculated, HB submits, pointing to various data and to the Lansdowne survey, that it is necessary to exclude from the calculation the following three categories of sales outlets:
- outlets where there are two or more HB freezer cabinets in place: these are outlets where by definition there is the necessary space and it is profitable to have a second freezer (namely 6% of sales outlets);

- outlets where there is no interest on the part of the retailer in stocking another brand of ice cream: in such a situation there is an insufficient causal connection between the practice of the provision of HB's freezer cabinets and the failure of the competing supplier to gain access to the market (27% of sales outlets);

- outlets where the retailer is interested in stocking another ice cream brand and would be prepared to install another cabinet, to replace an HB cabinet with two smaller cabinets or to replace an HB cabinet by his own cabinet for the purpose (2 to 5% of sales outlets).

47. HB thus submits that, when the degree of market foreclosure is calculated, account should be taken only of outlets in which the retailer wishes to change brand but is unable to do so. The approach adopted in the contested decision concerning the application of Article 85(1) of the Treaty is therefore over-simplistic and at variance with the law as it has developed over recent years. HB also submits that the Commission overestimates the space restrictions encountered by retailers.

48. HB also observes that its calculation of the true measure of market foreclosure is supported by other evidence of the dynamics of the relevant market. It submits, in particular, that the relevant market is contested by at least five manufacturers and that other manufacturers, including new entrants, have been able to achieve substantial levels of distribution, both numeric and weighted.

49. HB disputes the finding in the contested decision that the provision of freezers subject to an exclusivity clause is a cost barrier to entry or expansion of suppliers and raises competitors' cost of entry to the relevant market, inasmuch as new entrants too need to provide and maintain freezers. HB submits that this practice is necessary in order to prevent its competitors from using its freezers to store their products without having invested in their own freezers.

50. According to HB, to supply freezers to the impulse ice-cream trade in Ireland subject to a separate rental would involve demands on its logistical and other resources that cannot be quantified in purely monetary terms. In addition, HB would be at a competitive disadvantage since it would be required to carry on its balance sheet a fleet of freezer cabinets for use not only in its business but also in the business of its retail customers and competitors.

51. HB contests the Commission's assertion in recital 198 of the contested decision that price competition may suffer because competition in the impulse ice-cream products sector takes place to a large extent between outlets and that inter-brand competition is therefore reduced in outlets stocking only a single brand. It observes that in any event around 44% of outlets stock two brands of ice cream.

52. HB submits that the correct application of Article 85(1) of the Treaty, in the light of the case-law of the Court of Justice, calls for application of the rule of reason. It is necessary to make a distinction between restrictions of conduct and restrictions of competition. Any agreement inevitably involves some form of restriction of conduct, but does not necessarily give rise to a restriction of competition. It is therefore clear that application of Article 85(1) inevitably involves a qualitative assessment of any given restriction of conduct.

53. HB also submits that in the light of an analysis based on the rule of reason, Article 85 of the Treaty does not apply to freezer cabinet agreements, as it is clear that the exclusivity clause is necessary to achieve the full benefits of the system. Furthermore, the exclusivity clause is not unreasonably restrictive of competition. The exclusivity relates only to the freezer and the agreement is effectively terminable at will (see paragraph 43 above). It observes that in Case 161/84 Pronuptia [1986] ECR 353 the Court stated that it is possible to deal with particular formats for distribution (a system of distribution through franchises in that case) at the stage of deciding whether Article 85(1) is applicable. Community law has long recognised that in considering the applicability of Article 85(1) in a given case, it is necessary to take account of the nature of the products governed by the agreement (Case 56/65 Société Technique Minière [1966] ECR 235, at p. 250).
The contested decision accepts that the free on-loan freezer system provides benefits to both the supplier and the retailer (recital 224) and that it is widely employed in Europe (recital 21). HB also submits that the exclusivity clause does not confer geographical exclusivity on the retailer and has not prevented entry by Mars or other competitors to the relevant market. That clause does not therefore fall within the scope of Article 85(1) of the Treaty, as it is an ancillary restraint. HB observes that this analysis corresponds to that adopted by the Irish High Court in Masterfoods Ltd v HB Ice Cream, paragraphs 141 to 146 and 221 to 229, and more particularly paragraph 222. Similarly, HB relies on the report of the UK Monopolies and Mergers Commission of March 1994 on the supply in the UK of ice cream for immediate consumption and various judgments of United States courts and submits that there the approach to provision of point-of-sale equipment differs from the approach adopted by the Commission in the contested decision.

Even if a rule of reason were not applied, HB submits that the exclusivity clause would still fall outside the scope of Article 85(1) of the Treaty on a ‘quantitative basis’, notwithstanding the attempt in the contested decision to create an artificially broad category of foreclosed outlets. It submits that the judgment of the Court of Justice in Case C-234/89 Delimitis [1991] ECR I-935 and the judgment in Langnese-Iglo require a detailed examination of the contestability of a market in deciding whether or not a particular agreement or set of agreements produces such a degree of foreclosure as to fall foul of the Article 85(1) prohibition. According to HB, the Delimitis and Langnese-Iglo cases require two conditions to be satisfied for a market to be deemed open, namely, first, that there is access to the minimum number of outlets necessary for the profitable operation of the distribution system and, second, that competitors have some possibility for expansion of their activities, that is to say, to increase their market share. According to HB, ‘if the market is contestable so that new entrants are not “denied access” in the sense that there are “real and specific possibilities” for market entry, there is no foreclosure such as to bring Article 85(1) into play.’ Moreover, the importance of the network of similar agreements in the industry should not be exaggerated as it constitutes only ‘one factor amongst others’.

HB submits that the Court must examine the question of foreclosure of the market, and whether such foreclosure is acceptable or not, on the assumption that Mars or any other competitor is willing to make an investment in freezers comparable to that of the other market participants. That is apparent from paragraph 21 of the judgment in Delimitis, according to which it is necessary to take account of other strategies for penetrating the market before concluding that a competitor has been unreasonably denied access to the market.

According to HB, the relevant market is not foreclosed if the quantitative criterion is applied. First, as regards the duration of the restriction, it was established in the Langnese-Iglo case that the agreements in question had been concluded for five years and had an average duration of two and a half years; however, the freezer cabinet agreements are terminable at will (see paragraph 43 above).

Second, HB claims that, in the Langnese-Iglo case, the Court’s assessment of the foreclosure effect of the agreements at issue was based on the fact that the agreements excluded competing suppliers entirely from the relevant outlets. By contrast, the freezer exclusivity clause has no such effect. A competitor may convince the retailer of the merits of its products and so obtain access to his sales outlet.

Third, HB submits that in paragraph 105 of the Langnese-Iglo judgment the Court applied a two-tier test based on a ‘tying-in’ threshold of 30% in order to determine whether certain agreements had the effect of foreclosing the market. It is therefore necessary to convert the quantitative criteria developed in the Langnese-Iglo case in relation to outlet exclusivity, so as to apply it to freezer exclusivity. According to HB, the most appropriate method to convert those criteria is to focus on that part of the retail sector where the retailer has only an HB freezer and either no room for another freezer or considers that investment in a freezer is not economically viable. In the light of the Lansdowne survey, it is viable for a retailer to invest in his own freezer in 47% of sales outlets, accounting for over 80% of total ice-cream turnover.

HB therefore submits that the Commission has not established a causal connection between the freezer exclusivity clause and the difficulties experienced by suppliers or new entrants in penetrating the market. It concludes from this that, as the market is not foreclosed on the criteria laid down in the Langnese-Iglo case, there is no need to go to the second limb of the test, which is to look at the effect of the agreements in question in contributing to the overall degree of foreclosure of the relevant market. The judgment in Langnese-Iglo suggests that the Commission ought to have pointed to other features of the economic and legal context which it claims lead to significant foreclosure in the relevant market.
The Commission, supported by the interveners, submits that the exclusivity clause is contrary to Article 85 of the Treaty in that it restricts the freedom of retailers and prevents access to the market. It states that the clause operates as a de facto tie for two categories of retailers, namely ‘those who might add an additional freezer or those who might replace an existing freezer’. The contested decision demonstrates that retailers are reluctant to install an additional freezer because this requires giving up space which could be used for other products. The contested decision also shows that retailers who have no space but could replace an existing freezer, either by a freezer supplied by another manufacturer or by their own freezer, are reluctant to do so because replacing a freezer involves additional responsibilities like maintenance (for retailers buying their own freezers) or the loss of HB products (for retailers taking a freezer from another ice-cream manufacturer).

According to the Commission, the real question to be addressed by the Court is whether the contested decision has provided sufficient proof of its conclusion at paragraph 143 that ‘this restriction has the consequence that those competing suppliers are precluded from selling their products to those outlets, thereby restricting competition between suppliers in the relevant market’. The Commission contends that the contested decision clearly sets out the difficulties faced by retailers who wish to sell other brands of ice cream.

The Commission observes that the contested decision is simply intended to restore the commercial freedom of retailers and so allow rival producers to compete on the merits of their products. The real question is whether retailers, who are ultimately paying for the freezers in their shops, should be free to stock the ice-cream brand of their choice in those freezers. The contested decision has demonstrated the dilemma faced by retailers wishing to stock other brands of ice cream. If, in order to sell non-HB ice cream, the retailer must either install an additional freezer or cease to sell HB products, he will be reluctant to sell other brands. As a result, that outlet is closed off to any rival brand, regardless of the merits of the product. The Commission considers that this dilemma is exactly the same as that which it had identified in the judgment in *Langnese-Iglo v Commission*, cited above, at paragraph 108, and in Case T-9/93 *Schöller v Commission* [1995] ECR II-1611, paragraph 84. In those judgments the Court found that the Commission was right to regard freezer exclusivity agreements as ‘contributing to making access to the market more difficult.’

According to the Commission, HB exploits this dilemma for its own purposes by using the exclusivity clause as a barrier to the entry of new competitors. HB’s expenditure on freezers enables it to keep other suppliers out of the market. It also contests HB’s arguments that retailers are satisfied with their agreement with HB and have no interest in selling other brands of ice cream. The Commission accepts that the exclusivity clause presents advantages for the parties but observes that this fact does not mean that it does not contain any anti-competitive element.

With regard to the opportunity for retailers to terminate their agreement with HB, the Commission submits that a key element to be taken into consideration is the economic effect of the agreement. The Lansdowne survey shows that retailers who have an HB freezer rarely exercise their right to replace it with a freezer of another brand or to purchase their own freezer.

The Commission also submits that it is possible to separate the supply of ice cream from the supply of the freezer. It is not necessary for ice-cream manufacturers to own freezers. HB accepts that distinction, because in 1995 and 1996 it made two separate proposals to the Commission, which separated the ownership of freezers from the supply of ice cream, and were intended to allow it to obtain exemption under Article 85(3) of the Treaty.

Mars submits that by making success in the marketplace depend on success in gaining access to retail outlets, freezer exclusivity distorts the competitive process by conferring on the existing supplier an unfair advantage over smaller suppliers or newcomers in that market who are unlikely to have a full range of established products.

The Commission disputes HB’s claim that 6% of the relevant market is foreclosed rather than the 40% referred to in the contested decision.

The contested decision shows how difficult it is for a new entrant to gain access to the relevant market owing to the existence of the exclusivity clause (recitals 185 to 200). In any event, there is a causal
connection between the practice of HB freezer cabinet provision and the low market shares achieved by its competitors (recitals 185 to 194).

The Commission disputes HB’s argument to the effect that the agreements concluded with retailers fall outside the scope of Article 85 of the Treaty because of the application of the rule of reason and the judgment in Pronuptia. The provisions of the agreement examined by the Court of Justice in the judgment in Pronuptia were different.

Similarly, the Commission disputes HB’s interpretation of the judgment in Delimitis (see paragraph 55 above). It observes that in that judgment the Court of Justice examined whether it was possible for a new competitor to penetrate the bundle of contracts existing on the relevant market. Contrary to HB’s assertion, the minimum number of sales outlets necessary for the profitable operation of a distribution system is not a test used by the Court as a factor in assessing whether there are concrete possibilities of market penetration.

In Delimitis the Court of Justice stated that it was first necessary to establish whether there is clearly ‘a bundle of similar contracts’ in the relevant market. In Ireland the majority of freezers installed in outlets are supplied by HB (recital 152 of the contested decision). It is then necessary to examine whether there are opportunities for penetration of the relevant market. The Commission disputes that there are such possibilities in the present case. Thirdly, the Court of Justice suggested in its judgment in Delimitis that it is necessary to take into account the conditions under which competitive forces operate on the relevant market. The contested decision identifies the difficulties caused for new entrants by the fact of the exclusive use of HB freezers, which discourages retailers from stocking other products and creates logistical and cost barriers to market entry. The Commission submits that HB’s argument that a new entrant must be assumed to compete in the manner which is characteristic of the industry is not to be found in any of the cases cited by HB and would be unacceptable if the industry as a whole engaged in practices contrary to Article 85 or 86 of the Treaty.

The Commission submits that the degree of dependence referred to in the judgment in Delimitis is merely one factor amongst others in the economic and legal context in which a network of contracts must be assessed and that this is also apparent from the judgments in Langnes-Iglo v Commission and Schöller v Commission.

The analysis by the Court of First Instance in the last mentioned cases must, according to the Commission, be applied in the present case. The Court’s conclusion that exclusivity clauses relating to freezers make access to the market more difficult is applicable to the exclusivity clause at issue, because the Court there confirmed that the need for a new entrant to create a network of retailers for itself did constitute a barrier to market entry.

Findings of the Court

In its first two pleas, HB complains that the Commission committed a number of manifest errors in analysing the existence and extent of foreclosure of the relevant market resulting from the distribution agreements in question. It submits in particular that the Commission, by materially overestimating the degree of market foreclosure, infringed Article 85(1) of the Treaty.

HB challenges, more specifically, the Commission’s principal finding in the contested decision that 40% of sales outlets in Ireland are de facto tied to HB by the exclusivity clause and that access to those outlets is therefore foreclosed to other suppliers (see in particular recitals 143, 156 and 184). It submits that this conclusion is fundamentally wrong in law and in fact, as the Commission has not correctly applied the legal test for establishing whether the relevant market is foreclosed. HB complains that the Commission made no distinction between, on the one hand, retailers who are contractually precluded from stocking other suppliers’ ice creams and, on the other hand, those who are free to act in that way and have available space for that purpose, but who decide, using their own business judgment, not to do so. HB considers that retailers freely choose to stock its ice creams in particular because of the quality of its products. It submits that the fact that other manufacturers find it difficult to establish themselves on the relevant market is not due to the exclusivity clause but to the fact that their ice creams are less attractive to retailers and consumers.
It is apparent from the contested decision that the Commission examined not only the provisions of HB's distribution agreements, which do not formally preclude retailers from stocking other suppliers' ice creams in their sales outlets, but also the application of those agreements in the relevant market and the commercial options actually open to retailers pursuant to those agreements. After analysing the possibilities of persuading a retailer to stock the ice creams of a new entrant on the relevant market, the Commission considered that in respect of 40% of sales outlets - namely those having only freezer cabinets supplied by HB in which to stock ice creams and which do not therefore have either their own freezer or freezers provided by other ice-cream manufacturers - it was 'unlikely' that retailers would take the necessary steps to replace HB freezers by their own freezer or by a freezer supplied by a competing manufacturer or that they would provide space in which to install an additional freezer. It concluded from this that the exclusivity clause in the HB distribution agreements in fact operated as an outlet exclusivity in those 40% of sales outlets in the relevant market and that HB had contributed materially to a foreclosure of that market contrary to Article 85(1) of the Treaty.

The views of the parties differ as to the correctness of the Commission's factual analysis of the particular features of the relevant market in the contested decision and of its finding, based on that analysis, that the exclusivity clause infringes Article 85(1) of the Treaty.

It must also be pointed out that despite the highly detailed arguments submitted in their written pleadings and at the hearing with regard to the facts of the present case and the conclusions to be drawn from them, the parties do not really disagree on various features of the relevant market (see paragraph 42 above), and particularly the following:

- impulse ice-creams must be stored at a low temperature and therefore in a freezer cabinet in the retailer's premises;

- in Ireland and throughout Europe, manufacturers and distributors of ice creams generally adopt the practice of supplying freezers to retailers on the basis of an exclusivity clause. Owing to the exclusivity clause, a retailer who has one or more HB freezers only and who wishes to sell another brand of ice cream must either replace the HB freezer or freezers or install an additional freezer;

- unlike the clauses in the supply agreements at issue in the judgments in Langnese-Iglo v Commission and Schöller v Commission, which required retailers in Germany to sell in their outlets only products purchased directly from Langnese-Iglo and Schöller companies, the exclusivity clause in the present case does not preclude retailers from selling brands of ice creams other than HB, provided that the freezers made available by HB are used exclusively for its own products;

- HB has long held the position of 'market leader' in Ireland for impulse ice-creams. Its product range in Ireland is very popular and commercially very successful. It has acquired that position following considerable investment in the development and promotion of a full range of ice creams, which enjoy a high degree of brand recognition in Ireland;

- in accordance with the provisions of the HB distribution agreements, retailers who have entered into a freezer supply agreement may terminate that agreement at any time on giving two months notice. It is common ground that in practice HB does not enforce that period of notice on retailers who wish to terminate the agreement more quickly or with immediate effect;

- for the majority of retailers in Ireland, impulse ice-creams are a marginal product (in that they represent merely a small percentage of their turnover and profit) which is sold seasonally. Impulse ice-creams compete in the outlets for selling space, with a number of other products (whether or not impulse products);

- HB is part of the Unilever group. The companies in that group are the principal suppliers of ice creams in most of the Member States. In the impulse ice-cream sector, they are the market leader in several Member States.
The Court observes, as a preliminary point, that the exclusivity clause does not require retailers to sell only HB products in their sales outlets. Consequently, that clause is not, in formal terms, an exclusive purchasing obligation whose object is to restrict competition on the relevant market. The Court must therefore first examine whether the Commission has adequately proved, in the specific circumstances of the relevant market, that the exclusivity clause relating to freezer cabinets in reality imposes exclusivity on some sales outlets and whether the Commission correctly quantified the degree of that foreclosure. The Court must then ascertain, as appropriate, whether the degree of foreclosure is sufficiently high to constitute an infringement of Article 85(1) of the Treaty. Judicial review of Commission measures involving an appraisal of complex economic matters must be limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (see, to that effect, Joined Cases 142/84 and 156/84 BAT and Reynolds v Commission [1987] ECR 4487, paragraph 62, Case C-225/91 Matra v Commission [1993] ECR I-3203, paragraphs 23 and 25, Case T-7/92 Asia Motor France and Others v Commission [1993] ECR II-669, paragraph 33).

The assessment in the contested decision of the degree of foreclosure of the relevant market is principally based on information and statistical data contained in the Lansdowne survey. Moreover, the decision often refers to a survey of the relevant market commissioned by HB and completed in 1996 by Behaviour & Attitudes Ltd, a market research firm, (hereinafter ‘the B & A survey’) and a survey carried out in 1996 by Rosslyn Research Ltd for Mars (hereinafter ‘the Rosslyn survey’). Those surveys contain two types of information: first, purely factual information relating to the number of sales outlets in Ireland, the number of freezer cabinets per sales outlet and the calculation of the number of cabinets belonging to retailers or supplied by ice-cream manufacturers and, second, evaluations of statistical data supplied in a survey of a representative sample of retailers in Ireland. The Commission’s finding in recital 156 of the contested decision is based on an analysis of the information and relevant data from those surveys, its conclusion being that in 40% of sales outlets in the relevant market the only freezer cabinet/s for the storage of impulse ice-cream in place in the outlet had been provided by HB (see recitals 87 to 125 and 146 to 156 of the contested decision). The parties do not contest the overall correctness of that figure and, in its observations on the 1997 statement of objections, HB confirmed that it accepted that figure.

When examining the correctness of the Commission’s assessment of the existence and degree of market foreclosure, the Court cannot confine itself to looking at the effects of the exclusivity clause, considered in isolation, referring only to the contractual restrictions imposed by HB’s distribution agreements on individual retailers.

In order to determine whether HB’s exclusive distribution agreements fall within the prohibition contained in Article 85(1) of the Treaty, it is appropriate, in accordance with the case-law, to consider whether all the similar agreements entered into in the relevant market and the other features of the economic and legal context of the agreements at issue, show that those agreements cumulatively have the effect of denying access to that market to new competitors. If, on examination, that is found not to be the case, the individual agreements making up the bundle of agreements cannot impair competition within the meaning of Article 85(1) of the Treaty. If, on the other hand, such examination reveals that it is difficult to gain access to the market, it is then necessary to assess the extent to which the agreements at issue contribute to the cumulative effect produced, on the basis that only those agreements which make a significant contribution to any partitioning of the market are prohibited (Delimitis, paragraphs 23 and 24, and Langnieux-Iglo v Commission, paragraph 99).

It follows that, contrary to HB’s submission, the contractual restrictions on retailers must be examined not just in a purely formal manner from the legal point of view, but also by taking into account the specific economic context in which the agreements in question operate, including the particular features of the relevant market, which may, in practice, reinforce those restrictions and thus distort competition on that market contrary to Article 85(1) of the Treaty.

In that regard, it must be remembered that the exclusivity clause in HB’s distribution agreements was part of a set of similar agreements concluded by manufacturers on the relevant market and was an established practice not only in Ireland but also in other countries (see paragraph 79 above).

Thus, HB does not dispute that in 1996 around 83% of retail shops in Ireland had freezers supplied by a manufacturer and were subject to conditions similar to those of the exclusivity clause. The practical consequence of that network of agreements is that ice-cream manufacturers which do not have a freezer
cabinet installed in one or other of those 83% of outlets are unable to gain direct access to them in order to sell their products unless the retailer either replaces an existing cabinet with his own cabinet or a cabinet supplied by the new supplier, or installs another cabinet of his own or one belonging to the new supplier. Without infringing the terms on which the freezer cabinet in question is supplied, a retailer cannot use it to stock ice cream from another manufacturer alongside those of the supplier of the cabinet, even if there is a demand for those other brands. It follows that only 17% of outlets had freezer cabinets belonging to the retailer and, consequently, had capacity to stock ice cream from any supplier. Furthermore, according to the Lansdowne survey, 61% of freezer cabinets supplied by an ice-cream manufacturer on the relevant market come from HB, 11% from Mars, 9% from Valley and 8% from Nestlé (see recital 88 of the contested decision). According to the Rosslyn survey, 64% of freezer cabinets supplied by an ice-cream manufacturer on the relevant market come from HB, 14% from Mars and 4% from Valley (see recital 107 of the contested decision).

87. It is apparent from the file that the outlets which are the most important for the sale of impulse ice-cream are generally small in area and have limited space (see recital 43 of the contested decision). The Court finds that HB's argument referred to in paragraph 47 above, namely that the Commission overestimated the space constraints faced by retailers, cannot be accepted. Even if, as HB submits in its written pleadings, the number of freezers in Ireland increased by around 16% between 1991 and 1996 that does not mean that when the contested decision was adopted there were no such constraints. The legality of the contested decision must be assessed by reference to the facts existing when it was adopted. The Court observes that HB does not dispute the Commission's finding that in 1996 (see recital 147), that is to say just after the increase in the number of freezers in Ireland on which HB relies and two years before the contested decision was adopted, the optimal number of freezers necessary in an outlet at the height of the season had almost been achieved. Furthermore, according to the Lansdowne survey, 87% of retailers consider that it is not economically viable to allocate space to the installation of an additional freezer (see recital 97 of the contested decision).

88. Furthermore, it cannot be denied that the relevant product market is characterised by the need for each retailer to have at least one freezer - either owned by him or supplied by an ice-cream manufacturer - in order to stock and display ice creams (see paragraph 79 above). Consequently, the decision that a retailer who sells products for immediate consumption, such as confectionery, crisps and carbonated drinks, has to take is different where, on the one hand, an ice-cream manufacturer offers to sell him its products, as a replacement or supplement to an existing range, and, on the other hand, where a similar offer is made by a manufacturer of other products, such as cigarettes or chocolates, which do not require a freezer cabinet but normal shelf space. A retailer cannot simply stock a new range of ice creams alongside other existing products for a trial period in order to establish whether there is sufficient demand for that range. He must first of all take a business decision as to whether the investment, risks and other disadvantages associated with the installation of a freezer or an additional freezer, including the displacement and decrease in the sales of other brands of ice cream and other products, will be outweighed by additional profit. It follows that a rational retailer will allocate space to a freezer in order to stock ice cream of a particular brand only if the sale of that brand is more profitable than the sale of impulse ice-creams of other brands and of other products for immediate consumption.

89. The Court finds that, in the circumstances set out in particular in paragraphs 85 to 88 above, the provision of a freezer 'without charge', the evident popularity of HB's ice cream, the breadth of its range of products and the benefits associated with the sale of them are very important considerations in the eyes of retailers when they consider whether to install an additional freezer cabinet in order to sell a second, possibly reduced, range of ice cream or, a fortiori, to terminate their distribution agreement with HB in order to replace HB's freezer cabinet either by their own cabinet or by one belonging to another supplier, which would, in all probability, be subject to a condition of exclusivity.

90. Moreover, HB has held a dominant position on the relevant market for several years. When the contested decision was adopted it had an 89% share of the relevant market, both in volume and in value, the remainder being shared between several small suppliers (see the Court's findings in paragraphs 155 and 156 below). That dominant position is also illustrated by the high degree of recognition of the HB brand and the size and popularity of its product range in Ireland. The Court considers that the Commission, when assessing the effects of the exclusivity clause on the relevant market, could legitimately take into account the fact that HB held a dominant position on it in order to assess the conditions prevailing on that market and that the assessment was not, contrary to HB's submission, 'distorted'. It is settled law that the finding that an undertaking has a dominant position is not in itself a ground of criticism of the undertaking.
Consequently, the Commission, in taking into consideration the popularity of HB's ice creams and its position on the relevant market, is not penalising it for its legitimate business success. It has merely identified the effective dependence of retailers which results from the presence in the sales outlets of freezer cabinets supplied by HB, the dominant position of HB on the relevant market, the popularity of its product range, the constraints associated with the lack of space characterising typical sales outlets, the disadvantages and risks associated with stocking a second range of ice cream, as features that all form part of the economic context of the present case.

The Court finds that the effect of the measures taken by HB in order to ensure compliance with the exclusivity clause is to cause retailers to act differently in regard to its products than they do in regard to the ice creams of other brands and in a way which is liable to distort competition in the relevant market. Those effects are clearly shown by the fact that the retailers do stock ice creams of other brands alongside those of HB, in the same freezer, whenever they consider that they are free to do so.

It is apparent from the file and from the contested decision (see recital 48) that after its entry onto the relevant market in 1989 Mars gained a share of it, but that the reaction of HB, and its insistence that retailers complied with the exclusivity clause, reversed that development. Following the injunction against Mars granted by the High Court in 1990, which prohibited it from inducing retailers to stock its ice creams in HB freezers, the numeric distribution of its ice creams for immediate consumption in Ireland fell from 42% to less than 20%. This fact in itself indicates that there was a demand on the relevant market for products manufactured by HB's competitors and that the exclusivity clause does have a bearing on the ability of its competitors to penetrate that market and establish themselves on it.

The B & A survey also shows that a significant proportion [...] (2) % (more than 35%) of retailers would be prepared to stock a wider range of products if the exclusivity clauses no longer existed in the distribution agreements of ice-cream manufacturers (see recital 120 of the contested decision), which shows that the effect of those clauses may be, contrary to HB's arguments (see paragraph 51 above), to reduce not only the choice of consumers but also price competition between suppliers. Similarly, contrary to HB's submission, the fact that around 44% of sales outlets sell two brands of ice cream does not show that intra-brand competition is not affected by the exclusivity clause.

Furthermore, in Irish supermarkets that do not practise freezer-cabinet exclusivity, the ice creams of suppliers other than HB are sold alongside HB products. At the hearing, Richmond stated that in Ireland it supplies 65% of supermarkets and only 8% of retailers. Moreover, it must be pointed out that in the United Kingdom, where the distribution system for impulse ice-creams is different, Richmond has obtained a market share of 24%, whereas its share of the relevant market is no more than 2%. All those factors confirm that where it is possible to stock a second brand of ice cream in one and the same freezer, a significant number of retailers are prepared to do so. The fact that they do not do so is the result of the prevalence of exclusivity clauses in the relevant market.

The Court also notes that the Commission's conclusion that entry onto the relevant market by HB's competitors is hindered by the existence of the exclusivity clause is confirmed by HB's own assessment of the advantages of that clause. It is apparent from the contested decision that the Unilever group, upon the entry of Mars into the European market at the end of the 1980s, placed particular importance on the supply of freezer cabinets intended for the exclusive use of its companies (see recitals 64 to 68 of the contested decision) and itself took the view that this practice might have the effect of imposing exclusivity on the sales outlets in question. In a document of the Unilever group of 1989, entitled 'European ice cream marketing strategy', reference is made to the importance of the exclusivity clause and to the maintenance of the scheme of retaining ownership of the freezers, in the following terms:

'We must retain ownership of the cabinet, particularly where distribution is performed by third parties, in order to retain, as far as possible through exclusivity contracts, sole brand supply to the fridge, and de facto, to the outlet.'
In the light of the foregoing, the Court finds that the Commission has proved to the required legal standard that, notwithstanding the high degree of recognition of HB's products on the relevant market and the fact that it offers a complete range of ice creams, many of which are highly popular with consumers, there is objective and specific evidence demonstrating the existence of demand in Ireland for the ice creams of other manufacturers where they are available, even though those manufacturers have a smaller range of ice creams, namely the ice creams of manufacturers who, like Mars, occupy quite specific niches. The Commission has shown in that regard that a considerable number of retailers are prepared to stock impulse ice-creams from various manufacturers, provided that they may stock them in one and the same freezer and that they are not inclined to do so when they have to install an additional freezer of their own or one belonging to another manufacturer. Consequently, the Court cannot accept HB's argument that the reluctance of retailers to sell products of other ice-cream manufacturers must be attributed not to the exclusivity clause but rather to the fact that there is no demand for those products on the relevant market.

The Court also finds that the Commission rightly held, having regard to the specific features of the product in question and the economic context of this case, that the network of HB's distribution agreements together with the supply of freezer cabinets 'without charge' subject to the condition of exclusivity, have a considerable dissuasive effect on retailers with regard to the installation of their own cabinet or that of another manufacturer and operate de facto as a tie on sales outlets that have only HB freezer cabinets, that is to say 40% of sales outlets in the relevant market. Despite the fact that it is theoretically possible for retailers who have only an HB freezer cabinet to sell the ice creams of other manufacturers, the effect of the exclusivity clause in practice is to restrict the commercial freedom of retailers to choose the products they wish to sell in their sales outlets.

However, HB submits that, if the Court were to conclude that the exclusivity clause operates as a de facto tie in regard to the sales outlets, the degree of foreclosure resulting from its distribution agreements is no more than 6% of the entirety of sales outlets on the relevant market and does not lead to an appreciable restriction of competition on that market. It therefore considers that the Commission's finding that 40% of sales outlets of the relevant market are in fact foreclosed is manifestly erroneous. HB says that this percentage is too high, in particular because it includes three categories of sales outlets which cannot be regarded as foreclosed (see paragraph 46 above). It states in that regard that, in order to calculate the degree of foreclosure of the relevant market, account should be taken only of sales outlets where retailers wish to change their ice-cream supplier but are unable to do so.

Those arguments must be rejected.

Contrary to HB's submission (see paragraph 46 and 47 above), in the 6% of sales outlets with more than one HB freezer cabinet (and which therefore have space to install more than one cabinet) the retailers are not likely to replace an HB cabinet unless they take the view that this replacement and the sale of another brand of ice cream will enable them to obtain at least the same turnover as that which they previously achieved with HB ice creams. It is apparent from the file that in reality retailers only very rarely opt to replace one of the freezer cabinets supplied by HB with their own cabinet or with one belonging to another manufacturer, particularly because of the position and popularity of HB on the relevant market.

The Court considers that the 6% of sales outlets in question together with the 27% of sales outlets which have an HB freezer cabinet, and in which the retailers are allegedly not interested in stocking a brand of ice cream other than HB (according to the analysis made by HB of the Lansdowne survey data), must not be excluded when calculating the degree of foreclosure of the relevant market. Owing to the operation of the exclusivity clause, those retailers are faced with a situation which distorts their business options. In the light particularly of HB's position on the relevant market, the fact that none of its competitors has a range of products as well known or complete as its own, and the space constraints already referred to in paragraph 87 above, the ability of the retailers concerned to sell products of other manufacturers, especially where those manufacturers have a limited range of products, is in general an insufficient inducement to replace HB freezer cabinets or to install another cabinet (see, by analogy, Langnese-Igho v Commission, paragraph 108).

With regard to the third category of sales outlets, namely those in which retailers are allegedly interested in stocking other brands of ice cream and are able to do so but have not done so, their number varies between 2% and 5% - according to the figures submitted by HB and based on the analysis of the Lansdowne survey. Even though this category was not clearly defined by HB, it still represents only a tiny part of the 40% total and is not such as to invalidate the Commission's finding in the contested decision.
that the identified part of HB's network of agreements involved around 40% of all sales outlets on the relevant market.

Furthermore, with regard to the two latter categories of sales outlets, the Court also observes that the figures presented by HB based on its analysis of the Lansdowne survey are not such as to vitiate the Commission's assessment of the degree of foreclosure of the relevant market. In the absence of any indication on the part of HB of the reasons for which, first, 27% of the sales outlets in question are not interested in stocking a brand of ice cream other than HB and, second, 2% to 5% of the sales outlets in question which are interested in stocking other brands nevertheless do not take the steps necessary to do so, the Court considers that it is entirely possible that the circumstances are attributable to the factors identified by the Commission (see in particular recitals 157 to 184 of the contested decision) which reinforce the restrictions on competition in the relevant market resulting from the exclusivity clause and in fact create commercial dependence of retailers on HB.

As to HB's argument alleging that the freezer cabinet exclusivity imposed by the exclusivity clause cannot be regarded as an outlet exclusivity because the retailers have the option of terminating their distribution agreements with HB at any time, the Court considers that this possibility in no way precludes the effective enforcement of the agreements in question during the period in which that option is not used. Consequently, in assessing the effects of the distribution agreements on the relevant market, the Court must take their actual duration into consideration (see, by analogy, Langnese-Iglo v Commission, paragraph 111). HB rightly submits that, unlike the situation in other Member States, where the exclusivity clause is combined with a contractual obligation of several months or even several years, the situation in the present case, as the Commission acknowledges, offers retailers the possibility of terminating the exclusivity clause on very short notice, or even immediately. Such an argument might be convincing if that option were exercised in practice and if outlets were thus to become regularly available to new entrants on the relevant market. However, as the Commission has shown, that is not the case, because HB's distribution agreements are terminated on average every eight years. It follows that the argument to the effect that it is possible to terminate the HB distribution agreements is unsound, since the possibility of so doing does not in fact operate to reduce the degree of foreclosure of the relevant market.

As regards HB's argument relating to application of the rule of reason in the present case, the Court would point out that the existence of such a rule in Community competition law is not accepted. An interpretation of Article 85(1) of the Treaty, such as suggested by HB, is moreover difficult to reconcile with the structure of the rules prescribed by Article 85.

Article 85 of the Treaty expressly provides, in its third paragraph, for the exemption of agreements that restrict competition where they satisfy a number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is only within the specific framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed (see, to that effect, Case 161/84 Pronuptia [1986] ECR 353, paragraph 24, and Case T-17/93 Matra Hachette v Commission [1994] ECR II-595, paragraph 48, and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 European Night Services and Others v Commission [1998] ECR II-3141, paragraph 136). Article 85(3) of the Treaty would lose much of its effectiveness if such an examination had already to be carried out under Article 85(1) of the Treaty (see, to that effect, Case C-235/92 P Montecatini v Commission [1999] ECR I-4539, paragraph 133; Case T-14/89 Montedipe v Commission [1992] ECR II-1155, paragraph 265; Case T-148/89 Trifiliunt v Commission [1995] ECR II-1063, paragraph 109, and also Case T-112/99 M6 and Others v Commission [2001] ECR II-2459, paragraphs 72 to 74).

Furthermore, it cannot be inferred with certainty from the sole fact that the identified part of the HB network of agreements involved around 40% of all sales outlets in the market, that that part is automatically capable of preventing, restricting or distorting competition appreciably. That implies, as HB contended at the hearing, that 60%, therefore a majority, of sales outlets in the relevant market are not foreclosed as result of the exclusivity clause.

When assessing the effects of such a network of distribution agreements, it is necessary to have regard to the economic and legal context in which it operates and in which it might combine with others so as to have a cumulative effect on competition (see Delimitis, paragraph 14, and Langnese-Iglo v Commission, paragraph 100).
In the present case, the Commission took into consideration in the contested decision the effects on competition not only of HB’s distribution agreements but also of the various networks of agreements relating to freezer cabinets that were subject to an exclusivity clause, operated by other suppliers on the relevant market. According to the contested decision, 55% of sales outlets possessed only one or two HB freezer cabinets, 14% had one HB cabinet and a Mars cabinet, 7% had an HB cabinet and a cabinet from a manufacturer other than Mars (recital 108). The Commission also observed that the exclusivity condition applicable to freezer cabinets in 83% of the sales outlets on the relevant market (see paragraphs 18 and 86 above) constituted a significant practical and financial obstacle to market entry and to the expansion of other suppliers (see recitals 185 to 194).

111. The Court finds that, given that suppliers other than HB also make freezer cabinets available to retailers under very similar conditions (see in particular paragraph 85 above) and with the same constraints in terms of space, the Commission rightly held in the contested decision that the difficulties encountered in the outlets equipped only with HB freezer cabinets, in persuading retailers to replace the existing HB cabinet or to install additional freezer cabinets for impulse ice-creams, apply also to any freezer cabinet subject to a condition of exclusivity, even if the other suppliers do not have the same position and same popularity as HB on the relevant market. Competing suppliers are in effect prevented from gaining access to the relevant market by a series of factors including the burden which the purchase and maintenance of a freezer cabinet represents for retailers, their aversion to risk and their reluctance to sever established relations with their suppliers. It follows that the networks of agreements in place on the relevant market affect 83% of outlets in that market.

112. However, the extent of tying-in brought about by networks of agreements, although of some importance in assessing the partitioning of the market, is only one factor amongst others pertaining to the economic and legal context in which the network of agreements must be assessed (see Delimitis, paragraphs 19 and 20, and Langnes-Iglo v Commission, paragraph 101). It is also necessary to analyse the market conditions and in particular the real and specific opportunities for new competitors to penetrate that market notwithstanding the existence of those networks.

113. The Court also finds that the Commission rightly held in the contested decision that the provision to retailers of freezer cabinets subject to a condition of exclusivity and the running maintenance costs of those freezers represent a financial barrier to the entry of new suppliers on the relevant market and to the expansion of existing suppliers. The Court finds that there is no objective link between the supply of freezer cabinets subject to a condition of exclusivity and the sale of ice-creams. It is apparent from the contested decision that retailers are not inclined to accept freezer cabinets from suppliers who do not offer terms that are at least as advantageous as those offered by the suppliers of the cabinets already in place in the outlets concerned, or those offered by suppliers to that market in general. In the context of the relevant market, that means that the supplier must be ready to offer a freezer cabinet ‘without charge’ and to service it. It follows that, in accordance with the Commission’s findings in the contested decision (see in particular recital 189), the expense involved in acquiring a stock of freezer cabinets for installation in outlets which will ensure that the supplier’s products can achieve viable distribution levels, renders it very difficult to enter the relevant market, particularly for small companies and the suppliers of impulse ice-creams which occupy quite specific niches, because it is difficult to justify the investment in freezer cabinets from suppliers who offer a smaller range of products. Moreover, HB’s argument, set out in paragraph 59 above, that it is viable for 47% of outlets to have a freezer owned by the retailer, must be rejected because, given the practice not only of HB but also of other suppliers of making freezers available ‘without charge’ to retailers, the latter have no reason to buy their own freezer.

114. The Court also finds that HB has not proved to the requisite legal standard that it is impractical to impose a separate rental in respect of the supply of freezers (see paragraph 50 above). It is apparent from the contested decision that in Northern Ireland HB charges retailers an annual rent for the loan of its freezer cabinets and applies a price reduction to products which it supplies to retailers with their own cabinets (see recital 127). It follows that, having regard to the fact that it is possible to charge a separate rent for the supply of freezers in another geographic market, it cannot be regarded as necessary to have an exclusivity clause in order for a given supplier to prevent his competitors from using his freezers to stock their products. For the same reason, it cannot be claimed that HB would be obliged, without remuneration, to carry on its balance sheet freezer cabinets for use not only in its business but also in the business of its retail customers and competitors (see paragraphs 49 and 50 above).
Furthermore, although it is not disputed that the provision to retailers of freezer cabinets presents certain economic and practical advantages for suppliers of ice creams and for retailers, the Court holds that, when the supply of freezer cabinets to retailers is the subject of an exclusivity clause, the economic advantages of that practice are, in the conditions prevailing in the relevant market, counterbalanced by its negative effects on competition. It follows that the Court cannot accept the argument, put forward by HB in its pleadings, to the effect that this practice should be criticised only if there were no objective commercial justification for it.

In addition, it is apparent from the file that the fact that independent wholesale of impulse ice-cream is undeveloped in Ireland means that access to distribution via such independent intermediaries is rendered more difficult. Furthermore, the strength of existing brands in the relevant market and customer loyalty towards them amount to a formidable obstacle to new entrants (see recital 195 of the contested decision).

As to HB's argument that the relevant market is disputed by at least five manufacturers, it is apparent from the file that the other suppliers of impulse ice-creams hold only very small market shares. During the period June/July 1997, Mars, HB's biggest competitor on the market, had a market share of merely 4% to 5% in volume and in value. Furthermore, the market share held by Mars, Valley and Leadmore fell during the years preceding the adoption of the contested decision (see recitals 32 to 37). The Court therefore holds that the weak market shares held by HB's competitors are, at least in part, attributable to HB's practice of making freezer cabinets available without charge.

In the light of all the foregoing, the Court finds that it is clear from an examination of the entirety of the similar distribution agreements concluded on the relevant market, and other evidence of the economic and legal context of which those agreements form part, that the distribution agreements concluded by HB are liable to have an appreciable effect on competition for the purposes of Article 85(1) of the Treaty and contribute significantly to a foreclosure of the market.

The first and second pleas, alleging manifest errors of assessment of the facts and infringement of Article 85(1) of the Treaty are accordingly rejected.

The third plea: errors in law in applying Article 85(3) of the Treaty

Arguments of the parties

HB claims that the exclusivity clause falls within the scope of Article 85(3) of the Treaty and may be the subject of an exemption. It disputes the Commission's assertion in the contested decision that the restrictive effects of such agreements outweigh the advantages flowing from the distribution efficiency produced by them. Likewise it disputes that those advantages accrue solely to it and its retailers and are not, in the light of a broader public interest, of such a character as to compensate for the disadvantages which those agreements have for competition. Finally, HB disputes the findings in recital 234 of the contested decision that the advantage of total territorial coverage resulting from the exclusivity clause cannot outweigh the disadvantages of the foreclosure of the market caused by HB's network of freezer cabinet agreements.

HB claims more specifically that the contested decision is vitiated by three fundamental errors of law in relation to Article 85(3).

First, it submits that the contested decision contains a fundamental logical flaw with regard to the relationship between Article 85(1) and Article 85(3) of the Treaty. It states that according to the contested decision, Article 85(3) of the Treaty requires a balancing exercise between restriction of competition and availability of benefits of a type to justify exemption (see recitals 222 to 225). According to the contested decision, by competing too effectively in providing benefits to retailers and consumers, HB restricts competition contrary to Article 85(1) of the Treaty (see recital 226). Given that the benefits in question allegedly produce a restriction of competition under Article 85(1), those benefits cannot be taken into account for the grant of an exemption under Article 85(3) of the Treaty. The Commission's argument is therefore circular.
Second, according to HB, the various conditions for the application of Article 85(3) of the Treaty are cumulative, in the sense that each of the criteria must be satisfied before an exemption can issue. However, the question whether the criteria are satisfied must be the subject of a separate examination in respect of each of them. The Commission cannot contend that the benefits produced by the HB freezer cabinet agreements are de facto negated by the restrictive effects of those agreements; the question of a substantial elimination of competition must be addressed separately from the question of the benefits arising from the agreements. The Court made the need for separate analysis clear in paragraph 122 of its judgment in *Matra Hachette v Commission*. HB observes that the Commission considers that improvement of distribution at retail level in terms of reduced costs of transport and regular supply, distribution efficiencies at supply level in planning and logistics terms, and stimulation of demand by maximisation of product availability and visibility can be ignored because of alleged negative implications for competition in the relevant market. Contrary to what is alleged by the Commission (see paragraph 130 below), once objective advantages arising from an agreement have been identified, the question of foreclosure is relevant only to the test of a substantial elimination of competition under Article 85(3) of the Treaty. Paragraph 180 of the judgment in *Langness-Iglo v Commission*, cited by the Commission, is not inconsistent with HB's arguments in that regard (see again paragraph 130 below).

Third, HB submits that the Commission erred in its examination under Article 85(3) of the Treaty in relying on the fact that the relevant market is foreclosed. The true measure of foreclosure in that market is no more than 6%.

HB also submits that the detailed application by the Commission of some of the criteria in Article 85(3) of the Treaty also constitutes an error of law. It observes that the contested decision (see recital 227) acknowledges that the wider availability of freezer cabinets in retail outlets covering the entire geographic market and brought about largely by HB's freezer cabinet network can be considered an objective advantage, particularly in the distribution of products, and that the exclusivity clause contributes to the attainment of that advantage. The Commission seeks, however, to negate the advantage by asserting that it can be assumed that HB, in the interest of profit maximisation, will continue to supply cabinets even on a non-exclusive basis. The Commission is not, however, entitled to presume that HB will continue to supply cabinets in the absence of an exclusivity clause. Moreover, HB submits that the Commission, contrary to its statements in recitals 232 and 233 of the contested decision, cannot assume that there are competing suppliers who can manufacture a range of products comparable to HB's, and as cost effectively as HB, so as to be able profitably to distribute those products to sales outlets with a turnover that is too low to interest it and to retailers who, if they should cease to be supplied with ice cream by HB, would be able to provide their own cabinets. Similarly, it submits that there is no evidence that an independent dealer could provide a distribution service more cheaply and cost effectively than HB or that the emergence of a new entrepreneurial type of independent wholesaler is precluded by reason only of HB's form of freezer cabinet agreement.

HB submits that, in the context of distribution, ‘indispensable’ does not mean that there is no other way of distributing the products, but only that the restrictions are necessary to achieve the particular marketing strategy adopted by the manufacturer which brings benefits under Article 85(3) of the Treaty. It submits that if outlet exclusivity can be regarded as indispensable to realisation of those benefits, as the block exemptions for exclusive distribution and exclusive purchasing agreements clearly recognise, the same must be true of the exclusivity clauses in respect of freezer cabinets.

HB adds that if the exclusivity clause were to be held unlawful, that would clearly adversely affect its situation and its distribution arrangements. First, it would suffer a competitive disadvantage in that a third party competitor would be able to use HB's assets without making its own investment in cabinet provision in the outlets concerned but at the same time exclude HB from any cabinets that it provides. Second, it would not be possible to make the same full product offering of HB products in the cabinet, thereby resulting in lost sales. Inasmuch as costs of cabinet provision and maintenance are recouped through sales of HB ice cream, those costs would be *pro tanto* unrecovered. Third, there would be an increase in the costs of distribution of ice cream to the outlets concerned by the contested decision and to other outlets.

HB submits that its distribution system has benefits for consumers, in accordance with Article 85(3) of the Treaty. Otherwise the Commission would not previously have been satisfied that an exemption was justified at the time when it issued the notice under Article 19(3) of Regulation No 17 (see paragraph 12 above) stating that an exemption was justified. Indeed, much of the logic of the block exemption under

129. HB adds that its distribution agreements do not afford the possibility of eliminating competition in respect of a substantial part of the products in question, since, even on the Commission’s view, 60% of the market is not foreclosed. It also observes that the reference in recital 245 of the contested decision to the fact that it is a long time since a substantial change in the competitive structure of the relevant market has occurred is wrong on the facts, inasmuch as it ignores new market entry by large and sophisticated suppliers like Mars, Nestlé and Häagen-Dazs.

130. The Commission submits that the contested decision is not vitiated by a fundamental logical flaw. An exemption can be given only after the restrictive effects of an agreement are balanced against the benefits which it produces. Those benefits ‘cannot be identified with all the advantages which the parties obtain from the agreement’. It also submits that the contested decision examines separately each of the criteria under Article 85(3) of the Treaty. It points out that in the contested decision it found that HB’s agreements did not satisfy those criteria because they did not contribute to an improvement in the distribution of goods, did not allow consumers a fair share of the benefit of that system, were not indispensable to attain the benefits claimed and left HB the possibility of eliminating competition in respect of a substantial part of the products in question. The Commission, referring more specifically to paragraph 180 of the judgment in Langnese-Iglo v Commission, and to paragraph 142 of the judgment in Schöller v Commission, submits that its analysis of the first of the four criteria set out in Article 85(3) of the Treaty is not vitiated by an error of law.

131. According to the Commission, HB’s application focuses on only one of the four criteria which have to be satisfied in order to obtain an exemption, namely an improvement in the distribution of goods or the promotion of technical or economic progress, and does not deal with the other criteria in detail. Furthermore, HB has not shown how the benefits resulting from its distribution system, if there are any, are the result of the exclusivity clause and not of other factors.

132. The Commission submits that all the requirements in Article 85(3) must be satisfied simultaneously. It also submits that HB has not disputed, nor even called into question, the findings in recitals 239 and 240 of the contested decision that the exclusivity clause reduces the choices available to consumers and does not guarantee that any savings in efficiency are passed on to them. The Commission contests HB’s assertion that the exclusivity clause could benefit from an exemption by analogy with the block exemptions for exclusive distribution and exclusive purchasing. It states that the balance between the restrictions and the benefits - of which the notion of indispensability is an important part - is different in the case of impulse ice-cream. While, for many products, vertical restraints on the freedom of retailers can be accepted because they stimulate interbrand competition, such interbrand competition is less likely for impulse products, because customers do not in general enter a shop with the intention of buying those products and do not seek to compare the products of one sales outlet with those of another. Moreover, the benefits of the block exemptions in question could be lost if there was insufficient competition in the goods in question. That occurred in the Langnese-Iglo case. In addition, the fact that HB might suffer detriment if it abandoned a particular business practice does not mean that the practice is indispensable.

133. With regard to the criterion in Article 85(3) of the Treaty relating to the possibility of eliminating competition, the Commission states that HB has not commented on recitals 242 to 246 of the contested decision concerning the lack of competition on the relevant market and the barriers to entry facing any new entrant. The Commission states that HB merely disputes its argument that it is a long time since any substantial change in the competitive structure on the relevant market has occurred (recital 245 of the contested decision). The Commission reaffirms that the relevant market in fact continues to be dominated, at a level of 80%, by HB.

134. The Commission submits that HB’s argument, set out in paragraph 128 above, is incorrect and constitutes a new plea in law which was not raised in the application and is therefore inadmissible under Article 48(2) of the Rules of Procedure.

Findings of the Court

135.
It is settled case-law that the review carried out by the Court of the complex economic assessments undertaken by the Commission in the exercise of the discretion conferred on it by Article 85(3) of the Treaty in relation to each of the four conditions laid down therein, must be limited to ascertaining whether the procedural rules have been complied with, whether proper reasons have been provided, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers (see, to that effect, Joined Cases T-39/92 and T-40/92 CB and Europay v Commission [1994] II-49, paragraph 109; Matra Hachette v Commission, paragraph 104, and Case T-29/92 SPO and Others v Commission [1995] ECR II-289, paragraph 288). It is not for the Court of First Instance to substitute its own assessment for that of the Commission.

136.

It is also settled law that, where an exemption is being applied for under Article 85(3) of the Treaty, it is for the undertakings concerned in the first place to present to the Commission the evidence intended to establish that the agreement fulfils the conditions laid down by that provision (see, to that effect, Joined Cases 43/82 and 63/82 V'BI'B and V'BBB v Commission [1984] ECR 19, paragraph 52, and Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 45, and Langnese-Iglo v Commission, paragraph 179).

137.

The grant by the Commission of an individual exemption decision presupposes that the agreement or the decision of an association of undertakings satisfies all the four conditions laid down by Article 85(3) of the Treaty. If one of those four conditions is not satisfied, the exemption must be refused (see, to that effect, V'BI'B and V'BBB v Commission, paragraph 61; order of the Court of Justice of 25 March 1996 in Case C-137/95 P SPO and Others v Commission [1996] ECR I-1611, paragraph 34; and Matra Hachette v Commission, paragraph 104, and SPO and Others v Commission, paragraphs 267 and 286).

138.

The Court finds that, contrary to HB's submission in paragraph 123 above, it is clear from the contested decision that the Commission carried out a detailed analysis of the HB distribution agreement in the light of each of the four conditions laid down by Article 85(3) of the Treaty (see recitals 221 to 254 of the contested decision).

139.

As regards the first of those conditions, the agreements capable of being exempted are those which contribute 'to improving the production or distribution of goods or to promoting technical or economic progress'. The Court would point out in that regard that it is settled law of the Court of Justice and of the Court of First Instance that the improvement cannot be identified with all the advantages which the parties obtain from the agreement in their production or distribution activities. The improvement must in particular display appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition (Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, at 348, and Langnese-Iglo, paragraph 180).

140.

The first condition is examined in recitals 222 to 238 of the contested decision. The Commission acknowledged in particular that the agreements whereby freezer cabinets are made available might secure some or all of the benefits described in the fifth recital to Regulation No 1984/83 for HB itself and for the retailers who are the other parties to the agreements, and that the distribution method currently used by HB might offer it and its retailers certain advantages in terms of efficiency of planning, organisation and distribution. Therefore, the Commission held that those arrangements did not present appreciable objective advantages of such a character as to compensate for the disadvantages caused to competition. In support of that assertion, it pointed out that the freezer cabinet agreements in question considerably strengthened HB's position in the relevant market, especially vis-à-vis potential competitors. It rightly observed in that regard that the strengthening of an undertaking which is as important on the market as HB leads not to more but to less competition because the network of that undertaking's agreements constitutes a major barrier to the entry of others into the market, as well as to expansion within the market by its existing competitors (see in particular recitals 225 and 236 of the contested decision, and, by analogy, Langnese-Iglo v Commission, paragraph 182). It must also be pointed out that the level of foreclosure of the relevant market is in the order of 40% (see paragraph 98 above) and not 6% as HB submits (see paragraph 124 above).

141.

Consequently, the Court finds that, contrary to HB's contention (see paragraph 123 above), the Commission rightly took into consideration the barriers to entry to the relevant market resulting from the exclusivity clause, and the consequent weakening of competition, when it assessed HB's distribution agreement in the light of the first condition laid down by Article 85(3) of the Treaty (see, by analogy, Consten and Grundig v Commission at p. 348, and Langnese-Iglo v Commission, paragraph 180). It follows that the
Court cannot accept HB's argument set out in paragraph 122 above to the effect that recitals 222 to 225 of the contested decision contain a fundamental logical flaw with regard to the relationship between Article 85(1) and Article 85(3) of the Treaty, as the Commission was obliged, pursuant to settled case-law on the subject, to ascertain whether there were objective advantages of such a character as to compensate for the disadvantages which an agreement creates for competition.

The Court also notes that HB's distribution agreements have two particular aspects, namely, first, they make freezer cabinets available 'without charge' to retailers and, second, the retailers undertake to use those cabinets to stock HB ice creams only. The benefits ensured by the agreements in question are the result of the first aspect and can therefore be achieved even without the exclusivity clause.

The Court also accepts the Commission's argument in recital 227 of the contested decision that although the wide availability in outlets of freezer cabinets intended for the sale of impulse ice-creams, covering the entire geographic market and consisting mainly of HB's cabinets, could be considered an objective advantage in the distribution of those products in the public interest, it is nevertheless unlikely that HB would definitely cease to supply freezer cabinets to retailers, whatever the conditions, except in small number of cases, if its power to impose an obligation of exclusivity in respect of those freezers were to be restricted. HB has not shown that the Commission committed a manifest error in taking the view that business reality for a company such as HB, which wishes to maintain its position on the relevant market, is to be present in the maximum number of outlets possible (see recital 228 and paragraph 125 above).

Contrary to HB's submission, the Commission did not merely assume continuity of provision by HB of freezer cabinets on the relevant market, but carried out a prospective analysis of the operation of the market after the adoption of the contested decision. Furthermore, contrary to HB's argument (see paragraph 125 above), the Commission could validly rely on the argument that manufacturers competing with HB might adopt a policy of supplying freezer cabinets to sales outlets whose turnover in impulse ice-creams is too low to be of interest to HB, and do so upon more advantageous conditions than those which the retailers might expect to obtain themselves if HB ceased to supply freezer cabinets to certain sales outlets. Similarly, the Commission could validly point to the possibility that cabinets would be installed by independent resellers who would obtain supplies from various sources and satisfy demand from all the sales outlets from which HB had withdrawn its equipment or to which it decided not to supply equipment. HB cannot claim that the Commission's prospective analysis is vitiated by a manifest error of assessment unless it does so on the basis of concrete evidence, which HB has failed to adduce in the present case.

As HB's distribution agreements do not satisfy the first of the conditions laid down by Article 85(3) of the Treaty, the third plea must therefore be rejected and it is not necessary to consider whether the Commission committed a manifest error in regard to its assessment of the other conditions laid down by that provision. If any one of the four conditions is not satisfied, the exemption must be refused.

The fourth plea: errors of law in the application of Article 86 of the Treaty

Arguments of the parties

In its application HB does not contest the findings in the contested decision as to the existence of a dominant position, but only the finding that there was an abuse of that position (see recital 263), and in particular the fact that it induces retailiers to grant it exclusivity by supplying freezer cabinets to them and maintaining them at no direct charge to the retailer.

However, at the hearing and in its observations on the statement in intervention of Mars, HB claimed that it did not hold a dominant position. It argued that if, as the Court of Justice has held, a dominant position is defined by the capacity to retain market shares over a period of time 'without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share' (Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, paragraph 41), it manifestly does not have such a position. It observes that several other suppliers, in particular multinational undertakings such as Nestlé and Mars, have capacity which is largely sufficient to supply its retail customers if they wished to break away from HB.
HB submits that it is odd to classify as an abuse a practice which is widely employed, which the Commission does not argue has the object of restricting competition, and which is accepted as conferring benefits on the parties to the agreement.

HB contests the Commission's argument that the exclusivity clause interferes with retailers' freedom to choose suppliers on the basis of the merits of the products which they offer. Furthermore, that finding directly conflicts with recital 259 of the contested decision, which expressly recognises that a large majority of retailers choose to sell HB products and many of them exclusively so. HB adds that many of the retailers concerned would not stock ice cream at all if the freezer were not supplied to them. The supply of ice cream to small retailers and the provision of freezer cabinets improve HB's overall efficiency and increase competition. HB submits that the approach of Advocate General Jacobs in his Opinion in Case C-7/97 Bronner [1998] ECR I-7791, particularly in paragraphs 57 and 65, is also applicable to the exclusivity clause. Provision of cabinets on exclusive terms is an aspect of competition in the relevant market. HB observes that its cabinets are not an 'essential facility', since there are no material constraints preventing HB's competitors from installing cabinets in retail outlets wishing to stock alternative brands of impulse ice-cream.

HB also submits that the Commission's position on market foreclosure is unsustainable under Article 86 of the Treaty, because in all the cases in which vertical exclusivity has been held to be an abuse the Court of Justice or the Court of First Instance has expressly or implicitly applied a threshold or a de minimis test of market foreclosure (Hoffmann-La Roche v Commission; Case C-62/86 AKZO v Commission [1991] ECR I-3359, and Michelin v Commission; Case T-65/89 BPB Industries and British Gypsum v Commission [1993] ECR II-389). HB submits that, as the percentage of outlets with the potential for foreclosure by reason of HB cabinet provision is no more than 6%, the materiality threshold for an abuse alleged to consist of market foreclosure through the use of an exclusivity clause has not been achieved.

In its reply, HB observes that the Commission's analyses under Article 85(1) and Article 86 are inextricably linked to such a degree that the Commission is guilty of the 'recycling' of its Article 85 case to form an Article 86 case, in the manner criticised by the Court in Joined Cases T-68/89, T-77/89 and T-78/89 SIV and Others v Commission [1992] ECR II-1403, paragraph 360, hereinafter 'the Flat Glass judgment'.

The Commission, supported by the interveners, points out that the concept of an abuse is an objective one (Hoffmann-La Roche v Commission). Thus, the 'strengthening of the position of a dominant undertaking may be an abuse and prohibited under Article 86 of the Treaty regardless of the means and procedure by which it is achieved' (Case 6/72 Europenbhallge and Continental Can v Commission [1973] ECR 215, paragraph 27). As to HB's argument alleging that the exclusivity clause cannot constitute an abuse as it is a common practice, the Commission submits that even a common practice in the industry may be an abuse of a dominant position. It adds that HB cannot rely on the fact that the situation arises because of the free choice of retailers. HB has induced them to enter into agreements containing an exclusivity clause, and this constitutes the abuse.

The exclusivity clause constitutes a barrier to market entry and to the expansion of the relevant market and strengthens the power of the incumbent supplier on the market. Any competition by existing or potential suppliers is thereby minimised. Retailers are prevented from exercising their freedom of choice with regard to the products that they wish to stock and to the optimisation of space at the sales outlets. Moreover, consumer choice is reduced. The Commission submits that HB's practice of tying the cost of the freezer cabinet to an exclusivity clause when there is no objective link between them is at variance with conditions of normal competition for consumable items. Furthermore, the sales outlets in question represent 40% of all sales outlets on the market and not 6% as HB submits. Lastly, the Commission contends that HB has not defined the status or source of its 'materiality threshold' or explained why an abuse on such a scale cannot fall under Article 86.

The Commission also submits that the analysis which it carried out under Article 85 of the Treaty is separate from its analysis under Article 86 of the Treaty, so that HB cannot find support in the Flat Glass judgment. It states that in that judgment the Court held that the Commission had 'recycled' the facts constituting an infringement of Article 85 and had deduced from them, without carrying out any market survey, that the parties jointly held a substantial share of the market, that by virtue of that fact alone they held a collective dominant position, and that their unlawful behaviour constituted an abuse of that position.
It is settled case-law that very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for - without holders of much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share - is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, because of this alone, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position (Hoffman-La Roche v Commission, paragraph 41, and Case T-139/98 A-AIMS v Commission [2001] ECR II-3413, paragraph 51). Moreover, a dominant position is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (Case 2776 United Brands v Commission [1978] ECR 207, paragraph 65, and A-AIMS v Commission, paragraph 51).

The Court notes, first, that the contested decision defines the relevant market as the market for single wrapped items of impulse ice-cream in Ireland (recitals 138 and 140 of the contested decision) and that HB does not dispute that definition. HB, whilst not challenging the Commission's assertion in recitals 28 and 259 of the contested decision that its share, in volume and in value, of the relevant market exceeds 75% and that it has retained that share over several years, submits that it does not hold a dominant position on that market. When the contested decision was adopted, HB's share of the relevant market was 89% (see paragraph 90 above). It must also be pointed out that the other suppliers of impulse ice-cream present on that market, such as Mars and Nestlé, have very small market shares (see recitals 32 and 34 of the contested decision), despite the fact that they are major players on the neighbouring markets for confectionery and chocolate and sell those products in the same outlets as those in question in the present case. Furthermore, Mars and Nestlé have well-known brands for their products and the experience and financial capacity to enter new markets. HB therefore not only has an extremely large share of the relevant market but there is a considerable gap between its market share and those of its immediate competitors.

Moreover, it is clear from the documents before the Court that HB has the most extensive and most popular range of products on the relevant market, that it is the sole supplier of impulse ice-creams in approximately 40% of outlets in the relevant market, that it is part of the multinational Unilever group which has been producing and marketing ice creams for many years in all the Member States and many other countries, in which undertakings in the group are very often the major supplier in their respective market, and that the HB brand is very well-known. The Court therefore finds that the Commission correctly held that HB is an unavoidable partner for many retailers on the relevant market and that it has a dominant position on that market.

It is necessary, next, to ascertain whether the Commission was correct to conclude in the contested decision that HB had abused its dominant position on the relevant market. It is settled case-law that the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition 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 (Hoffman-La Roche v Commission, paragraph 91, and AKZO v Commission, paragraph 69). It follows that Article 86 of the Treaty prohibits a dominant undertaking from eliminating a competitor and from strengthening its position by recourse to means other than those based on competition on the merits. The prohibition laid down in that provision is also justified by the concern not to cause harm to consumers (see, to that effect, Europenhallage and Continental Can v Commission, paragraph 26, and Joined Cases 4073 to 4873, 50/73, 54/73 to 5673, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraphs 526 and 527).

Consequently, although a finding that an undertaking has a dominant position is not in itself a recrimination, it means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (Michelin v Commission, paragraph 57).
159. The Court finds, as a preliminary point, that HB rightly submits that the provision of freezer cabinets on a condition of exclusivity constitutes a standard practice on the relevant market (see paragraph 85 above). In the normal situation of a competitive market, those agreements are concluded in the interests of the two parties and cannot be prohibited as a matter of principle. However, those considerations, which are applicable in the normal situation of a competitive market, cannot be accepted without reservation in the case of a market on which, precisely because of the dominant position held by one of the traders, competition is already restricted. Business conduct which contributes to an improvement in production or distribution of goods and which has a beneficial effect on competition in a balanced market may restrict such competition where it is engaged in by an undertaking which has a dominant position on the relevant market. With regard to the nature of the exclusivity clause, the Court finds that the Commission rightly held in the contested decision that HB was abusing its dominant position on the relevant market by inducing retailers who, for the purpose of stocking impulse ice-cream, did not have their own freezer cabinet, or a cabinet made available by an ice-cream supplier other than HB, to accept agreements for the provision of cabinets subject to a condition of exclusivity. That infringement of Article 86 takes the form, in this case, of an offer to supply freezer cabinets to the retailers and to maintain the cabinets free of any direct charge to the retailers.

160. The fact that an undertaking in a dominant position on a market ties de facto - even at their own request - 40% of outlets in the relevant market by an exclusivity clause which in reality creates outlet exclusivity constitutes an abuse of a dominant position within the meaning of Article 86 of the Treaty. The exclusivity clause has the effect of preventing the retailers concerned from selling other brands of ice cream (or of reducing the opportunity for them to do so), even though there is a demand for such brands, and of preventing competing manufacturers from gaining access to the relevant market. It follows that HB's contention, set out in paragraph 149 above, that the percentage of outlets potentially likely to be inaccessible owing to the provision of freezer cabinets does not exceed 6%, is incorrect and must be rejected.

161. Furthermore, HB's reference to the Opinion of Advocate General Jacobs in the judgment in Bronner, is irrelevant in the present case because, as the Commission correctly submits in its pleadings, it did not claim in the contested decision that HB's freezer cabinets were an 'essential facility', which is the issue examined in his Opinion, and it is not necessary for HB to transfer an asset or to conclude contracts with persons which it has not selected in complying with the contested decision.

162. In addition, the Court must reject HB's argument relating to the 'recycling' of the file (see paragraph 150 above). Unlike the conduct criticised in the Flat Glass judgment, the Commission did not merely 'recycle' facts constituting an infringement of Article 85(1) of the Treaty in order to find that the conduct in question also infringed Article 86 of the Treaty. In the present case, the Commission analysed the relevant market at length in the contested decision and concluded that HB had a dominant position on that market. The Commission then correctly concluded that by inducing retailers to obtain supplies exclusively from HB under the conditions referred to in paragraphs 159 and 160 above, HB had recourse to methods different from those which condition normal competition in consumer products.

163. The fourth plea must therefore be rejected.

The fifth plea: errors of law relating to respect for rights to property and infringement of Article 222 of the Treaty

Arguments of the parties

164. HB submits that the application of the competition rules in the contested decision constitutes an unjustified and disproportionate infringement of its rights to property, as recognised in Article 222 of the Treaty. It accepts that the right to property is not absolute but says that any restriction on that right must not constitute a disproportionate and intolerable interference with the rights of the owner (see Case 44/79 Hauër [1979] ECR 3727). The result of the prohibition of the exclusivity clause is to permit freezer cabinets paid for and maintained by HB to be used for the stocking of ice creams supplied by third parties and that seriously affects its property rights in the cabinets and more generally its economic interests. HB submits that, contrary to the Commission's statement in recital 219 of the contested decision, its property rights
could not be appropriately protected by the levying of a separate rental fee for the freezer cabinet. It observes that the management and levying of a rental fee would involve substantial operating costs and that rental would not compensate for the economic dysfunctions which would be caused to its distribution system by the stocking of third-party ice creams in its cabinets. Moreover, it would be placed at a manifest disadvantage in comparison with its competitors, who could continue to make freezer cabinets available without charge.

165. HB also contests the Commission's claim (see recital 213 of the contested decision) that, as HB has placed the cabinets in retail outlets, any contractual restriction that HB imposes on the use of the cabinet can be subject to the competition rules. It submits that, in the intellectual property field, it is recognised that matters going to the essence of a property owner's rights include not only the rights to licence (Case 434/85 Allen & Hanburys [1988] ECR 1245, paragraph 11), to refuse third parties the grant of licences (Case 238/87 Volvo [1988] ECR 6211, paragraph 8), to prevent infringements of rights (Joined Cases C-92/92 and C-326/92 Collins [1993] ECR I-5145), but also particular provisions of a licence agreement (see paragraphs 75, 79, 85, 86, 90 and 100 of Commission Decision 83/400/EEC of 11 July 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.395 - Windsurfing International), OJ 1983 L 229, p. 1). The exclusivity clause is qualitatively comparable to the types of clauses authorised in licences of intellectual property rights.

166. HB observes that the economic value of its network of freezer cabinets lies in its having a necessary facility available at the outlets for storage and sale of its ice creams, in particular in outlets which, without the provision of a freezer cabinet, could not sell ice creams, as they would be unable to invest in their own cabinets. Therefore, HB's rights to control the freezer cabinets, and the fact that it insists on the exclusivity attached to them, goes to the substance or essence of its rights (Case 247/86 Alsatel [1988] ECR 5987).

167. The Commission, supported by the interveners, contends that there has been no impairment of HB's property rights. It states that HB has already given up some of its rights over the freezer cabinets to the retailers in return for payment. HB thus remains owner but has conferred certain rights on those retailers. Consequently, HB's claim that its property rights have been 'confiscated' is purely rhetorical. It is the retailers who pay for the cabinet provision, the cost of which is included in the cost of the ice cream.

168. Furthermore, the Commission submits that if the retailers are authorised to use HB freezer cabinets to sell other brands of ice cream, they would not be 'free riding' in that respect, because HB could recover the cost of its investment in several ways, and in particular by requiring payment of a separate fee for the rental of the freezer. It disputes HB's claim that it would be difficult to collect such a fee, as HB already invoices retailers for supplies of ice cream. It states that HB has not proved that a separate system of rental would introduce economic dysfunctions into its distribution network. Moreover, the Commission submits that HB is not placed at a disadvantage in comparison with its competitors if they continue to make freezer cabinets available to retailers without charge, because if the cost of ice cream and the cost of the freezer cabinet are separated, the result should be financially neutral for retailers who continue to buy HB ice cream and stock it in freezers supplied by HB.

169. The Commission states that the analogy drawn by HB between its property rights and the field of intellectual property is erroneous, as the owners of intellectual property rights obtain certain protection to enable them to recoup the investment they have made in the products in question. According to the Commission, the public interest in competition must be balanced against the public interest in the development of new medicines or other useful results which benefit society as a whole, as well as manufacturers. The public interest in ice cream is different. In any event, even if HB's situation were covered by the intellectual property rules, the cases cited by it in paragraph 165 above demonstrate that the owner of an intellectual property right is not entirely immune from the competition rules in the way he sells his products.

Findings of the Court

170. It is settled case-law that, although the right to property forms part of the general principles of Community law, it is not an absolute right but must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and
intolerable interference, impairing the very substance of the rights guaranteed (Hauer, paragraph 23; Case 265/87 Schröder [1989] ECR 2237, paragraph 15, Case C-280/93 Germany v Commission [1994] ECR I-4973, paragraph 78). Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC) provides that in order to achieve the aims of the Community, its activities are to include 'a system ensuring that competition in the internal market is not distorted'. It follows that the application of Articles 85 and 86 of the Treaty constitutes one of the aspects of public interest in the Community (see, to that effect, the Opinion of Advocate General Cosmas in Masterfoods and HB, at p. I-11371). Consequently, pursuant to those articles, restrictions may be applied on the exercise of the right to property, provided that they are not disproportionate and do not affect the substance of that right.

171. The property right at issue in the present case concerns HB's network of freezer cabinets and its right to exploit them commercially. The contested decision in no way affects HB's ownership of its assets, but merely regulates, in the public interest, one particular manner of exploiting them, in the same way as, for example, the legislature in many Member States intervenes in order to protect a tenant. The contested decision does not deprive HB of its rights of property in its stock of freezer cabinets or prevent it from exploiting those assets by renting them out on commercial terms. It provides merely that if HB decides to exploit them by making them available 'without charge' to retailers, it may not do so on the basis of an exclusivity clause so long as it holds a dominant position on the relevant market. It follows that the Commission correctly held in the contested decision that the exclusivity clause infringes Articles 85(1) and 86 of the Treaty in outlets which have only freezer cabinets supplied by HB for the stocking of impulse ice-creams and do not have a freezer cabinet of their own or one provided by another manufacturer. It rightly rejected the request for an exemption, pursuant to Article 85(3) of the Treaty, which HB had submitted in respect of the exclusivity clause. It then simply gave HB formal notice to cease those infringements immediately and to refrain from taking any measure having the same object or effect. The contested decision does not, therefore, contain any undue limitation on the exercise of HB's right to property in its freezer cabinets.

172. Moreover, in the light of its findings in paragraph 114 above, the Court must reject HB's argument, set out in paragraph 164 above, based on the disadvantages linked to the imposition of a separate fee for the freezer cabinets. As regards HB's argument, set out in paragraph 164 above, that it is disadvantaged in comparison with its competitors, who would be able to continue to make freezer cabinets available to retailers without charge, the Court points out that the HB distribution agreements, unlike those of its competitors, contribute significantly to the foreclosure of the relevant market. In addition, as HB has a dominant position on that market, it has, irrespective of the reasons for such a position, a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (Michelin v Commission, paragraph 57, and paragraph 158 above).

173. Consequently, the fifth plea must also be rejected.

The sixth plea: infringement of Article 190 of the Treaty

Arguments of the parties

174. HB submits that the contested decision infringes Article 190 of the Treaty in at least four respects. First, the definition of 'foreclosure' of the market used by the Commission evolved between the 1993 statement of objections and that issued in 1997. HB adds that the Commission altered its view in regard to HB during that same period. Second, the fact that the Commission did not apply the reasoning followed in Langnese-Iglo v Commission relating to the application of Article 85(1) of the Treaty to the exclusivity clause means that the contested decision is inadequately reasoned. Third, HB submits that the inferences which the Commission draws from the facts of the present case are not well founded as a matter of logic and thus the decision is vitiated by an inadequate statement of reasons. Fourth, the fact that the Commission failed to explain why HB freezer-cabinet exclusivity is not indispensable to attainment of the benefits arising from the HB agreements making those cabinets available, for the purposes of Article 85(3) of the Treaty, when it had recognised both in the 1993 statement of objections and in its 1995 notice (see paragraph 12 above) that such exclusivity could merit an exemption, is a defect of reasoning which vitiates the contested decision.
The Commission, supported by the interveners, observes, first, that under Article 190 of the Treaty it is required to state the reasons which led to the decision actually adopted, not the reasons which at an earlier stage might or might not have led it to adopt a different decision. Second, it submits that it has not significantly altered its analysis since 1993. In any event, it is entitled to alter its position in the light of new facts. It took into account the judgments in Langnese-Iglo v Commission and Schöller v Commission, which were delivered after the 1993 statement of objections.

Findings of the Court

176. According to settled case-law, the extent of the obligation to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning of the institution, in such a way as to give the persons concerned sufficient information to enable them to ascertain whether the decision is well founded or vitiated by a defect which may permit its legality to be contested, and to enable the Community judicature to carry out its review of the legality of the measure (Joined Cases T-213/95 and T-18/96 SCK and FNK v Commission [1997] ECR II-1739, paragraph 226, and Case T-241/97 Stork Amsterdam v Commission [2000] ECR II-309, paragraph 73). It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, Joined Cases 296/82 and 318/82 Netherlands and Leenawider Papierwarenfabriek v Commission [1985] ECR 809, paragraph 19; Case C-350/88 Delacre and Others v Commission [1990] ECR I-395, paragraphs 15 and 16, and Case C-56/93 Belgium v Commission [1996] ECR I-723, paragraph 86).

177. The Court finds, first, that in its second and third arguments set out in paragraph 174 above HB fails to draw the necessary distinction between the requirement for a statement of reasons and the substantive legality of the contested decision. Under cover of its allegation that the statement of reasons is inadequate, it complains that the Commission erred in law and made a manifest error in its assessment of the facts. HB is not criticising a failure to state reasons but rather the correctness of the decision. It follows that those arguments must be rejected in the context of this plea.

178. With regard to HB's first and fourth arguments, the Court finds that the Commission explained, in particular in recitals 7 and 247 of the contested decision, that it revised its initial favourable view, contained in its statement of 15 August 1995, because the amendments proposed by HB to its distribution system had not brought about the expected results in terms of free access to sales outlets. In so doing, the Commission gave sufficient reasons in law for its decision to depart from its initial position. Moreover, it is clear from recital 241 of the contested decision that the Commission considered that HB had not shown that the alleged advantages brought about by the distribution agreements, leading to a general improvement of production and distribution for the benefit, inter alia, of consumers, could not be secured equally effectively by removing the exclusivity in favour of HB's products and thus the tie between the provision of freezer cabinets and the supply of ice creams. As recital 247 makes clear, it is for this reason in particular, that the agreements in question could not benefit from an exemption under Article 85(3) of the Treaty.

179. It follows that the plea alleging infringement of the obligation to state reasons under Article 190 of the Treaty is unfounded.

The seventh plea: failure to respect fundamental principles of Community law

Arguments of the parties

180. HB submits that the Commission, in departing from the terms of its 1995 notice (see paragraph 12 above), infringed the principle of the protection of legitimate expectations, there being no 'overriding public interest'. The circumstances surrounding the 'settlement' concluded in 1995 between HB and the Commission concerning changes to its distribution system and its implementation by HB were of such a nature as to create the legitimate expectation that the Commission, first, would adopt a favourable view in
regard to its revised agreements concerning freezer-cabinet exclusivity and, second, would not alter its previous position or reformulate its case with regard to the facts and law. HB adds that if business cannot trust the Commission to behave as agreed, the system of comfort letters and informal settlements of disputes will fall into disrepute.

181. HB submits that the Commission also infringed the principle of subsidiarity and its obligation of sincere cooperation with the national courts. It points out that identical proceedings were pending before the Irish courts and submits that there was no Community interest to justify the Commission's intervention, since the case concerned the supply by an Irish company to Irish consumers, through Irish retailers, of products specific to the Irish market.

182. HB also submits that the Commission infringed the principle of legal certainty in adopting the contested decision at a time when appeal proceedings, for which a hearing date had been fixed before the decision was taken, were pending before the Irish courts. Moreover, HB observes that the decision of the High Court was the complete opposite of the Commission's. Even though the Commission has a duty to take into account the interests of complainants, the Commission's notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the Treaty (OJ 1993 C 39, p. 6) clearly indicates that 'there is not normally a sufficient Community interest in examining a case when the plaintiff is able to secure adequate protection of his rights before the national courts. In these circumstances the complaint will normally be filed.'

183. Furthermore, the contested decision infringes the principle of proportionality in that it deprives HB of the economic value of its freezer cabinets in such a way that it disproportionately affects its property rights. Similarly, it is disproportionate in that it invalidates all HB's agreements concerning the provision of freezer cabinets in the allegedly foreclosed part of the market, which is contrary to the judgment in Langnese-Iglo v Commission and Delimitis, which recognise that it is not necessary for all impediments to market access to be removed, provided that real possibilities for market penetration and expansion exist. Moreover, the contested decision infringes the principle of proportionality and is discriminatory in that it prohibits, not only for the past but also for the future, HB freezer-cabinet exclusivity in relations with the relevant category of retailers. In Langnese-Iglo v Commission the Court annulled the part of the Commission's decision prohibiting Langnese-Iglo from concluding exclusive purchasing agreements until after 31 December 1997, holding that it would be contrary to the principle of equal treatment to exclude for certain undertakings the benefits of a block exemption regulation as regards the future whilst other undertakings could continue to conclude exclusive purchasing agreements such as those prohibited by the decision.

184. HB also argues that the contested decision is discriminatory in that it constitutes an arbitrary attack on HB's ability to compete on the basis adopted by all other companies carrying on business on the relevant market.

185. Lastly, HB submits that the arguments relied on in support of the pleas alleging infringement of Article 190 of the Treaty equally support the plea of infringement of an essential procedural requirement. Furthermore, it asserts that the Commission, by refusing any dialogue in order to find a solution to the breakdown in the ‘1995 deal’, fell short of accepted standards of proper administration and thereby infringed essential procedural requirements.

186. The Commission, supported by the interveners, contends that it cannot have violated a legitimate expectation of HB by virtue of HB's failure to obtain an exemption under Article 85(3) of the Treaty. HB did not receive 'precise assurances' to that effect and, in any event, legitimate expectations cannot be invoked where there has been a breach of Community law.

187. The Commission submits that the notion of subsidiarity does not concern the question whether Community law is to be applied by national courts or by the Commission; that question has long since been settled. According to the Commission, HB's argument is based on the mistaken premise that the Commission cannot sanction an infringement of Articles 85 and 86 of the Treaty which has been brought to its attention if that infringement (which, by definition, requires an effect on trade between Member States) produces effects only on the market of a Member State.

188. The Commission also contends that it did not infringe the principle of legal certainty by adopting the contested decision at a time when proceedings were pending before the Irish courts. It submits that it was entitled to adopt that decision for a number of reasons. First, HB had notified an agreement, seeking a
negative clearance or an exemption. Only the Commission has the power to take a decision to grant an exemption under Article 85(3) of the Treaty. Second, when the Commission adopted the contested decision, a number of actions were pending before national courts and competition authorities. It submits that it had a duty to take account of the interests of complainants and, therefore, was required to take a rapid decision once it had reached the conclusion that there had been a breach of Articles 85(1) and 86 of the Treaty. According to HB, the Commission ought to have awaited the outcome of the appeal lodged before the Irish courts before adopting the contested decision. That would not have resolved the problem of legal certainty, but merely deferred the adoption of the contested decision.

The Commission submits that the contested decision does not infringe the principle of proportionality. That decision does not abolish HB's rights of ownership over the freezers. The decision gives a specific example of how HB could recoup its investment in the freezers by lawful means. HB has not put forward any valid reason why it cannot administer a separate billing system for ice creams and freezers. HB claims that the contested decision invalidates all the agreements in question, but interprets the judgments in Langnes-Iglo v Commission and Delimitis as meaning that not all impediments to market access need be removed. However, the Commission submits that in its judgment in Delimitis the Court of Justice held that the agreements have to be taken as a whole and not subdivided. Furthermore, with regard to HB's argument that the contested decision prohibits the exclusivity clause not only for the past but also for the future, the Commission submits that the decision merely prevents HB from concluding new agreements with the same effect or the same object as the existing ones.

The Commission disputes HB's claim that it was treated unfairly and discriminated against. In the decision (recital 204) the Commission took into account the effects produced by the other networks of agreements, but established that none of those other networks had contributed significantly to the foreclosure of the relevant market. The principle of equal treatment does not require those agreements to be forbidden where they have no significant restrictive effect.

Lastly, the Commission denies that it has infringed any essential procedural requirement.

Findings of the Court

With regard to infringement of legitimate expectations, it is settled case-law that the right to rely on the principle of the protection of legitimate expectations, which is one of the fundamental principles of the Community, extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations by giving him precise assurances (see, to that effect, Case T-266/97 Vlaamse Televisie Maatschappij v Commission [1999] ECR II-2329, paragraph 71, and Joined Cases T-485/93, T-491/93, T-494/93 and T-61/98 Dreyfus and Others v Commission [2000] ECR II-3659, paragraph 85).

The Court finds, first, that the Commission did not give HB specific assurances as to the consequences of the commitments notified by the letter of 8 March 1995 (see paragraph 12 above). Furthermore, it did not adopt a decision applying Article 85(3) of the Treaty, a decision which it could in any event have revoked or amended pursuant to Article 8(3) of Regulation No 17 if there were a change in the facts that were basic to the making of the decision.

The notice of 15 August 1995 was issued expressly under Article 19(3) of Regulation No 17. In that notice, the Commission proposed - on a preliminary basis - to adopt a favourable attitude to HB's distribution agreements, as revised by HB, and invited all the interested third parties to submit their observations to it within a specified time. It follows that the notice in question merely indicated a preliminary position of the Commission, which was subject to change, in the light particularly of the observations of third parties. Consequently, HB could not have had a legitimate expectation that the Commission would grant it an exemption under Article 85(3) of the Treaty in accordance with that notice, solely on the basis of publication of the notice.

As regards HB's argument that it acted irreversibly to its detriment in adopting changes to its distribution system on the basis of the Commission's 'proposal' to adopt a favourable position in regard to its distribution agreements, the Court considers that, if HB could have had a legitimate expectation in regard to the notice in question, that expectation would have been confined to the procedure initiated by
the Commission by its 1993 statement of objections and the objections raised in it relating to the HB distribution agreements at that date. However, in the present case, the Commission did not act on the basis of its 1993 statement of objections but, having found that the changes made by HB to its distribution system had not had the expected results in terms of freedom of access to sales outlets, it initiated a new procedure and raised new objections to that system in its 1997 statement of objections. Given that, even if the Commission had granted an exemption to HB, it would have had the power, and even the obligation, under Article 8(3) of Regulation No 17, to revoke or amend that exemption if it had found that the exempted agreements nevertheless had certain effects that were incompatible with the conditions laid down in Article 85(3) of the Treaty, and particularly if experience had shown that the changes made by HB to its distribution system had not brought about the expected results, the Court finds that the Commission, in adopting the 1997 statement of objections, did not infringe the principle of protection of legitimate expectations in the present case.

196. It follows that this objection must be rejected.

197. As regards HB's claims that the principles of subsidiarity, sincere cooperation and legal certainty have been infringed, the Court points out that, although Articles 85(1) and 86 of the Treaty produce direct effects in relations between individuals and create direct rights in respect of the individuals concerned which the national courts must safeguard, that does not mean that the Commission has no right to adopt a position in a case, even though an identical or similar case is pending before one or more national courts, provided in particular that trade between Member States is capable of being affected. Such an effect has not been called into question in the present case.

198. In pointing to the fact that the present case concerns the supply by an Irish company to Irish consumers, through Irish retailers, of products that are specific to the Irish market and to the fact that when the contested decision was adopted parallel proceedings had been decided by the High Court or were pending before the Supreme Court, HB has not proved to the requisite legal standard that the Commission infringed those principles or its Notice on cooperation between itself and national courts in the application of Articles 85 and 86 of the EC Treaty. It is clear from the contested decision and the Commission's written pleadings that the application of a condition of exclusivity for freezer cabinets supplied to retailers is a contractual practice adopted by the majority of ice-cream manufacturers in the Community. Furthermore, companies in the Unilever group play a significant role in the impulse ice-cream market in several Member States. It follows that the issues dealt with in the contested decision had a wider Community importance, in particular in light of the fact that various national courts and competition authorities were dealing with parallel cases raising similar issues to those in the present case (see, in particular, recitals 275 to 280 of the contested decision). In those circumstances, the adoption of the contested decision by the Commission was appropriate in order to ensure that the Community competition rules would be applied coherently to the various forms of exclusivity practised by ice-cream manufacturers throughout the Community.

199. Furthermore, as the Court of Justice held in its judgment in Masterfoods and HB, the Commission has exclusive competence to adopt decisions in implementation of Article 85(3) of the Treaty, pursuant to Article 9(1) of Regulation No 17. The Commission is also entitled to adopt, at any time, individual decisions applying Articles 85 and 86 of the Treaty, even though it shares competence to apply Articles 85(1) and 86 of the Treaty with the national courts, and even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with the national court's decision (see, to that effect, Masterfoods and HB, paragraphs 47 and 48, and Delimitis, paragraphs 44 and 45). Given that during the negotiations the Commission had received HB's application for an exemption as well as third-party complaints, HB's arguments relating to subsidiarity are unfounded.

200. The present objections must therefore be rejected.

201. As regards HB's assertions that the contested decision infringes the principle of proportionality and is discriminatory, the Court finds that those allegations are unfounded. The principle of proportionality requires that the acts of the Community institutions do not exceed the limits that are appropriate and necessary in order to achieve the aim pursued (see Case 15/83 Denkavit Nederland [1984] ECR 2171, paragraph 25). Moreover, discrimination is the different treatment of identical situations or the treatment of different situations identically.
First, in light of the Court's assessment set out in paragraphs 170 to 173 above, the Court finds that the contested decision does not contain any undue or disproportionate limitation of HB's property rights in its freezer cabinets. Nor does it constitute an arbitrary or discriminatory impairment of HB's ability to compete with other suppliers on the basis adopted by all the other companies active on the relevant market, in the light especially of the overwhelming position which HB holds on that market and the significant contribution by HB, unlike the other suppliers, to the foreclosure of that market (see paragraph 172 above).

Second, the fact that the contested decision invalidates the exclusivity clause in the agreements for the supply of freezer cabinets concluded between HB and retailers in Ireland that are applicable to cabinets installed in outlets equipped only with cabinets supplied by HB for the storage of single-wrapped impulse ice-creams and which have neither their own freezer cabinet nor a cabinet from another ice-cream manufacturer, does not mean that the decision is disproportionate.

A network of distribution agreements set up by a single supplier may escape the prohibition laid down in the competition rules provided that it does not significantly contribute, in conjunction with all the similar contracts found on the relevant market, including those of other suppliers, to denying access to the market to new national and foreign competitors (see, by analogy, Delimitis, paragraphs 23 and 24, and Langnese-Iglo, paragraph 129). That means that where a network of similar agreements concluded by a single manufacturer exists, the assessment of the effects of that network on competition applies to the entire set of individual contracts constituting the network. The Court finds, therefore, that the Commission correctly assessed the bundle of HB's distribution agreements as a whole and, in consequence, did not split the agreements, as HB alleges. It is clear from the judgment in Case C-214/99 Neste Markkinointi [2000] ECR I-11121, see, in particular, paragraphs 36 and 37) that it is only exceptionally, and in specific circumstances which are not present in this case, that the network of the same supplier may be subdivided.

Third, it is apparent from Article 4 of the contested decision that the Commission required HB immediately to cease the infringements of Articles 85(1) and 86 of the Treaty constituted by its network of distribution agreements and to refrain from taking any measure having the same object or effect. The Court finds that this provision is not disproportionate or discriminatory, as it merely prohibits HB from reintroducing the exclusivity clause in the same circumstances as those referred to in Articles 1 and 3 of the contested decision, and thereby guarantees the effectiveness of the contested decision, by preventing a return in the future to the anti-competitive practice found to exist (see, by analogy, the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-279/95 P Langnese-Iglo v Commission [1998] ECR I-5609, paragraph 39).

It follows that this objection must be rejected.

Inasmuch as HB's objection relating to infringement of essential procedural requirements and an inadequate statement of reasons consists of a mere reference by it to its arguments set out in the context of the fifth plea, alleging infringement of Article 190 of the Treaty, the Court finds that that objection cannot be upheld in view of the assessment made by the Court in paragraphs 176 to 179 above. As to HB's argument relating to the need to extend the negotiations in order to find a solution to the breakdown in the ‘1995 settlement’, the Court also considers that the Commission has not infringed any essential procedural requirements. As the Commission found that the changes made by HB to its distribution system had not brought about the expected results in terms of freedom of access to sales outlets, it was not obliged to pursue the negotiations indefinitely, particularly when the case had extended over a lengthy period. The Commission was therefore entitled to initiate a new procedure and to raise new objections to that system in its 1997 statement of objections, leaving HB an opportunity to respond to it.

This objection must therefore be rejected.

Consequently, the seventh plea is unfounded.

It follows that the entire plea is unfounded.

Costs
Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. As HB has been unsuccessful in its submissions and the Commission has asked for costs, HB must be ordered to bear its own costs and to pay the Commission's costs, including those relating to the interim proceedings.

Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener other than those mentioned in the preceding subparagraph of Article 87(4) to bear its own costs. In the present case, Mars and Richmond, which intervened in support of the Commission, must bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application as unfounded;

2. Orders Van den Bergh Foods Ltd to bear its own costs and to pay those of the Commission, including the costs of the interim proceedings;

3. Orders Masterfoods Ltd and Richmond Frozen Confectionery Ltd to bear their own costs.

Delivered in open court in Luxembourg on 23 October 2003.
JUDGMENT OF THE COURT (Fifth Chamber)

29 April 2004 (1)

(Competition – Article 82 EC – Abuse of a dominant position – Brick structure used to supply regional sales data for pharmaceutical products in a Member State – Copyright – Refusal to grant a licence)

In Case C-418/01,
REFERENCE to the Court under Article 234 EC by the Landgericht Frankfurt am Main (Germany) for a preliminary ruling in the proceedings pending before that court between

IMS Health GmbH & Co. OHG

and

NDC Health GmbH & Co. KG,

on the interpretation of Article 82 EC,

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), acting for the President of the Fifth Chamber, C.W.A. Timmermans and S. von Bahr, Judges,
Advocate General: A. Tizzano,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

– IMS Health GmbH & Co. OHG, by S. Barthelmes and H.-C. Salger, Rechtsanwälte, and J. Temple Lang, Solicitor,
– NDC Health GmbH & Co. KG, by G. Janke and T. Lübbig, Rechtsanwälte,
– the Commission of the European Communities, by A. Whelan and S. Rating, acting as Agents,
having regard to the Report for the Hearing,

after hearing the oral observations of IMS Health GmbH & Co. OHG, represented by S. Barthelmes, H.-C. Salger, C. Feddersen and G. Jung-Weiser, Rechtsanwälte, and by J. Temple-Lang, of NDC Health GmbH & Co. KG, represented by G. Janke and T. Lübbig, and the Commission, represented by A. Whelan and S. Rating, at the hearing on 6 March 2003,

after hearing the Opinion of the Advocate General at the sitting on 2 October 2003,

gives the following

Judgment

1 By order of 12 July 2001, received at the Court on 22 October 2001, the Landgericht Frankfurt am Main referred for a preliminary ruling under Article 234 EC three questions on the interpretation of Article 82 EC.
2 Those questions arose in proceedings between IMS Health GmbH & Co. OHG (‘IMS’) and NDC Health GmbH & Co. KG (‘NDC’) concerning the use by the latter of a brick structure developed by IMS for the provision of German regional sales data on pharmaceutical products.

Factual background
3 IMS and NDC are engaged in tracking sales of pharmaceutical and healthcare products.
4 IMS provides data on regional sales of pharmaceutical products in Germany to pharmaceutical laboratories formatted according to the brick structure. Since January 2000, it has provided studies based on a brick structure consisting of 1,860 bricks, or a derived structure consisting of 2,847 bricks, each corresponding to a designated geographic area. According to the order for reference, those bricks were created by taking account of various criteria, such as the boundaries of municipalities, postcodes, population density, transport connections and the geographical distribution of pharmacies and doctors’ surgeries.
5 Several years ago IMS set up a working group in which undertakings in the pharmaceutical industry, which are clients of IMS, participated. That working group makes suggestions for improving and optimising market segmentation. The extent of the working group’s contribution to the determination of market segmentation is a subject of dispute between IMS and NDC.
6 The national court found that IMS not only marketed its brick structures, but also distributed them free of charge to pharmacies and doctors’ surgeries. According to the national court, that practice helped those structures to become the normal industry standard to which its clients adapted their information and distribution systems.
7 After leaving his post in 1998, a former manager of IMS created Pharma Intranet Information AG (‘PII’), whose activity also consisted in marketing regional data on pharmaceutical products in Germany formatted on the basis of brick structures. At first, PII tried to market structures consisting of 2,201 bricks. On account of reticence manifested by potential clients, who were accustomed to structures consisting of 1,860 or 2,847 bricks, it decided to use structures of 1,860 or 3,000 bricks, very similar to those used by IMS.
8 PII was acquired by NDC.

Procedural background and the questions referred for a preliminary ruling
9 On application by IMS the Landgericht Frankfurt am Main granted an interlocutory order, of 27 October 2000, prohibiting PII from using the 3,000 brick structure or any other brick structure derived from the IMS 1,860 brick
structure (hereinafter generically referred to as ‘the 1 860 brick structure’). After PII’s acquisition by NDC, the same prohibition was issued in respect of NDC by interlocutory order of 28 December 2000.

10 Those orders were both confirmed by a judgment of the Landgericht Frankfurt am Main of 16 November 2000 and then by judgment of the Oberlandesgericht Frankfurt am Main (Germany) of 12 July 2001. The latter based its decision on the finding that the brick structure used by IMS is a database within the meaning of Article 4 of the Urheberrechtsgesetz (copyright law), which may be protected by copyright.

11 On 19 December 2000, NDC made a complaint to the Commission of the European Communities, claiming that IMS’s refusal to grant it a licence to use the 1 860 brick structure constituted an infringement of Article 82 EC.

12 On 3 July 2001, the Commission adopted an interim measure in the form of Commission Decision 2002/165/EC relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP D3/38.044 – NDC Health v IMS Health: Interim measures) (OJ 2002 L 59, p. 18). By Article 1 of that decision, it ordered IMS to grant a licence to use the 1 860 brick structure to all the undertakings present on the market for the provision of German regional sales data. That measure was justified by the existence of ‘exceptional circumstances’. The Commission held that the 1 860 brick structure created by IMS has become the industry standard for the relevant market. Refusal of access to that structure, without any objective justification, was likely to eliminate all competition on the market in question, because, without it, it was impossible to compete on the relevant market (paragraphs 180 and 181 of the grounds of Decision 2002/165).

13 By application lodged at the Registry of the Court of First Instance of the European Communities on 6 August 2001, IMS brought an action under Article 230 EC for annulment of Decision 2002/165. By a document lodged on the same day, it requested suspension of operation of that decision, pursuant to Articles 242 and 243 EC, pending a substantive determination by the Court of First Instance.

14 By order of 26 October 2001, Case T-184/01 R IMSHealth v Commission [2001] ECR II-3193, the President of the Court of First Instance ordered suspension of operation of Decision 2002/165 pending a substantive determination by the Court of First Instance. The appeal against that order was dismissed, by order of the President of the Court of Justice in Case C-481/01 P(R) NDC Health v IMS Health and Commission [2002] ECR I-3401.

15 By Decision 2003/741/EC of 13 August 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP D3/38.044 – NDC Health v IMS Health: Interim measures) (OJ 2003 L 268, p. 69), the Commission withdrew Decision 2002/165. That withdrawal was based on the fact that there was no longer any urgency in imposing interim measures pending the Commission’s decision to close the administrative procedure.

16 In the main proceedings at the origin of the present request for a preliminary ruling, IMS pursues its objective of prohibiting NDC from using the 1 860 brick structure.

17 The Landgericht Frankfurt am Main takes the view that IMS cannot exercise its right to obtain an injunction prohibiting all unlawful use of its work if it acts in an abusive manner, within the meaning of Article 82 EC, by refusing to grant a licence to NDC on reasonable terms. It therefore decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

1. Is Article 82 EC to be interpreted as meaning that there is abusive conduct by an undertaking with a dominant position on the market where it refuses to grant a licence agreement for the use of a databank protected by copyright to an undertaking which seeks access to the same geographical and product market if the participants on the other side of the market, that is to say potential clients, reject any product which does not make use of the databank protected by copyright because their set-up relies on products manufactured on the basis of that databank?

2. Is the extent to which an undertaking with a dominant position on the market has involved persons from the other side of the market in the development of the databank protected by copyright relevant to the question of abusive conduct by that undertaking?

3. Is the material outlay (in particular with regard to costs) in which clients who have hitherto been supplied with the product of the undertaking having a dominant market position would be involved if they were in future to go over to purchasing the product of a competing undertaking which does not make use of the databank protected by copyright relevant to the question of abusive conduct by an undertaking with a dominant position on the market?
The questions for a preliminary ruling

Preliminary observations

18 In light of the procedural context in which the present reference for a preliminary ruling has arisen and the disputes as to the establishment of the facts, it must be recalled that, pursuant to Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, the latter, when ruling on the interpretation or validity of Community provisions, is empowered to do so only on the basis of the facts which the national court puts before it (see, in particular, Case C-30/93 AC-ATEL Electronics Vertriebs [1994] ECR I-2305, paragraph 16, and Case C-107/98 Teckal [1999] ECR I-8121, paragraph 29).

19 In view, in particular, of the fact that the Commission opened a procedure in which it examines the applicability of Article 82 EC to the facts underlying the dispute in the main proceedings, it must also be recalled that where the national courts give a ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, they must avoid taking decisions which conflict with those taken or envisaged by the Commission in the implementation of Articles 81 and 82 EC (Case C-234/89 Delimitis [1991] ECR I-935, paragraph 47).

20 It is in the light of those matters that the request for a preliminary ruling must be examined.

21 By its first question, the national court asks, essentially, whether the refusal to grant a licence to use a brick structure for the presentation of regional sales data by an undertaking in a dominant position which has an intellectual property right therein to another undertaking which also wishes to provide such data in the same Member State, but which, because potential users are unfavourable to it, cannot develop an alternative brick structure for the presentation of the data that it proposes to offer, constitutes an abuse of a dominant position within the meaning of Article 82 EC.

22 As the Advocate General stated in point 29 of his Opinion, that question is based on the premiss, whose validity it is for the national court to ascertain, that the use of the 1 860 brick structure protected by an intellectual property right is indispensable in order to allow a potential competitor to have access to the market in which the undertaking which owns the right occupies a dominant position.

23 By its second question, the national court questions the effect that the degree of participation by users may have on the development of a brick structure, protected by an undertaking in a dominant position which has an intellectual property right therein to another undertaking which also wishes to provide such data in the same Member State, but which, because potential users are unfavourable to it, cannot develop an alternative brick structure for the presentation of the data that it proposes to offer, constitutes an abuse of a dominant position within the meaning of Article 82 EC.

24 As the Advocate General noted in point 32 of his Opinion, those two questions, read in the light of the order for reference, concern the matters underlying the first question, because they seek essentially to clarify the relevant criteria for the determination of whether use of the 1 860 brick structure protected by the intellectual property right is indispensable in order to allow a potential competitor to have access to the market in which the undertaking owning the right occupies a dominant position.

25 Accordingly, it is appropriate to answer the second and third questions first.

The second and third questions

Observations of the parties

26 According to IMS, the participation of the users in the development of a product or a service protected by an intellectual property right is evidence of competition, because it represents the manufacturer’s efforts to gain a competitive advantage by developing products and services better adapted to the needs of its clients. The outlay, to which clients must agree, where there is a change to a legally developed competing product, is normal since the costs are offset by the advantages of the competing product.

27 NDC and the Commission argue that the considerable role played in the design of the 1 860 brick structure by the users has contributed to the creation of a relationship of dependency of the latter on that structure. Referring to the judgment in Case C-7/97 Brenner [1998] ECR I-7791, they submit that the criterion for determining whether that structure is indispensable is whether a competitor can create a viable alternative. In the case in the main proceedings the legal and economic obstacles make such a solution impossible.
Reply of the Court

28 It is clear from paragraphs 43 and 44 of Brunner that, in order to determine whether a product or service is indispensable for enabling an undertaking to carry on business in a particular market, it must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services. According to paragraph 46 of Brunner, in order to accept the existence of economic obstacles, it must be established, at the very least, that the creation of those products or services is not economically viable for production on a scale comparable to that of the undertaking which controls the existing product or service.

29 It is for the national court to determine, in the light of the evidence submitted to it, whether such is the case in the dispute in the main proceedings. In that regard, as the Advocate General stated in points 83 and 84 of his Opinion, account must be taken of the fact that a high level of participation by the pharmaceutical laboratories in the improvement of the 1860 brick structure protected by copyright, on the supposition that it is proven, has created a dependency by users in regard to that structure, particularly at a technical level. In such circumstances, it is likely that those laboratories would have to make exceptional organisational and financial efforts in order to acquire the studies on regional sales of pharmaceutical products presented on the basis of a structure other than that protected by the intellectual property right. The supplier of that alternative structure might therefore be obliged to offer terms which are such as to rule out any economic viability of business on a scale comparable to that of the undertaking which controls the protected structure.

30 The answer to the second and third questions must, therefore, be that, for the purposes of examining whether the refusal by an undertaking in a dominant position to grant a licence for a brick structure protected by an intellectual property right which it owns is abusive, the degree of participation by users in the development of that structure and the outlay, particularly in terms of cost, on the part of potential users in order to purchase studies on regional sales of pharmaceutical products presented on the basis of an alternative structure are factors which must be taken into consideration in order to determine whether the protected structure is indispensable to the marketing of studies of that kind.

The first question

Observations submitted to the Court

31 As to whether and in what circumstances the refusal by an undertaking in a dominant position in a given market, which owns an intellectual property right in a product indispensable for carrying on business in the same market to grant a licence to use that product, may constitute abusive conduct, IMS, NDC and the Commission all refer to the judgment in Joined Cases C-241/91 P and C-242/91 P RTE and ITP v Commission (Magill) [1995] ECR I-743. However, they do not interpret it in the same way and do not draw the same conclusions from it.

32 IMS argues that the Magill judgment must be interpreted as meaning that three conditions must be satisfied. The refusal to grant a licence must prevent the emergence of a new product, must be unjustified, and have the effect of reserving a secondary market for the dominant undertaking. In the case in the main proceedings, the first and third conditions are not satisfied because NDC is not trying to introduce a new product into a secondary market, but intends to use the 1860 brick structure, perfected by IMS, in order to supply an almost identical product on the same market.

33 NDC, which claims that it wishes to supply a new product, and the Commission take the view that, according to the Magill judgment, in order for a refusal of a licence to be considered abusive, it is not essential for there to be two distinct markets. NDC submits that it is sufficient that the undertaking in a dominant position in a certain market has a monopoly on an infrastructure which is indispensable in order to compete with it on the market in which it carries on business. In the same way, the Commission submits that it is not necessary for the infrastructure in question to be in a separate market and that it is sufficient that it is at an upstream production stage.

Reply of the Court

34 According to settled case-law, the exclusive right of reproduction forms part of the rights of the owner of an intellectual property right, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position (judgment in Case 238/87 Volvo [1988] ECR 6211, paragraph 8, and Magill, paragraph 49).
Nevertheless, as is clear from that case-law, exercise of an exclusive right by the owner may, in exceptional circumstances, involve abusive conduct (Valvo, paragraph 9, and Magill, paragraph 50).

36 The Court held that such exceptional circumstances were present in the case giving rise to the judgment in Magill, in which the conduct of the television channels in a dominant position which gave rise to the complaint consisted in their relying on the copyright conferred by national legislation on the weekly listings of their programmes in order to prevent another undertaking from publishing information on those programmes together with commentaries, on a weekly basis.

37 According to the summary of the Magill judgment made by the Court at paragraph 40 of the judgment in Bronner, the exceptional circumstances were constituted by the fact that the refusal in question concerned a product (information on the weekly schedules of certain television channels), the supply of which was indispensable for carrying on the business in question (the publishing of a general television guide), in that, without that information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale (Magill, paragraph 53), the fact that such refusal prevented the emergence of a new product for which there was a potential consumer demand (paragraph 54), the fact that it was not justified by objective considerations (paragraph 55), and was likely to exclude all competition in the secondary market (paragraph 56).

38 It is clear from that case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market.

39 In light of the order for reference and the observations submitted to the Court, which reveal a major dispute as regards the interpretation of the third condition, it is appropriate to consider that question first.

The third condition, relating to the likelihood of excluding all competition on a secondary market

40 In that regard, it is appropriate to recall the approach followed by the Court in the Bronner judgment, in which it was asked whether the fact that a press undertaking with a very large share of the daily newspaper market in a Member State operates the only nationwide newspaper home-delivery scheme in that Member State refuses paid access to that scheme by the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme under economically reasonable conditions, constitutes abuse of a dominant position.

41 The Court, first of all, invited the national court to determine whether the home-delivery schemes constituted a separate market (Bronner, paragraph 34), on which, in light of the circumstances of the case, the press undertaking held a de facto monopoly position and, thus, a dominant position (paragraph 35). It then invited the national court to determine whether the refusal by the owner of the only nationwide home-delivery scheme in a Member State, which used that scheme to distribute its own daily newspapers, to allow the publisher of a rival daily newspaper access to it deprived that competitor of a means of distribution judged essential for the sale of its newspaper (paragraph 37).

42 Therefore, the Court held that it was relevant, in order to assess whether the refusal to grant access to a product or a service indispensable for carrying on a particular business activity was an abuse, to distinguish an upstream market, constituted by the product or service, in that case the market for home delivery of daily newspapers, and a (secondary) downstream market, on which the product or service in question is used for the production of another product or the supply of another service, in that case the market for daily newspapers themselves.

43 The fact that the home-delivery service was not marketed separately was not regarded as precluding, from the outset, the possibility of identifying a separate market.

44 It appears, therefore, as the Advocate General set out in points 56 to 59 of his Opinion, that, for the purposes of the application of the earlier case-law, it is sufficient that a potential market or even hypothetical market can be identified. Such is the case where the products or services are indispensable in order to carry on a particular business and where there is an actual demand for them on the part of undertakings which seek to carry on the business for which they are indispensable.

45 Accordingly, it is determinative that two different stages of production may be identified and that they are interconnected, inasmuch as the upstream product is indispensable for the supply of the downstream product.
Transposed to the facts of the case in the main proceedings, that approach prompts consideration as to whether the 1 860 brick structure constitutes, upstream, an indispensable factor in the downstream supply of German regional sales data for pharmaceutical products.

It is for the national court to establish whether that is in fact the position, and, if so be the case, to examine whether the refusal by IMS to grant a licence to use the structure at issue is capable of excluding all competition on the market for the supply of German regional sales data on pharmaceutical products.

The first condition, relating to the emergence of a new product

As the Advocate General stated in point 62 of his Opinion, that condition relates to the consideration that, in the balancing of the interest in protection of the intellectual property right and the economic freedom of its owner against the interest in protection of free competition, the latter can prevail only where refusal to grant a licence prevents the development of the secondary market to the detriment of consumers.

Therefore, the refusal by an undertaking in a dominant position to allow access to a product protected by an intellectual property right, where that product is indispensable for operating on a secondary market, may be regarded as abusive only where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.

It is for the national court to determine whether such is the case in the dispute in the main proceedings.

The second condition, relating to whether the refusal was unjustified

As to that condition, on whose interpretation no specific observations have been made, it is for the national court to examine, if appropriate, in light of the facts before it, whether the refusal of the request for a licence is justified by objective considerations.

Accordingly, the answer to the first question must be that the refusal by an undertaking which holds a dominant position and owns an intellectual property right in a brick structure indispensable to the presentation of regional sales data on pharmaceutical products in a Member State to grant a licence to use that structure to another undertaking which also wishes to provide such data in the same Member State, constitutes an abuse of a dominant position within the meaning of Article 82 EC where the following conditions are fulfilled:

1. the undertaking which requested the licence intends to offer, on the market for the supply of the data in question, new products or services not offered by the owner of the intellectual property right and for which there is a potential consumer demand;
2. the refusal is not justified by objective considerations;
3. the refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market.

Costs

The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Landgericht Frankfurt am Main by order of 12 July 2001, hereby rules:

1.
For the purposes of examining whether the refusal by an undertaking in a dominant position to grant a licence for a brick structure protected by an intellectual property right which it owns is abusive, the degree of participation by users in the development of that structure and the outlay, particularly in terms of cost, on the part of potential users in order to purchase studies on regional sales of pharmaceutical products presented on the basis of an alternative structure are factors which must be taken into consideration in order to determine whether the protected structure is indispensable to the marketing of studies of that kind.

2. The refusal by an undertaking which holds a dominant position and owns an intellectual property right in a brick structure indispensable to the presentation of regional sales data on pharmaceutical products in a Member State to grant a licence to use that structure to another undertaking which also wishes to provide such data in the same Member State, constitutes an abuse of a dominant position within the meaning of Article 82 EC where the following conditions are fulfilled:

- the undertaking which requested the licence intends to offer, on the market for the supply of the data in question, new products or services not offered by the owner of the intellectual property right and for which there is a potential consumer demand;
- the refusal is not justified by objective considerations;
- the refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market.

on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof;

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

HAS ADOPTED THIS REGULATION:

CHAPTER I
PRINCIPLES

Article 1

Application of Articles 81 and 82 of the Treaty

1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.
2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.

3. The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required.

Article 2

Burden of proof

In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

Article 3

Relationship between Articles 81 and 82 of the Treaty and national competition laws

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

CHAPTER II

POWERS

Article 4

Powers of the Commission

For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.

Article 5

Powers of the competition authorities of the Member States

The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

- requiring that an infringement be brought to an end,
- ordering interim measures,
- accepting commitments,
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Article 6
Powers of the national courts
National courts shall have the power to apply Articles 81 and 82 of the Treaty.

CHAPTER III
COMMISSION DECISIONS

Article 7
Finding and termination of infringement
1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.

Article 8
Interim measures
1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures.

2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

Article 9
Commitments
1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:
(a) where there has been a material change in any of the facts on which the decision was based;
(b) where the undertakings concerned act contrary to their commitments; or
(c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.
Article 10

Finding of inapplicability

Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied.

The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

CHAPTER IV

COOPERATION

Article 11

Cooperation between the Commission and the competition authorities of the Member States

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.

3. The competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.

4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may also be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty.

5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.

6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

Article 12

Exchange of information

1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.
2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,

- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

Article 13
Suspension or termination of proceedings

1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.

2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

Article 14
Advisory Committee

1. The Commission shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).

2. For the discussion of individual cases, the Advisory Committee shall be composed of representatives of the competition authorities of the Member States. For meetings in which issues other than individual cases are being discussed, an additional Member State representative competent in competition matters may be appointed. Representatives may, if unable to attend, be replaced by other representatives.

3. The consultation may take place at a meeting convened and chaired by the Commission, held not earlier than 14 days after dispatch of the notice convening it, together with a summary of the case, an indication of the most important documents and a preliminary draft decision. In respect of decisions pursuant to Article 8, the meeting may be held seven days after the dispatch of the operative part of a draft decision. Where the Commission dispatches a notice convening the meeting which gives a shorter period of notice than those specified above, the meeting may take place on the proposed date in the absence of an objection by any Member State. The Advisory Committee shall deliver a written opinion on the Commission’s preliminary draft decision. It may deliver an opinion even if some members are absent and are not represented. At the request of one or several members, the positions stated in the opinion shall be reasoned.

4. Consultation may also take place by written procedure. However, if any Member State so requests, the Commission shall convene a meeting. In case of written procedure, the Commission shall determine a time-limit of not less than 14 days within which the Member States are to put forward their observations for circulation to all other Member States. In case of decisions to be taken pursuant to Article 8, the time-limit of 14 days is replaced by seven days. Where the Commission determines a time-limit for the written procedure which is shorter than those
specified above, the proposed time-limit shall be applicable in the absence of an objection by any Member State.

5. The Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

6. Where the Advisory Committee delivers a written opinion, this opinion shall be appended to the draft decision. If the Advisory Committee recommends publication of the opinion, the Commission shall carry out such publication taking into account the legitimate interest of undertakings in the protection of their business secrets.

7. At the request of a competition authority of a Member State, the Commission shall include on the agenda of the Advisory Committee cases that are being dealt with by a competition authority of a Member State under Article 81 or Article 82 of the Treaty. The Commission may also do so on its own initiative. In either case, the Commission shall inform the competition authority concerned.

A request may in particular be made by a competition authority of a Member State in respect of a case where the Commission intends to initiate proceedings with the effect of Article 11(6).

The Advisory Committee shall not issue opinions on cases dealt with by competition authorities of the Member States. The Advisory Committee may also discuss general issues of Community competition law.

Article 15
Cooperation with national courts

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.

2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

3. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.

Article 16
Uniform application of Community competition law

1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.
2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

CHAPTER V
POWERS OF INVESTIGATION

Article 17
Investigations into sectors of the economy and into types of agreements

1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.

The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices.

The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.

2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply mutatis mutandis.

Article 18
Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.

2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.

3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of the simple request or of the decision to the competition authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated and the competition authority of the Member State whose territory is affected.
6. At the request of the Commission the governments and competition authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

Article 19

Power to take statements

1. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.

2. Where an interview pursuant to paragraph 1 is conducted in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of that Member State, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview.

Article 20

The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

   a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

   b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

   c) to take or obtain in any form copies of or extracts from such books or records;

   d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

   e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned
shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 of the Treaty, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

Article 21

Inspection of other premises

1. If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

2. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the right to have the decision reviewed by the Court of Justice. It shall in particular state the reasons that have led the Commission to conclude that a suspicion in the sense of paragraph 1 exists. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

3. A decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the Member State concerned. The national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged.

However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

4. The officials and other accompanying persons authorised by the Commission to conduct an inspection ordered in accordance with paragraph 1 of this Article shall have the powers set out in Article 20(2)(a), (b) and (c). Article 20(5) and (6) shall apply mutatis mutandis.

Article 22

Investigations by competition authorities of Member States

1. The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.
2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

CHAPTER VI
PENALTIES

Article 23

Fines

1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

(a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);

(b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;

(c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);

(d) in response to a question asked in accordance with Article 20(2)(e),

- they give an incorrect or misleading answer,

- they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or

- they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);

(e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken.

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 or Article 82 of the Treaty; or

(b) they contravene a decision ordering interim measures under Article 8; or

(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.
4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.

After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred.

However, the Commission shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.

The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10% of its total turnover in the preceding business year.

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

Article 24

Periodic penalty payments

1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Article 81 or Article 82 of the Treaty, in accordance with a decision taken pursuant to Article 7;
(b) to comply with a decision ordering interim measures taken pursuant to Article 8;
(c) to comply with a commitment made binding by a decision pursuant to Article 9;
(d) to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3);
(e) to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).

2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 23(4) shall apply correspondingly.

CHAPTER VII

LIMITATION PERIODS

Article 25

Limitation periods for the imposition of penalties

1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:

(a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;
(b) five years in the case of all other infringements.
2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement. Actions which interrupt the running of the period shall include in particular the following:

(a) written requests for information by the Commission or by the competition authority of a Member State;

(b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State;

(c) the initiation of proceedings by the Commission or by the competition authority of a Member State;

(d) notification of the statement of objections of the Commission or of the competition authority of a Member State.

4. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.

5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.

6. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

Article 26

Limitation period for the enforcement of penalties

1. The power of the Commission to enforce decisions taken pursuant to Articles 23 and 24 shall be subject to a limitation period of five years.

2. Time shall begin to run on the day on which the decision becomes final.

3. The limitation period for the enforcement of penalties shall be interrupted:

(a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation;

(b) by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fine or periodic penalty payment.

4. Each interruption shall start time running afresh.

5. The limitation period for the enforcement of penalties shall be suspended for so long as:

(a) time to pay is allowed;

(b) enforcement of payment is suspended pursuant to a decision of the Court of Justice.

CHAPTER VIII

HEARINGS AND PROFESSIONAL SECRECY

Article 27
Hearing of the parties, complainants and others

1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission’s file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.

4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 28

Professional secrecy

1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.

CHAPTER IX

EXEMPTION REGULATIONS

Article 29

Withdrawal in individual cases

1. Where the Commission, empowered by a Council Regulation, such as Regulations 19/65/EEC, (EEC) No 2821/71, (EEC) No 3976/87, (EEC) No 1534/91 or (EEC) No 479/92, to apply Article 81(3) of the Treaty by regulation, has declared Article 81(1) of the Treaty inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, it may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81(3) of the Treaty.
2. Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which a Commission Regulation referred to in paragraph 1 applies have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the Regulation in question in respect of that territory.

CHAPTER X

GENERAL PROVISIONS

Article 30

Publication of decisions

1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.

2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 31

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 32

Exclusions

This Regulation shall not apply to:

(a) international tramp vessel services as defined in Article 1(3)(a) of Regulation (EEC) No 4056/86;

(b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation (EEC) No 4056/86;

(c) air transport between Community airports and third countries.

Article 33

Implementing provisions

1. The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures may concern, inter alia:

(a) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints;

(b) the practical arrangements for the exchange of information and consultations provided for in Article 11;

(c) the practical arrangements for the hearings provided for in Article 27.

2. Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time-limit it lays down, which may not be less than one month. Before publishing a draft measure and before adopting it, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions.
CHAPTER XI
TRANSITIONAL, AMENDING AND FINAL PROVISIONS

Article 34
Transitional provisions

1. Applications made to the Commission under Article 2 of Regulation No 17, notifications made under Articles 4 and 5 of that Regulation and the corresponding applications and notifications made under Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall lapse as from the date of application of this Regulation.

2. Procedural steps taken under Regulation No 17 and Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall continue to have effect for the purposes of applying this Regulation.

Article 35
Designation of competition authorities of Member States

1. The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.

2. When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.

3. The effects of Article 11(6) apply to the authorities designated by the Member States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5. The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5.

4. Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that is separate and different from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.…

Article 45
Entry into force

This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Communities.

It shall apply from 1 May 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 16 December 2002.

For the Council

The President

M. Fischer Boel
JUDGMENT OF THE COURT

20 September 2001 (1)

(Article 85 of the EC Treaty (now Article 81 EC) - Beer tie - Leasing of public houses - Restrictive agreement - Right to damages of a party to the contract)

In Case C-453/99,

REFERENCE to the Court under Article 234 EC by the Court of Appeal (England and Wales) (Civil Division) for a preliminary ruling in the proceedings pending before that court between

Courage Ltd

and
Bernard Crehan

and between

Bernard Crehan

and

Courage Ltd and Others,

on the interpretation of Article 85 of the EC Treaty (now Article 81 EC) and other provisions of Community law,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, M. Wathelet (Rapporteur) and V. Skouris (Presidents of Chambers), D.A.O. Edward, P. Jann, L. Sevón, F. Macken and N. Colneric, J.N. Cunha Rodrigues and C.W.A. Timmermans, Judges,

Advocate General: J. Mischo,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Courage Ltd, by N. Green QC, instructed by A. Molyneux, Solicitor,
- Bernard Crehan, by D. Vaughan QC and M. Brealey, Barrister, instructed by R. Croft, solicitor,
- the United Kingdom Government, by J.E. Collins, acting as Agent, and K. Parker QC,
- the French Government, by K. Rispal-Bellanger et R. Loosli-Surrans, acting as Agents,
- the Italian Government, by U. Leanza, acting as Agent,
- the Swedish Government, by L. Nordling and I. Simfors, acting as Agents,
- the Commission of the European Communities, by K. Wiedner, acting as Agent, and N. Khan, Barrister,

having regard to the Report for the Hearing,

after hearing the oral observations of Courage Ltd, represented by N. Green and M. Gray, Barrister, of Bernard Crehan, represented by D. Vaughan and M. Brealey, of the United Kingdom Government, represented by J.E. Collins and K. Parker, and of the Commission, represented by K. Wiedner and N. Khan, at the hearing on 6 February 2001,

after hearing the Opinion of the Advocate General at the sitting on 22 March 2001,

gives the following

Judgment

1.
By order of 16 July 1999, received at the Court on 30 November 1999, the Court of Appeal (England and Wales) (Civil Division) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 85 of the EC Treaty (now Article 81 EC) and other provisions of Community law.

2. The four questions have been raised in proceedings between Courage Ltd (hereinafter ‘Courage’) and Bernard Crehan, a publican, concerning unpaid supplies of beer.

Facts of the case and the questions referred for a preliminary ruling

3. In 1990, Courage, a brewery holding a 19% share of the United Kingdom market in sales of beer, and Grand Metropolitan plc (hereinafter ‘Grand Met’), a company with a range of catering and hotel interests, agreed to merge their leased public houses (hereinafter ‘pubs’). To this end, their respective pubs were transferred to Inntrepreneur Estates Ltd (hereinafter ‘IEL’), a company owned in equal shares by Courage and Grand Met. An agreement concluded between IEL and Courage provided that all IEL tenants had to buy their beer exclusively from Courage. Courage was to supply the quantities of beer ordered at the prices specified in the price lists applicable to the pubs leased by IEL.

4. IEL issued a standard form lease agreement to its tenants. While the level of rent could be the subject of negotiation with a prospective tenant, the exclusive purchase obligation (‘beer tie’) and the other clauses of the contract were not negotiable.

5. In 1991, Mr Crehan concluded two 20-year leases with IEL imposing an obligation to purchase from Courage. The rent, subject to a five-year upward-only rent review, was to be the higher of the rent for the immediately preceding period or the best open market rent obtainable for the residue of the term on the other terms of the lease. The tenant had to purchase a fixed minimum quantity of specified beers and IEL agreed to procure the supply of specified beer to the tenant by Courage at the prices shown in the latter’s price list.

6. In 1993, Courage, the plaintiff in the main proceedings, brought an action for the recovery from Mr Crehan of the sum of GBP 15,266 for unpaid deliveries of beer. Mr Crehan contested the action on its merits, contending that the beer tie was contrary to Article 85 of the Treaty. He also counter-claimed for damages.

7. Mr Crehan contended that Courage sold its beers to independent tenants of pubs at substantially lower prices than those in the price list imposed on IEL tenants subject to a beer tie. He contended that this price difference reduced the profitability of tied tenants, driving them out of business.


9. That notification was withdrawn in October 1997 following the introduction by IEL of a new standard form lease agreement, which was also notified to the Commission. The new lease is, however, not at issue in the main proceedings, as the actions brought concern the operation of the beer tie under the old lease.

10. The considerations which led the Court of Appeal to refer questions to the Court of Justice for a preliminary ruling were as follows.

11. According to the referring court, English law does not allow a party to an illegal agreement to claim damages from the other party. So, even if Mr Crehan’s defence, that the lease into which he entered infringes Article 85 of the Treaty, were upheld, English law would bar his claim for damages.

12. Moreover, in a judgment which predated the present order for reference, the Court of Appeal had held, without considering it necessary to seek a ruling from the Court of Justice on the point, that Article 85(1) of the EC Treaty was intended to protect third parties, whether competitors or consumers, and not parties
to the prohibited agreement. It was held that they were the cause, not the victims, of the restriction of competition.

13. The Court of Appeal points out that the Supreme Court of the United States of America held, in its decision in *Perma Life Mufflers Inc. v International Parts Corp.* 392 U.S. 134 (1968), that where a party to an anticompetitive agreement is in an economically weaker position he may sue the other contracting party for damages.

14. The Court of Appeal therefore raises the question of the compatibility with Community law of the bar in English law to Mr Crehan's claims set out at paragraph 6 above.

15. If Community law confers on a party to a contract liable to restrict or distort competition legal protection comparable to that offered by the law of the United States of America, the Court of Appeal points out that there might be tension between the principle of procedural autonomy and that of the uniform application of Community law.

16. In those circumstances, it decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Is Article 81 EC (ex Article 85) to be interpreted as meaning that a party to a prohibited tied house agreement may rely upon that article to seek relief from the courts from the other contracting party?

2. If the answer to Question 1 is yes, is the party claiming relief entitled to recover damages alleged to arise as a result of his adherence to the clause in the agreement which is prohibited under Article 81?

3. Should a rule of national law which provides that courts should not allow a person to plead and/or rely on his own illegal actions as a necessary step to recovery of damages be allowed as consistent with Community law;

4. If the answer to Question 3 is that, in some circumstances, such a rule may be inconsistent with Community law, what circumstances should the national court take into consideration?’

**The questions**

17. By its first, second and third questions, which should be considered together, the referring court is asking essentially whether a party to a contract liable to restrict or distort competition within the meaning of Article 85 of the Treaty can rely on the breach of that provision before a national court to obtain relief from the other contracting party. In particular, it asks whether that party can obtain compensation for loss which he alleges to result from his being subject to a contractual clause contrary to Article 85 and whether, therefore, Community law precludes a rule of national law which denies a person the right to rely on his own illegal actions to obtain damages.

18. If Community law precludes a national rule of that sort, the national court wishes to know, by its fourth question, what factors must be taken into consideration in assessing the merits of such a claim for damages.

19. It should be borne in mind, first of all, that the Treaty has created its own legal order, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal order are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal assets. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62 *Van Gend en Loos* [1963] ECR 1, Case 6/64 *Costa* [1964] ECR 585 and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 31).
Secondly, according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market (judgment in Case C-126/97 Eco Swiss [1999] ECR I-3055, paragraph 36).

Indeed, the importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void (judgment in Eco Swiss, cited above, paragraph 36).

That principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article 85(1) are met and so long as the agreement concerned does not justify the grant of an exemption under Article 85(3) of the Treaty (on the latter point, see *inter alia* Case 10/69 Portelange [1969] ECR 309, paragraph 10). Since the nullity referred to in Article 85(2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties (see the judgment in Case 22/71 Béguelin [1971] ECR 949, paragraph 29). Moreover, it is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned (see the judgment in Case 48/72 Brasserie de Hacelt II [1973] ECR 77, paragraph 26).

Thirdly, it should be borne in mind that the Court has held that Article 85(1) of the Treaty and Article 86 of the EC Treaty (now Article 82 EC) produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard (judgments in Case 127/73 BRT and SABAM [1974] ECR 51, paragraph 16, ("BRT I") and Case C-282/95 P Guérin Automobiles v Commission [1997] ECR I-1503, paragraph 39).

It follows from the foregoing considerations that any individual can rely on a breach of Article 85(1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.

As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see *inter alia* the judgments in Case 106/77 Simmenthal [1978] ECR 629, paragraph 16, and in Case C-213/89 Factortame [1990] ECR I-2433, paragraph 19).

The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.

There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.

However, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see Case C-261/95 Palmisani [1997] ECR I-4025, paragraph 27).

In that regard, the Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them (see, in particular, Case 238/78 Irkis-Arkydy v Council and Commission
31. Similarly, provided that the principles of equivalence and effectiveness are respected (see Palmisani, cited above, paragraph 27), Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past (see Case 39/72 Commission v Italy [1973] ECR 101, paragraph 10), a litigant should not profit from his own unlawful conduct, where this is proven.

32. In that regard, the matters to be taken into account by the competent national court include the economic and legal context in which the parties find themselves and, as the United Kingdom Government rightly points out, the respective bargaining power and conduct of the two parties to the contract.

33. In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him.

34. Referring to the judgments in Case 23/67 Brasserie de Haecht [1967] ECR 127 and Case C-234/89 Delimitis [1991] ECR I-935, paragraphs 14 to 26, the Commission and the United Kingdom Government also rightly point out that a contract might prove to be contrary to Article 85(1) of the Treaty for the sole reason that it is part of a network of similar contracts which have a cumulative effect on competition. In such a case, the party contracting with the person controlling the network cannot bear significant responsibility for the breach of Article 85, particularly where in practice the terms of the contract were imposed on him by the party controlling the network.

35. Contrary to the submission of Courage, making a distinction as to the extent of the parties' liability does not conflict with the case-law of the Court to the effect that it does not matter, for the purposes of the application of Article 85 of the Treaty, whether the parties to an agreement are on an equal footing as regards their economic position and function (see inter alia Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 382). That case-law concerns the conditions for application of Article 85 of the Treaty while the questions put before the Court in the present case concern certain consequences in civil law of a breach of that provision.

36. Having regard to all the foregoing considerations, the questions referred are to be answered as follows:

- a party to a contract liable to restrict or distort competition within the meaning of Article 85 of the Treaty can rely on the breach of that article to obtain relief from the other contracting party;

- Article 85 of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract;

- Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition.

Costs

37. The costs incurred by the United Kingdom, French, Italian and Swedish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,
THE COURT,

in answer to the questions referred to it by the Court of Appeal (England and Wales) (Civil Division) by order of 16 July 1999, hereby rules:

1. A party to a contract liable to restrict or distort competition within the meaning of Article 85 of the EC Treaty (now Article 81 EC) can rely on the breach of that provision to obtain relief from the other contracting party.

2. Article 85 of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract.

3. Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition.

### Recent Commission fines

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<td>Spanish road bitumen</td>
<td>183</td>
</tr>
<tr>
<td></td>
<td>Zips and Fasteners</td>
<td>328</td>
</tr>
<tr>
<td></td>
<td>Professional videotape</td>
<td>75</td>
</tr>
<tr>
<td></td>
<td>Irish Sugar</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>Flat glass</td>
<td>487</td>
</tr>
<tr>
<td></td>
<td>Chloroprene rubber</td>
<td>243</td>
</tr>
<tr>
<td>2008</td>
<td>Synthetic rubber cartel</td>
<td>34</td>
</tr>
<tr>
<td></td>
<td>Microsoft</td>
<td>899</td>
</tr>
<tr>
<td></td>
<td>Belgian removal services</td>
<td>33</td>
</tr>
<tr>
<td></td>
<td>E.ON breaking seal</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>Sodium chlorate cartel</td>
<td>79</td>
</tr>
<tr>
<td></td>
<td>Aluminium fluoride cartel</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Candle wax cartel</td>
<td>676</td>
</tr>
<tr>
<td></td>
<td>Banana cartel</td>
<td>60</td>
</tr>
<tr>
<td></td>
<td>Automotive glass cartel</td>
<td>1,384</td>
</tr>
<tr>
<td>2009</td>
<td>Marine hoses</td>
<td>131</td>
</tr>
<tr>
<td></td>
<td>Intel</td>
<td>1,060</td>
</tr>
<tr>
<td></td>
<td>E.ON/GDF Suez cartel</td>
<td>1,106</td>
</tr>
<tr>
<td></td>
<td>Calcium carbide/magnesium</td>
<td>61</td>
</tr>
<tr>
<td>Year</td>
<td>Case</td>
<td>Fine in €</td>
</tr>
<tr>
<td>--------------</td>
<td>--------------------------------------------------</td>
<td>-------------</td>
</tr>
<tr>
<td>2016/2017</td>
<td>Trucks</td>
<td>3,807,022,000</td>
</tr>
<tr>
<td>2012</td>
<td>Cathode Tubes</td>
<td>1,409,588,000</td>
</tr>
<tr>
<td>2013/2016</td>
<td>Euro interest rates derivatives</td>
<td>1,310,039,000</td>
</tr>
<tr>
<td>2008</td>
<td>Automotive glass</td>
<td>1,185,500,000</td>
</tr>
<tr>
<td>2014</td>
<td>Automotive bearings</td>
<td>953,306,000</td>
</tr>
<tr>
<td>2007</td>
<td>Lifts and escalators</td>
<td>832,422,250</td>
</tr>
<tr>
<td>2001</td>
<td>Vitamins</td>
<td>790,515,000</td>
</tr>
<tr>
<td>2010/2017</td>
<td>Airfreight (incl. re-adoption)</td>
<td>785,345,000</td>
</tr>
<tr>
<td>2013/2015</td>
<td>Yen interest rate derivatives</td>
<td>669,719,000</td>
</tr>
<tr>
<td>2007/2012</td>
<td>Gas insulated switchgear (incl. re-adoption)</td>
<td>675,445,000</td>
</tr>
</tbody>
</table>
### Convergence of National Law and Regulation 1/2003

<table>
<thead>
<tr>
<th>Major Change introduced by Reg 1/2003 or EU practice</th>
<th>Corresponding national law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Abolition of notification</strong>&lt;br&gt; <em>Exception légale</em>&lt;br&gt; (Article 1)</td>
<td>AT, BE, BG, CR, CY, CZ, DE, EE, ES, FI, FR, GR, HU, IE, NL, LT, LU, MT, PL, PT, RO, SI, SK, SV, UK&lt;br&gt; <strong>No convergence</strong>&lt;br&gt; DK, IT, LV</td>
</tr>
<tr>
<td><strong>2. Parallel application of</strong>&lt;br&gt; Union and national rules&lt;br&gt; (Article 3(2))</td>
<td>AT, BE, BG, CR, CY, CZ, DE, DK, EE, ES, FI, FR, GR, HU, IE, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK, SV, UK&lt;br&gt; <strong>No convergence</strong>&lt;br&gt; IT</td>
</tr>
<tr>
<td><strong>3. Power to impose</strong>&lt;br&gt; structural remedies&lt;br&gt; (Article 7)</td>
<td>AT, BE, BG, CR, CY, CZ, DE, ES, FR, GR, HU, IE, LT, LU, LV, MT, NL, PL, PT, RO, SI, UK&lt;br&gt; <strong>No convergence</strong>&lt;br&gt; DK, EE, FI, LT, PL, SK, SV</td>
</tr>
<tr>
<td><strong>4. Power to order</strong>&lt;br&gt; interim measures&lt;br&gt; (Article 8)</td>
<td>AT, BE, BG, CY, CZ, DE, DK, ES, FI, FR, GR, HU, IE, IT, LT, LV, MT, NL, PL, PT, RO, SI, SK, SV, UK&lt;br&gt; <strong>No convergence</strong>&lt;br&gt; LU, EE, LV</td>
</tr>
<tr>
<td><strong>5. Power to adopt</strong>&lt;br&gt; commitment decisions&lt;br&gt; (Article 9)</td>
<td>AT, BE, BG, CR, CY, CZ, DE, DK, ES, FI, FR, GR, HU, IE, IT, MT, LT, LU, NL, PL, PT, RO, SI, SK, SV, UK&lt;br&gt; <strong>No convergence</strong>&lt;br&gt; LV, EE</td>
</tr>
<tr>
<td><strong>6. Power to inspect</strong>&lt;br&gt; non-business premises&lt;br&gt; (Article 21)</td>
<td>AT, BE, CR, CY, CZ, DE, DK, ES, FI, FR, GR, HU, IE, LT, LV, MT, NL, PL, PT, RO, SI, SK, SV, UK&lt;br&gt; <strong>No convergence</strong>&lt;br&gt; DE, BG, DK, IT</td>
</tr>
<tr>
<td><strong>7. Informal guidance</strong></td>
<td>AT, BE, BG, CR, DE, DK, EE, ES, FR, IE, NL, MT, PL, PT, RO, SI, CY, CZ, FI, GR, HU, LT, LV, SK&lt;br&gt; <strong>No convergence</strong>&lt;br&gt; IT, LU</td>
</tr>
</tbody>
</table>
8. Leniency programme

SV, UK
AT, BE, BG, CR, CY,
CZ, DE, DK, EE, ES,
FI, FR, GR, HU, IE,
IT, LT, LU, LV, NL,
PL, PT, RO, SI, SK,
SV, UK

Number of case investigations initiated by NCAs of which the Commission has been informed pursuant to Article 11(3) of Regulation 1/2003

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Initiated</th>
<th>Cases Reported</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004-2005</td>
<td>200</td>
<td>181</td>
</tr>
<tr>
<td>2006</td>
<td>144</td>
<td></td>
</tr>
<tr>
<td>2007</td>
<td>140</td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>149</td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>129</td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td>158</td>
<td></td>
</tr>
<tr>
<td>2011</td>
<td>137</td>
<td></td>
</tr>
<tr>
<td>2012</td>
<td>106</td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td>116</td>
<td></td>
</tr>
<tr>
<td>2014</td>
<td>173</td>
<td></td>
</tr>
<tr>
<td>2015</td>
<td>160</td>
<td></td>
</tr>
</tbody>
</table>

Total May 2004 – January 2016: 1,797

Cases per Member State (1 May 2004 - 1 January 2016)

New case investigations Envisaged decisions (Art 11(4))

<table>
<thead>
<tr>
<th>Country</th>
<th>New Case Investigations</th>
<th>Envisaged Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>100</td>
<td>25</td>
</tr>
<tr>
<td>Belgium</td>
<td>57</td>
<td>16</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>22</td>
<td>7</td>
</tr>
<tr>
<td>Croatia</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Cyprus</td>
<td>18</td>
<td>6</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>20</td>
<td>10</td>
</tr>
<tr>
<td>Denmark</td>
<td>77</td>
<td>46</td>
</tr>
<tr>
<td>Germany</td>
<td>200</td>
<td>113</td>
</tr>
<tr>
<td>Greece</td>
<td>47</td>
<td>45</td>
</tr>
<tr>
<td>Estonia</td>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>Finland</td>
<td>33</td>
<td>14</td>
</tr>
<tr>
<td>France</td>
<td>246</td>
<td>119</td>
</tr>
<tr>
<td>Hungary</td>
<td>117</td>
<td>39</td>
</tr>
<tr>
<td>Ireland</td>
<td>20</td>
<td>2</td>
</tr>
<tr>
<td>Italy</td>
<td>135</td>
<td>112</td>
</tr>
<tr>
<td>Latvia</td>
<td>19</td>
<td>5</td>
</tr>
<tr>
<td>Lithuania</td>
<td>23</td>
<td>20</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>15</td>
<td>5</td>
</tr>
<tr>
<td>Malta</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>105</td>
<td>50</td>
</tr>
<tr>
<td>Poland</td>
<td>29</td>
<td>14</td>
</tr>
<tr>
<td>Portugal</td>
<td>69</td>
<td>23</td>
</tr>
<tr>
<td>Romania</td>
<td>52</td>
<td>34</td>
</tr>
<tr>
<td>Slovakia</td>
<td>24</td>
<td>20</td>
</tr>
<tr>
<td>Slovenia</td>
<td>32</td>
<td>28</td>
</tr>
<tr>
<td>Spain</td>
<td>137</td>
<td>101</td>
</tr>
</tbody>
</table>
The most faithful NCAs may be identified from the following table (to October 2010):

<table>
<thead>
<tr>
<th>Country</th>
<th>Last and next to last</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sweden</td>
<td>63/22</td>
<td>85</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>81/23</td>
<td>104</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,709</strong>/<strong>900</strong></td>
<td></td>
</tr>
</tbody>
</table>

Notifications made by national courts under Article 15(2) of Regulation 1/2003

<table>
<thead>
<tr>
<th>Country</th>
<th>Notifications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spain</td>
<td>106</td>
</tr>
<tr>
<td>Germany</td>
<td>91</td>
</tr>
<tr>
<td>France</td>
<td>64</td>
</tr>
<tr>
<td>Belgium</td>
<td>27</td>
</tr>
<tr>
<td>Netherlands</td>
<td>20</td>
</tr>
<tr>
<td>Austria</td>
<td>10</td>
</tr>
<tr>
<td>Sweden</td>
<td>7</td>
</tr>
<tr>
<td>Finland</td>
<td>6</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>6</td>
</tr>
<tr>
<td>Lithuania</td>
<td>4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>351</strong></td>
</tr>
</tbody>
</table>

Specialist national courts for civil proceedings in competition matters

- **YES**: BE, DE, DK, ES, FR, SK, UK
- **NO**: AT, BG, CR, CY, CZ, EE, FI, GR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SV

Requests for Information (Article 15(1))

- *Estaciones 2000/Repsol*, Juzgado de Primera Instancia No 58, Madrid, 18.05.2004
- *Wallonie Expo c/ FEBIAC*, Cour d’Appel, Bruxelles, 2.2.2005
- *SABAM c/ Productions and Marketing*, Cour d’Appel, Bruxelles, 2.2.2005
- *Emond c/ Brasserie Haecht*, Cour d’Appel, Bruxelles, 2.2.2005
- *Estaciones de combustible*, Juzgado de lo Mercantil No 4, Madrid, 7.7.2005
- *Poort van Antwerp*, Hof van beroep van Antwerpen, 23.5.2006
- *Nederlandse Mosselen Producenten*, Grechtshof ’s-Gravenhage, 23.5.2006
- *Berenguer/Repsol*, Juzgado de Primera Instancia No 73, Madrid, 29.09.2006
- *Danska Staten genom Bornholms Trafiken m/ Ystad Hamm Logistik*, Högsta Domstolen, 16.2.2007
- *Brouwerij Haecht*, Hof van beroep te Antwerpen, 10.3.2009
- *REPSOL*, Juzgado de lo Mercantil, Barcelona, 18.7.2009
Canales i Fils c/ Petrocat, Juzgado de lo Mercantil, Barcelona, 18.9.2009
Dalphi Metal Espana c/ Tataki-Petri, Juzgado Mercantile, Madrid, 9.10.2009
Bikes/Ducati, Rechtbank van Koophandel te Dendermonde, 17.11.2009
iPhones, Cour Commercial, Bruxelles, 18.12.2009
Kapitol c/ Magyar Telecom, Cour d’Appel, Bruxelles, 7.8.2012
REPSOL, Juzgado Mercantile, Madrid, 7.10.2013
Wm Morrison v Mastercard, High Court, London, 5.5.2014
Payment Systems, Rechtbank van Koophandel, Brussel, 5.6.2014
Mobile telephones, Court d’Appel, Paris, 1.12.2014
Secretary of State for Health v Servier Laboratories, High Court, London, 22.12.2014
Waste Collection, Curtea de Apel, Bucharest, 6.7.2015
Sainsbury’s Supermarkets v MasterCard, High Court (Chancery Division), London, 29.10.2015
Gaisa transports, Augstākā tiesa, Rīga, 22.12.2015
Tax Litigation, Erstinstanzen Finanzgerichtliches Klageverfahren, 21.07.2017
Selective Distribution, Shoes, Rechtsbank van Koophandel, Antwerp, 29.11.2017

Amicus curiae briefs (Article 15(3))

Garage Grémeau, Cour d’Appel de Paris, 2.11.2006
X BV, Gerechtshof Amsterdam, 24.9.2009
Competition Authority v Beef Industry Development Society Ltd (BIDS) and Barry Brothers, High Court, Dublin, 3.3.2010
Železničná spoločnosť Cargo Slovakia, a.s, Najvyšší súd Slovenskej Republiky, 25.6.2010
X BV, Hoge Raad der Nederlanden, 16.12.2010
Bundeswettbewerbsbehörde gegen 43 im Transportsektor tätige Unternehmen, Obersten Gerichtshof als Kartellobergericht, 12.9.2011
Orange Caraïbe, Cour de Cassation, Paris, 13.10.2011
National Grid v ABB and ors, High Court, London, 3.3.2011
Tessenderlo Chemie t Belgische Staat, Grondwettelijk Hof, 8.3.2012
Spanish Insurance, Tribunal Supremo, Madrid, 4.12.2013
Morgan Advanced Materials v Deutsche Bahn, Supreme Court, London, 18.2.2014
Succession to cartel fines, Bundesgerichtshof, Germany, 7.4.2014
Concurrence à l’Agriculture, Cour de Cassation, Paris, 27.2.2015
Spanish fines, Tribunal Supremo, Madrid, 21.4.2015
EURIBOR, High Court, London, 27.1.2017
Visa and Mastercard MIFs, Court of Appeal, London, 21.2.2018

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 83 and 308 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

4. On the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5.

5. Following the report referred to in paragraph 4 and on a proposal from the Commission, the Council, acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3.

Article 2

Appraisal of concentrations
1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition.

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

5. In making this appraisal, the Commission shall take into account in particular:

- whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,

- whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Article 3

Definition of concentration

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

3. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.
4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).

5. A concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;

(c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 4

Prior notification of concentrations and pre-notification referral at the request of the notifying parties

1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

For the purposes of this Regulation, the term "notified concentration" shall also cover intended concentrations notified pursuant to the second subparagraph. For the purposes of paragraphs 4 and 5 of this Article, the term "concentration" includes intended concentrations within the meaning of the second subparagraph.

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the undertakings concerned, their country of origin, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

4. Prior to the notification of a concentration within the meaning of paragraph 1, the persons or undertakings referred to in paragraph 2 may inform the Commission, by means of a reasoned submission, that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.

The Commission shall transmit this submission to all Member States without delay. The Member State referred to in the reasoned submission shall, within 15 working days of receiving the
submission, express its agreement or disagreement as regards the request to refer the case. Where that Member State takes no such decision within this period, it shall be deemed to have agreed.

Unless that Member State disagrees, the Commission, where it considers that such a distinct market exists, and that competition in that market may be significantly affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national competition law.

The decision whether or not to refer the case in accordance with the third subparagraph shall be taken within 25 working days starting from the receipt of the reasoned submission by the Commission. The Commission shall inform the other Member States and the persons or undertakings concerned of its decision. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned.

If the Commission decides, or is deemed to have decided, pursuant to the third and fourth subparagraphs, to refer the whole of the case, no notification shall be made pursuant to paragraph 1 and national competition law shall apply. Article 9(6) to (9) shall apply mutatis mutandis.

5. With regard to a concentration as defined in Article 3 which does not have a Community dimension within the meaning of Article 1 and which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to in paragraph 2 may, before any notification to the competent authorities, inform the Commission by means of a reasoned submission that the concentration should be examined by the Commission.

The Commission shall transmit this submission to all Member States without delay.

Any Member State competent to examine the concentration under its national competition law may, within 15 working days of receiving the reasoned submission, express its disagreement as regards the request to refer the case.

Where at least one such Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the case shall not be referred. The Commission shall, without delay, inform all Member States and the persons or undertakings concerned of any such expression of disagreement.

Where no Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with paragraphs 1 and 2. In such situations, no Member State shall apply its national competition law to the concentration.

6. The Commission shall report to the Council on the operation of paragraphs 4 and 5 by 1 July 2009. Following this report and on a proposal from the Commission, the Council, acting by a qualified majority, may revise paragraphs 4 and 5.

Article 5
Calculation of turnover

1. Aggregate turnover within the meaning of this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller or sellers.
However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

3. In place of turnover the following shall be used:

(a) for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC(7), after deduction of value added tax and other taxes directly related to those items, where appropriate:

(i) interest income and similar income;

(ii) income from securities:
- income from shares and other variable yield securities,
- income from participating interests,
- income from shares in affiliated undertakings;

(iii) commissions receivable;

(iv) net profit on financial operations;

(v) other operating income.

The turnover of a credit or financial institution in the Community or in a Member State shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the Community or in the Member State in question, as the case may be;

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and (3)(b), (c) and (d) and the final part of Article 1(2) and (3), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly:

(i) owns more than half the capital or business assets, or

(ii) has the power to exercise more than half the voting rights, or

(iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

(iv) has the right to manage the undertakings' affairs;

(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4(b), in calculating the aggregate turnover of the undertakings concerned for the purposes of this Regulation:

(a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4(b) to (e);
(b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

Article 6

Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

(c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the concentration compatible pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

3. The Commission may revoke the decision it took pursuant to paragraph 1(a) or (b) where:

(a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit,

or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

4. In the cases referred to in paragraph 3, the Commission may take a decision under paragraph 1, without being bound by the time limits referred to in Article 10(1).

5. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 7

Suspension of concentrations

1. A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).

2. Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:

(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and
(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.

3. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, before notification or after the transaction.

4. The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(1), (2) or (3) or on a presumption pursuant to Article 10(6).

This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1.

Article 8

Powers of decision of the Commission

1. Where the Commission finds that a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion defined in Article 2(3) or, in the cases referred to in Article 2(4), does not fulfil the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where the Commission finds that a concentration:

(a) has already been implemented and that concentration has been declared incompatible with the common market, or

(b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty,

the Commission may:

- require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,
- order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.

5. The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:

(a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the common market has not yet been taken;

(b) has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article;

(c) has already been implemented and is declared incompatible with the common market.

6. The Commission may revoke the decision it has taken pursuant to paragraphs 1 or 2 where:

(a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

7. The Commission may take a decision pursuant to paragraphs 1 to 3 without being bound by the time limits referred to in Article 10(3), in cases where:

(a) it finds that a concentration has been implemented

(i) in contravention of a condition attached to a decision under Article 6(1)(b), or

(ii) in contravention of a condition attached to a decision taken under paragraph 2 and in accordance with Article 10(2), which has found that, in the absence of the condition, the concentration would raise serious doubts as to its compatibility with the common market; or

(b) a decision has been revoked pursuant to paragraph 6.

8. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 9

Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within 15 working days of the date of receipt of the copy of the notification, a Member State, on its own initiative or upon the invitation of the Commission, may inform the Commission, which shall inform the undertakings concerned, that:

(a) a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market, or

(b) a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

(a) it shall itself deal with the case in accordance with this Regulation; or

(b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State’s national competition law.
If, however, the Commission considers that such a distinct market or threat does not exist, it shall adopt a decision to that effect which it shall address to the Member State concerned, and shall itself deal with the case in accordance with this Regulation.

In cases where a Member State informs the Commission pursuant to paragraph 2(b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken:

(a) as a general rule within the period provided for in Article 10(1), second subparagraph, where the Commission, pursuant to Article 6(1)(b), has not initiated proceedings; or

(b) within 65 working days at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6(1)(c), without taking the preparatory steps in order to adopt the necessary measures under Article 8(2), (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the 65 working days referred to in paragraph 4(b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4(b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3(b).

6. The competent authority of the Member State concerned shall decide upon the case without undue delay.

Within 45 working days after the Commission's referral, the competent authority of the Member State concerned shall inform the undertakings concerned of the result of the preliminary competition assessment and what further action, if any, it proposes to take. The Member State concerned may exceptionally suspend this time limit where necessary information has not been provided to it by the undertakings concerned as provided for by its national competition law.

Where a notification is requested under national law, the period of 45 working days shall begin on the working day following that of the receipt of a complete notification by the competent authority of that Member State.

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 243 of the Treaty, for the purpose of applying its national competition law.

**Article 10**

**Time limits for initiating proceedings and for decisions**

1. Without prejudice to Article 6(4), the decisions referred to in Article 6(1) shall be taken within 25 working days at most. That period shall begin on the working day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the working day following that of the receipt of the complete information.

That period shall be increased to 35 working days where the Commission receives a request from a Member State in accordance with Article 9(2) or where the undertakings concerned offer commitments pursuant to Article 6(2) with a view to rendering the concentration compatible with the common market.
2. Decisions pursuant to Article 8(1) or (2) concerning notified concentrations shall be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the time limit laid down in paragraph 3.

3. Without prejudice to Article 8(7), decisions pursuant to Article 8(1) to (3) concerning notified concentrations shall be taken within not more than 90 working days of the date on which the proceedings are initiated. That period shall be increased to 105 working days where the undertakings concerned offer commitments pursuant to Article 8(2), second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings.

The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. Likewise, at any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the agreement of the notifying parties. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days.

4. The periods set by paragraphs 1 and 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an inspection by decision pursuant to Article 13.

The first subparagraph shall also apply to the period referred to in Article 9(4)(b).

5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1). The concentration shall be re-examined in the light of current market conditions.

The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification becomes incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay.

The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the third subparagraph.

The second and third subparagraphs shall also apply in the cases referred to in Article 6(4) and Article 8(7).

6. Where the Commission has not taken a decision in accordance with Article 6(1)(b), (c), 8(1), (2) or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.

Article 11

Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require the persons referred to in Article 3(1)(b), as well as undertakings and associations of undertakings, to provide all necessary information.

2. When sending a simple request for information to a person, an undertaking or an association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which the information is to be provided, as well as the penalties provided for in Article 14 for supplying incorrect or misleading information.

3. Where the Commission requires a person, an undertaking or an association of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which it is to be provided. It shall also indicate the penalties provided for in Article 14 and indicate or impose the penalties provided for in Article 15. It shall further indicate the right to have the decision reviewed by the Court of Justice.
4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested on behalf of the undertaking concerned. Persons duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of any decision taken pursuant to paragraph 3 to the competent authorities of the Member State in whose territory the residence of the person or the seat of the undertaking or association of undertakings is situated, and to the competent authority of the Member State whose territory is affected. At the specific request of the competent authority of a Member State, the Commission shall also forward to that authority copies of simple requests for information relating to a notified concentration.

6. At the request of the Commission, the governments and competent authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

7. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation. At the beginning of the interview, which may be conducted by telephone or other electronic means, the Commission shall state the legal basis and the purpose of the interview.

Where an interview is not conducted on the premises of the Commission or by telephone or other electronic means, the Commission shall inform in advance the competent authority of the Member State in whose territory the interview takes place. If the competent authority of that Member State so requests, officials of that authority may assist the officials and other persons authorised by the Commission to conduct the interview.

Article 12

Inspections by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 13(1), or which it has ordered by decision pursuant to Article 13(4). The officials of the competent authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

2. If so requested by the Commission or by the competent authority of the Member State within whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

Article 13

The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall have the power:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
(c) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

3. Officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 14, in the production of the required books or other records related to the business which is incomplete or where answers to questions asked under paragraph 2 of this Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competent authority of the Member State in whose territory the inspection is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 14 and 15 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competent authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of, and those authorised or appointed by, the competent authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection, including the sealing of business premises, books or records, ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall ensure that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the competent authority of that Member State, for detailed explanations relating to the subject matter of the inspection. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission's decision shall be subject to review only by the Court of Justice.

Article 14

Fines

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, fines not exceeding 1 % of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 where, intentionally or negligently:

(a) they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4, Article 10(5) or Article 22(3);

(b) they supply incorrect or misleading information in response to a request made pursuant to Article 11(2);

(c) in response to a request made by decision adopted pursuant to Article 11(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit;

(d) they produce the required books or other records related to the business in incomplete form during inspections under Article 13, or refuse to submit to an inspection ordered by decision taken pursuant to Article 13(4);
(e) in response to a question asked in accordance with Article 13(2)(e),
- they give an incorrect or misleading answer,
- they fail to rectify within a time limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
- they fail or refuse to provide a complete answer on facts relating to the subject matter and purpose of an inspection ordered by a decision adopted pursuant to Article 13(4);
(f) seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Article 13(2)(d) have been broken.

2. The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)b or the undertakings concerned where, either intentionally or negligently, they:
(a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3);
(b) implement a concentration in breach of Article 7;
(c) implement a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not comply with any measure ordered by decision pursuant to Article 8(4) or (5);
(d) fail to comply with a condition or an obligation imposed by decision pursuant to Articles 6(1)(b), Article 7(3) or Article 8(2), second subparagraph.

3. In fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement.

4. Decisions taken pursuant to paragraphs 1, 2 and 3 shall not be of a criminal law nature.

Article 15
Periodic penalty payments

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, periodic penalty payments not exceeding 5 % of the average daily aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 for each working day of delay, calculated from the date set in the decision, in order to compel them:
(a) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(3);
(b) to submit to an inspection which it has ordered by decision taken pursuant to Article 13(4);
(c) to comply with an obligation imposed by decision pursuant to Article 6(1)(b), Article 7(3) or Article 8(2), second subparagraph; or;
(d) to comply with any measures ordered by decision pursuant to Article 8(4) or (5).

2. Where the persons referred to in Article 3(1)b, undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payments at a figure lower than that which would arise under the original decision.

Article 16
Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.
Article 22

Referral to the Commission

1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay.

Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request.

All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as a Member State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end.

3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine, the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request.

The Commission shall inform all Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4.

The Member State or States having made the request shall no longer apply their national legislation on competition to the concentration.

4. Article 2, Article 4(2) to (3), Articles 5, 6, and 8 to 21 shall apply where the Commission examines a concentration pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a request has been made.

Where a notification pursuant to Article 4 is not required, the period set in Article 10(1) within which proceedings may be initiated shall begin on the working day following that on which the Commission informs the undertakings concerned that it has decided to examine the concentration pursuant to paragraph 3.

5. The Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1. In such cases, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1.