

Cases Ladbroke & Suiker Unie (State Action Doctrine)

Judgment of the Court of 11 November 1997. - Commission of the European Communities and French Republic v Ladbroke Racing Ltd. - Competition - Articles 85, 86 and 90 of the EC Treaty - Rejection of a complaint concerning the conduct of an undertaking without prior examination of the compatibility of national legislation affecting such conduct. Joined cases C-359/95 P and C-379/95 P.

Summary

When the Commission receives a complaint alleging infringement of Articles 85 and 86 and of Article 90 of the Treaty, it may reject the complaint relating to Articles 85 and 86 definitively, on the ground that those articles are not applicable and there is no Community interest in pursuing the investigation, before it has completed its examination of the complaint relating to Article 90.

The compatibility of national legislation with the Treaty rules on competition cannot be regarded as decisive in the context of an examination of the applicability of Articles 85 and 86 of the Treaty to the conduct of undertakings which are complying with that legislation. Although an assessment of the conduct of the undertakings requires a prior evaluation of the relevant national legislation, the sole purpose of that evaluation is to determine what effect that legislation may have on such conduct.

Articles 85 and 86 of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings.

Articles 85 and 86 may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition.

When the Commission is considering the applicability of Articles 85 and 86 of the Treaty to the conduct of undertakings, a prior evaluation of national legislation affecting such conduct should therefore be directed solely to ascertaining whether that legislation prevents

undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition.

Parties

In Joined Cases C-359/95 P and C-379/95 P,

Commission of the European Communities, represented by Francisco Enrique González Díaz and Richard Lyal, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

and

French Republic, represented by Jean-François Dobelle, Deputy Director of the Legal Affairs Directorate of the Ministry for Foreign Affairs, assisted by Catherine de Salins, Head of Section in that directorate, and Jean-Marc Belorgey, Special Adviser in that directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

appellants,

APPEALS against the judgment of the Court of First Instance of the European Communities (First Chamber, Extended Composition) in Case T-548/93 Ladbroke Racing v Commission [1995] ECR II-2565), seeking to have that judgment set aside, the other party to the proceedings being: Ladbroke Racing Ltd, a company incorporated under English law, represented by Jeremy Lever QC and Christopher Vajda, Barrister, instructed by Stephen Kon, Solicitor, with an address for service in Luxembourg at the Chambers of Winandy & Err, 60 Avenue Gaston Diderich,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and R. Schintgen (Presidents of Chambers), G.F. Mancini, P.J.G. Kapteyn (Rapporteur), J.L. Murray, D.A.O. Edward, J.-P. Puissochet, G. Hirsch and P. Jann, Judges,

Advocate General: G. Cosmas,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 21 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 13 May 1997,

gives the following

Judgment

Grounds

1 By applications lodged at the Court Registry on 22 and 27 November 1995, the Commission of the European Communities (C-359/95 P) and the French Republic (C-379/95 P) each brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 18 September 1995 in Case T-548/93 *Ladbroke Racing v Commission* ([1995] ECR II-2565, hereinafter 'the contested judgment') annulling the decision of the Commission in its letter of 29 July 1993 to reject a complaint lodged by *Ladbroke Racing Ltd* ('Ladbroke') under Articles 85 and 86 of the EC Treaty ('the contested decision').

2 By order of the President of the Court of Justice of 29 January 1996, Cases C359/95 P and C-379/95 P were joined for the purposes of the written and oral procedure and the judgment.

3 The contested judgment states (paragraphs 2 to 7) that *Ladbroke* lodged a complaint (No IV/33.374) with the Commission on 24 November 1989 against the French Republic under Article 90 of the EC Treaty and against the 10 main racing companies (*sociétés de courses*) in France and against the *Pari Mutuel Urbain* ('PMU'), an economic interest grouping created by the 10 companies in France to manage their rights to organize off-course totalizator betting on horse racing, under Articles 85 and 86 of the Treaty.

4 The PMU initially managed the rights of the racing companies to organize such betting as a 'joint service' operating in the context of a decree of 11 June 1930 on the extension of off-course totalizator betting, adopted in implementation of Article 186 of the Finance Law of 16 April 1930. Article 1 of the decree provided: 'With the authorization of the Minister for Agriculture, totalizator betting may be organized and operated outside racecourses by the Parisian racing companies acting jointly with the aid of the provincial racing companies'. Under Article 13 of Decree No 74-954 of 14 November 1974 on horse-racing companies, the PMU has, since that date, exclusive responsibility for managing the rights of the racing companies in relation to off-course totalizator betting, inasmuch as the article provides that 'the racing companies authorized to organize off-course totalizator betting ... shall entrust its management to a joint service to be called the *Pari Mutuel Urbain*'. The exclusive rights thereby conferred on the PMU are also protected by the prohibition on the placing or accepting of bets on horse-races by anyone other than the PMU (Article 8 of the Interministerial Decree of 13 September 1985 governing the *Pari Mutuel Urbain*). This exclusivity extends to bets taken abroad on races organized in France and bets taken in France on races organized abroad, which likewise may be taken only by the authorized companies and/or the PMU (Article 15(3) of Law No 64-1279 of 23 December 1964 on the 1965 Finance Law and Article 21 of Decree No 83-878 of 4 October 1983 on the horse-racing companies and the PMU) (paragraph 3 of the contested judgment).

5 The complaint was directed principally against that method of organizing off-course totalizator betting in France.

6 As regards its complaint against the PMU and its member companies, *Ladbroke* alleged that there were agreements or concerted practices between the racing companies authorized in

France and between them and the PMU the object of which was, in breach of Article 85 of the Treaty, to grant the latter exclusive rights in the management and organization of off-course totalizator betting on races organized or controlled by those companies, (paragraph 5 of the contested judgment). The complaint also alleged that the grant of such exclusive rights to the PMU constituted an abuse of a dominant position on the part of the racing companies, in breach of Article 86 of the Treaty (paragraph 6 of the contested judgment).

7 That part of the complaint was also directed moreover against agreements and concerted practices whose object was to support a request for State aid to the PMU, thereby enabling the PMU to extend its activities to Member States other than the French Republic, in breach of Article 85 (paragraph 5 of the contested judgment). It also requested that the breaches of Article 86 resulting from the PMU's receipt of illegal State aid and the use of advantages procured by that aid to meet competition be terminated. Lastly, Ladbroke notified the Commission of other abuses of a dominant position by the PMU, consisting in the exploitation of those placing bets, the users of its services (paragraph 6 of the contested judgment).

8 As regards its complaint against the French Republic, Ladbroke claimed that the latter had infringed, first, Articles 3(g) [formerly Article 3(f)], 5, 52, 53, 85, 86 and 90(1) of the EC Treaty by enacting and maintaining in force legislation providing a legal basis for the agreements between the racing companies inter se and between them and the PMU granting the latter exclusive rights to take off-course bets and prohibiting anyone else from placing or accepting off-course bets on horse-races organized in France otherwise than through the PMU. Secondly, it had further breached Articles 3(g) [formerly Article 3(f)], 52, 53, 59, 62, 85, 86 and 90(1) of the EC Treaty by enacting and maintaining in force legislation prohibiting the placing in France of bets on races organized abroad save through authorized companies and/or the PMU. Lastly, it had breached Articles 90(1), 92 and 93 of the EC Treaty by granting the PMU illegal aid (paragraph 7 of the contested judgment).

9 By the contested decision the Commission rejected the complaint under Articles 85 and 86 of the Treaty against the PMU and its member companies on the grounds, first, that Articles 85 and 86 were not applicable and, secondly, the absence of a Community interest (paragraphs 13 to 19 of the contested judgment).

*10 The Commission did not take a position on the aspects of the complaint directed against the French Republic under Article 90 of the Treaty. Before the Commission adopted the contested decision Ladbroke brought an action for failure to act on the ground that the Commission had failed to exercise the powers conferred on it by Article 90(3) of the Treaty, which was declared inadmissible by the Court of First Instance in its judgment of 27 October 1994 in Case T-32/93 *Ladbroke v Commission* [1994] ECR II-1015, paragraph 37 (paragraph 10 of the contested judgment).*

11 In the contested judgment the Court of First Instance annulled the contested decision on the ground that, by definitively rejecting the part of the complaint directed against the PMU and its member companies on the ground that Articles 85 and 86 of the Treaty did not apply and there was no Community interest, without first having completed its examination of the compatibility of the French legislation with the Treaty rules on competition, the Commission had failed to fulfil its duty to examine carefully the factual and legal issues brought to its attention by the complainants so as to satisfy the requirement of certainty which a final decision determining whether an infringement exists must satisfy (paragraph 50 of the contested judgment). The Commission's reasoning was thus based on a misinterpretation of the

conditions governing the definitive determination of the existence of alleged infringements (paragraph 51 of the contested judgment).

12 For a more detailed account of the facts which gave rise to the dispute reference may be made to paragraphs 1 to 19 of the contested judgment.

13 The Commission submits that the Court should:

(1) quash the judgment in so far as it annuls the contested decision;

(2) dismiss the application under Article 173 of the EC Treaty as unfounded; and

(3) order Ladbroke to pay the costs in the proceedings before both the Court of First Instance and the Court of Justice.

14 The French Republic submits that the Court should:

(1) set aside the judgment in so far as it annuls the contested decision; and

(2) uphold the submissions put forward by the Commission before the Court of First Instance.

15 Ladbroke submits that the Court should:

(1) dismiss the appeals in Cases C-359/95 P and C-379/95 P;

(2) order the Commission and the French Republic to pay Ladbroke's costs;

(3) alternatively, if the Court allows the appeals, retain the case and give judgment on the outstanding issues in Ladbroke's application in Case T-548/93 or remit the case to the Court of First Instance for judgment on those issues.

16 The Commission puts forward three pleas in support of its appeal. The first is that the Court of First Instance erred in law in holding that where both Article 90 and Articles 85 and 86 of the Treaty may be relevant to a case, the Commission must complete its investigation under Article 90 of the Treaty before ruling on either the applicability of Articles 85 and 86 or the existence of a Community interest in investigating the complaint. The Court of First Instance has thereby established an order of priority as between the procedure provided for in Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) and the procedure against a Member State for failure to fulfil its obligations, which is incompatible with the Commission's discretion to decide what aspect of a complaint should be considered first and against whom (the undertakings or the State) proceedings should be first initiated.

17 The second plea is that the Court of First Instance erred in law in holding that this general principle must apply even where a finding on Article 90 is not logically necessary for a ruling on the applicability of Articles 85 and 86 of the EC Treaty. The Court has thus overlooked the Commission's finding that, regardless of the compatibility of the French legislation with the Treaty, certain prior conditions necessary for the application of Articles 85 and 86 were not satisfied and, in any event, there was insufficient interest in investigating the complaint under Articles 85 and 86.

18 *The third plea is based on lack of reasoning, inasmuch as the Court of First Instance failed, first, to explain why the Commission was bound to examine the French legislation in the light of Article 90 before rejecting the requests made in the complaint relating to Articles 85 and 86 and, secondly, failed to state why the Commission was not entitled to take into account the Community interest in order to determine the priority to be given to different aspects of the complaint, or in what way the Commission's appraisal of the Community interest in this case was manifestly wrong.*

19 *The French Government also relies on three pleas in support of its appeal. The first is that the Court of First Instance erred in law by failing to take into account the Court's case-law to the effect that, where State measures leave no freedom of action to undertakings, as was the position in this case from 1974 onwards, Articles 85 and 86 of the Treaty cannot be applied to such undertakings as long as those measures remain in force.*

20 *In response to that plea, however, the Commission submits that it is necessary to distinguish between State measures requiring undertakings to engage in conduct contrary to Articles 85 and 86 and measures that do not require any conduct contrary to those rules but simply create a legal framework that itself restricts competition. In the first case, the Commission considers that Article 85 remains applicable to undertakings' conduct despite the existence of national statutory obligations and irrespective of the possible application of Articles 3(g), 5 and 85 of the Treaty with regard to those State measures. In fact, the Commission argues that an undertaking can and, by virtue of the primacy of Community law and the direct effect of Articles 85(1) and 86 of the Treaty, must refuse to comply with a State measure that requires conduct contrary to those provisions.*

21 *In the second case, by contrast, Article 85 may in certain circumstances not apply. That is the case here, since the 1974 legislation does not require the conclusion of an agreement between the main racing companies but itself grants the PMU the exclusive right to organize off-course totalizator betting. The restriction of competition thus flowed directly from the national legislation, without any action on the part of undertakings being necessary.*

22 *The second plea relied on by the French Government is that the Court of First Instance erred in law in failing to take into account well-established case-law to the effect that a complainant under Regulation No 17 is not entitled to a final decision as to the existence of an alleged infringement of Articles 85 and 86 of the Treaty. In particular, the Court of First Instance overlooked the Commission's reasoning as to the lack of Community interest in investigating the complaint, based on the fact that since 1974 the absence of competition on the French market for taking bets resulted directly from the legislation. Accordingly, a finding that the racing companies and the PMU had infringed Articles 85 and 86 would have had no effect on competition after that date; as regards the period prior to 1974, the finding of an infringement of the Treaty rules could lead only to an award of damages and interest, which the Commission has no power to order.*

23 *The third plea relied on by the French Government is that the Court of First Instance erred in law by calling in question the Commission's discretion as to whether to take action against a Member State in respect of legislation which is allegedly contrary to the Treaty.*

24 *It is to be noted that in their pleas the Commission and the French Republic challenge, albeit in different terms and for different purposes, the Court of First Instance's reasoning that it was necessary for the Commission to complete its examination of the compatibility of the*

French legislation with the Treaty rules on competition before it could definitively reject the complaint concerning Articles 85 and 86 of the Treaty.

25 Accordingly, it is necessary to consider that finding and the reasoning on which it is based.

26 In paragraph 46 of the contested judgment the Court of First Instance found that the Commission had 'initiated the procedure for examining the applicant's complaint under Article 90 of the Treaty in order to assess the compatibility of the French legislation with the other Treaty provisions; that procedure is still in progress'. The Court stated that 'consequently, the question to be considered is whether the Commission could definitively reject the applicant's complaint under Articles 85 and 86 of the Treaty and Regulation No 17 without having previously completed its examination of the complaint under Article 90 of the Treaty'.

27 In paragraph 47 of the judgment it stated that 'the Commission has submitted, both in its pleadings and at the hearing, that the competition issue raised by the applicant's complaint could be resolved only by examining the compatibility of the French legislation concerning the PMU's statutory monopoly with the Treaty rules and by taking action, if appropriate, under Article 90 of the Treaty and that, accordingly, that examination was a priority, since the result of it would hold good for any prior or future agreements between the sociétés de courses (defence, point 46)'. The Court of First Instance concluded that 'the conduct of the sociétés de courses and the PMU, impugned by Ladbroke in its complaint, could not have been fully assessed under Articles 85 and 86 of the Treaty without a prior evaluation of the national legislation in the light of the provisions of the Treaty'.

28 The Court of First Instance stated that if the Commission were to find that the national legislation was consistent with the provisions of the Treaty, then conduct of the racing companies and the PMU complying with that national legislation would likewise have to be regarded as compatible with Articles 85 and 86 of the Treaty, whereas if their conduct was not in compliance with the national legislation, it would remain to be determined whether it infringed Articles 85 and 86 of the Treaty (paragraph 48 of the contested judgment). If, however, the Commission were to find that the legislation infringed the Treaty, it would then have to consider whether or not the fact that the companies and the PMU were complying with that legislation could lead to the adoption of measures against them in order to terminate infringements of Articles 85 and 86 of the Treaty (paragraph 49 of the contested judgment).

29 The Court of First Instance therefore concluded, in paragraph 50 of the contested judgment, that 'by deciding to definitively reject the applicant's complaint under Articles 85 and 86 of the Treaty without first completing its examination of the compatibility of the French legislation with the provisions of the Treaty, the Commission cannot be regarded as having carried out its duty to examine carefully the factual and legal issues brought to its attention by the complainants ... so as to satisfy the requirement of certainty which a final decision determining whether or not an infringement exists must [satisfy] ... It was not therefore entitled to conclude at that stage that the abovementioned provisions of the Treaty were inapplicable to the conduct of the main sociétés de courses and the PMU to which the applicant had objected and then that there was no Community interest in finding that the matters alleged by the applicant were infringements on the ground that they involved past infringements of the competition rules'.

30 That reasoning is thus based on the premiss that the lawfulness, in terms of Articles 85 and 86, of conduct of undertakings complying with national legislation, and the action which should be taken against them, depends on whether that legislation is compatible with the Treaty.

31 However, the compatibility of national legislation with the Treaty rules on competition cannot be regarded as decisive in the context of an examination of the applicability of Articles 85 and 86 of the Treaty to the conduct of undertakings which are complying with that legislation.

32 Although an assessment of the conduct of the racing companies and the PMU in the light of Articles 85 and 86 of the Treaty requires a prior evaluation of the French legislation, the sole purpose of that evaluation is to determine what effect that legislation may have on such conduct.

33 Articles 85 and 86 of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative (see to that effect, as regards Article 86 of the Treaty, Case 41/83 *Italy v Commission* [1985] ECR 873, paragraphs 18 to 20; Case C-202/88 *France v Commission* - the so-called 'telecommunications terminals' judgment - [1991] ECR I-1223, paragraph 55; and Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 20). If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings (see also *Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission* [1975] ECR 1663, paragraphs 36 to 72, and more particularly paragraphs 65, 66, 71 and 72).

34 Articles 85 and 86 may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition (*Joined Cases 209/78 to 215/78 and 218/78 Van Landewyck and Others v Commission* [1980] ECR 3125; *Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831; and Case C-219/95 *P Ferriere Nord v Commission* [1997] ECR I-0000).

35 When the Commission is considering the applicability of Articles 85 and 86 of the Treaty to the conduct of undertakings, a prior evaluation of national legislation affecting such conduct should therefore be directed solely to ascertaining whether that legislation prevents undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition.

36 The Court of First Instance therefore erred in law in holding that by definitively rejecting the complaint on the ground that Articles 85 and 86 did not apply, and that there was no Community interest, before having completed its examination of the compatibility of the French legislation with the Treaty rules on competition, the Commission was relying on an interpretation of the conditions governing the definitive determination of the existence of alleged infringements which was wrong in law.

37 Consequently, the contested judgment should be set aside, without it being necessary to examine the other arguments relied on by the appellants.

Referral of the case to the Court of First Instance

38 According to the first paragraph of Article 54 of the EC Statute of the Court of Justice, if the appeal is well founded the Court of Justice is to quash the decision of the Court of First

Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

39 Since it is not possible at this stage to give final judgment because the Court of First Instance ruled on only one of the complaints raised by Ladbroke, it is necessary to refer the case back to that Court.

Operative part

On those grounds,

THE COURT

hereby:

- 1. Sets aside the judgment of the Court of First Instance of 18 September 1995 in Case T-548/93 Ladbroke Racing v Commission.*
- 2. Refers the case back to the Court of First Instance.*
- 3. Reserves costs.*

Judgment of the Court of 16 December 1975. - Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities. - Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73.

Summary

1 . THERE IS NO REASON AT ALL WHY THE COMMISSION SHOULD NOT MAKE A SINGLE DECISION COVERING SEVERAL INFRINGEMENTS OF ARTICLES 85 OR 86 OF THE EEC TREATY, EVEN IF SOME OF THE UNDERTAKINGS TO WHICH IT IS ADDRESSED ARE UNCONNECTED WITH SOME OF THESE INFRINGEMENTS, PROVIDED THAT THE DECISION PERMITS EACH ADDRESSEE TO OBTAIN A CLEAR PICTURE OF THE COMPLAINTS MADE AGAINST IT .

2 . COMMUNITY INSTITUTIONS ARE UNDER A DUTY TO SEND AN UNDERTAKING TO WHICH A DECISION IS ADDRESSED A COPY OF THAT DECISION IN THE

LANGUAGE OF THE MEMBER STATE TO WHICH THIS UNDERTAKING BELONGS

IF THIS REQUIREMENT IS FULFILLED, THE FACT THAT THE COMMISSION ALSO SENT AN UNDERTAKING COPIES OF THE DECISION IN OTHER LANGUAGES IS NOT SUCH AS TO CALL INTO QUESTION ITS VALIDITY .

3 . FOR THE PURPOSE OF DETERMINING THE PERSONS TO WHOM A DECISION, WHICH FINDS THAT THERE HAS BEEN AN INFRINGEMENT OF ARTICLES 85 OR 86 OF THE TREATY, APPLIES, ONLY THE OPERATIVE PART OF THIS DECISION MUST BE CONSIDERED, PROVIDED THAT IT IS NOT OPEN TO MORE THAN ONE INTERPRETATION .

4 . THE CONCEPT OF A 'CONCERTED PRACTICE' REFERS TO A FORM OF COORDINATION BETWEEN UNDERTAKINGS, WHICH, WITHOUT HAVING BEEN TAKEN TO THE STAGE WHERE AN AGREEMENT PROPERLY SO-CALLED HAS BEEN CONCLUDED, KNOWINGLY SUBSTITUTES FOR THE RISKS OF COMPETITION, PRACTICAL COOPERATION BETWEEN THEM WHICH LEADS TO CONDITIONS OF COMPETITION WHICH DO NOT CORRESPOND TO THE NORMAL CONDITIONS OF THE MARKET, HAVING REGARD TO THE NATURE OF THE PRODUCTS, THE IMPORTANCE AND NUMBER OF THE UNDERTAKINGS AS WELL AS THE SIZE AND NATURE OF THE SAID MARKET .

SUCH PRACTICAL COOPERATION AMOUNTS TO A CONCERTED PRACTICE, PARTICULARLY IF IT ENABLES THE PERSONS CONCERNED TO CONSOLIDATE ESTABLISHED POSITIONS TO THE DETRIMENT OF EFFECTIVE FREEDOM OF MOVEMENT OF THE PRODUCTS IN THE COMMON MARKET AND OF THE FREEDOM OF CONSUMERS TO CHOOSE THEIR SUPPLIERS .

THESE CRITERIA OF 'COORDINATION' AND 'COOPERATION' LAID DOWN BY THE CASE-LAW OF THE COURT, WHICH IN NO WAY REQUIRE THE WORKING OUT OF AN ACTUAL PLAN, MUST BE UNDERSTOOD IN THE LIGHT OF THE CONCEPT INHERENT IN THE PROVISIONS OF THE TREATY RELATING TO COMPETITION THAT EACH ECONOMIC OPERATOR MUST DETERMINE INDEPENDENTLY THE

POLICY WHICH HE INTENDS TO ADOPT ON THE COMMON MARKET INCLUDING THE CHOICE OF THE PERSONS AND UNDERTAKINGS TO WHICH HE MAKES OFFERS OR SELLS .

ALTHOUGH 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 AND ANTICIPATED CONDUCT OF THEIR COMPETITORS, IT DOES HOWEVER STRICTLY PRECLUDE ANY DIRECT OR INDIRECT CONTACT BETWEEN SUCH OPERATORS, THE OBJECT OR EFFECT WHEREOF IS EITHER TO INFLUENCE THE CONDUCT ON THE MARKET OF AN ACTUAL OR POTENTIAL COMPETITOR OR TO DISCLOSE TO SUCH A COMPETITOR THE COURSE OF CONDUCT WHICH THEY THEMSELVES HAVE DECIDED TO ADOPT OR CONTEMPLATE ADOPTING ON THE MARKET .

IF AN ECONOMIC OPERATOR ACCEPTS THE COMPLAINTS MADE TO HIM BY ANOTHER OPERATOR IN CONNEXION WITH THE COMPETITION TO WHICH THE PRODUCTS MANUFACTURED BY THE FORMER OPERATOR EXPOSE THE LATTER, THE CONDUCT OF THE OPERATORS CONCERNED AMOUNTS TO A CONCERTED PRACTICE .

THE FACT THAT A VENDOR ALIGNS HIS PRICE ON THE HIGHEST PRICE CHARGED BY A COMPETITOR IS NOT NECESSARILY EVIDENCE OF A CONCERTED PRACTICE BUT MAY BE EXPLAINED BY AN ATTEMPT TO OBTAIN THE MAXIMUM PROFIT .

5 . WHEN ARTICLE 85 (1) NOT ONLY PROHIBITS AGREEMENTS, DECISIONS OR PRACTICES HAVING REGARD TO THEIR OBJECT BUT ALSO TO THEIR ACTUAL EFFECTS IN THE FIELD OF COMPETITION, IT IMPLIES THAT THESE EFFECTS MUST BE CONSIDERED IN THE CONTEXT IN WHICH THEY TAKE PLACE, THAT IS TO SAY IN THEIR SURROUNDING ECONOMIC AND LEGAL CIRCUMSTANCES WITHIN WHICH THEY MAY, TOGETHER WITH OTHER FACTORS, HAVE A COMULATIVE EFFECT ON COMPETITION .

IN ORDER TO DETERMINE WHETHER AN AGREEMENT IS CAUGHT BY ARTICLE 85 (1) IT CANNOT THEREFORE BE SEVERED FROM THIS CONTEXT; IN PARTICULAR, THE EXISTENCE OF SIMILAR CONTRACTS MAY BE TAKEN INTO CONSIDERATION TO THE EXTENT TO WHICH THESE KINDS OF CONTRACTS ARE IN GENERAL LIKELY TO RESTRICT FREE TRADE .

6 . (A) THE FACT THAT A TRADE REPRESENTATIVE CONTRACT, WHICH IMPOSES UPON THE REPRESENTATIVE A PROHIBITION OF COMPETITION, COMPLIES WITH THE NATIONAL LAW GOVERNING THIS CONTRACT OR THAT THIS LAW EVEN IMPOSES A SIMILAR PROHIBITION IS NOT DETERMINATIVE WHEN CONSIDERING WHETHER SUCH A CONTRACT IS NOT CAUGHT BY ARTICLE 85 OR 86 .

(B) NEVERTHELESS IF AN AGENT SELLS IN THE NAME AND FOR THE ACCOUNT OF A PRODUCER OR ASSOCIATION OF PRODUCERS HE MAY IN PRINCIPLE BE TREATED AS AN AUXILIARY ORGAN FORMING AN INTEGRAL PART OF THE LATTER'S UNDERTAKING, WHO MUST CARRY OUT HIS PRINCIPAL'S INSTRUCTIONS AND THUS, LIKE A COMMERCIAL EMPLOYEE, FORMS AN ECONOMIC UNIT WITH THIS UNDERTAKING .

IN THESE CIRCUMSTANCES INCOMPATIBILITY WITH ARTICLE 85 OR ARTICLE 86 IS NOT SIMPLY DUE TO THE FACT THAT THE PRINCIPAL FORBIDS SUCH AN AUXILIARY TO TRADE WITHOUT HIS CONSENT IN PRODUCTS WHICH MIGHT COMPETE WITH HIS OWN PRODUCTS .

(C) AS PURCHASES FROM A 'TRADE REPRESENTATIVE' ARE IN FACT DIRECT PURCHASES FROM HIS PRINCIPAL THE FACT THAT THE LATTER FORCED WHOLESALERS TO APPLY TO ITS REPRESENTATIVES AND NOT TO ITSELF CAN NEITHER BE AN ABUSE NOR EVIDENCE THEREOF .

(D) EVEN IF AN AGENT IS CALLED A 'TRADE REPRESENTATIVE' UNDER THE TERMS OF THE AGREEMENT WHICH HE HAS ENTERED INTO WITH HIS PRINCIPAL, HE CANNOT BE REGARDED AS AN AUXILIARY ORGAN FORMING AN INTEGRAL PART OF HIS PRINCIPAL'S UNDERTAKING :

1 . IF THE SAID AGREEMENT CONFERS UPON THE AGENT OR ALLOWS HIM TO PERFORM DUTIES WHICH FROM AN ECONOMIC POINT OF VIEW ARE APPROXIMATELY THE SAME AS THOSE CARRIED OUT BY AN INDEPENDENT DEALER, BECAUSE THEY PROVIDE FOR THE AGENT ACCEPTING THE FINANCIAL RISKS OF THE SALES OR THE PERFORMANCE OF CONTRACTS ENTERED INTO WITH THIRD PARTIES,

OR

2 . IF THE AGENT IS A LARGE BUSINESS HOUSE WHICH AT THE SAME TIME AS IT DISTRIBUTES PRODUCTS FOR THE ACCOUNT OF THE PRINCIPAL UNDERTAKES AS AN INDEPENDENT DEALER A VERY CONSIDERABLE AMOUNT OF BUSINESS ON THE MARKET FOR THE PRODUCT IN QUESTION .

THEREFORE A CLAUSE PROHIBITING COMPETITION ENTERED INTO BETWEEN SUCH AN AGENT AND HIS PRINCIPAL MAY BE AN AGREEMENT BETWEEN UNDERTAKINGS WHICH IS PROHIBITED UNDER ARTICLE 85 .

IF SUCH A CLAUSE IS INSERTED AT THE INSISTENCE OF AN UNDERTAKING OCCUPYING A DOMINANT POSITION, IT MAY IN THE CIRCUMSTANCES REFERRED TO IN 1 ABOVE BE AN ABUSE UNDER ARTICLE 86 .

(E) CLAUSES PROHIBITING COMPETITION IMPOSED BY AN UNDERTAKING OCCUPYING A DOMINANT POSITION ON TRADE REPRESENTATIVES MAY CONSTITUTE AN ABUSE, IF FOREIGN COMPETITORS FIND THAT THERE ARE NO INDEPENDENT OPERATORS WHO CAN MARKET THE PRODUCT IN QUESTION ON A SUFFICIENTLY LARGE SCALE, AND ARE IN PRACTICE FORCED TO APPLY TO THE SAID UNDERTAKING'S TRADE REPRESENTATIVES IF THEY WISH TO SELL THIS PRODUCT IN THE LATTER'S SALES TERRITORY, OR IF THE SAID UNDERTAKING ENLARGES THE SCOPE OF THE PROHIBITION OF COMPETITION TO SUCH AN EXTENT THAT IT NO LONGER CORRESPONDS TO THE NATURE OF THE LEGAL AND ECONOMIC RELATIONSHIP IN QUESTION .

7 . FOR THE PURPOSE OF DETERMINING WHETHER A SPECIFIC TERRITORY IS LARGE ENOUGH TO AMOUNT TO 'A SUBSTANTIAL PART OF THE COMMON MARKET' WITHIN THE MEANING OF ARTICLE 86 OF THE TREATY THE PATTERN AND VOLUME OF THE PRODUCTION AND CONSUMPTION OF THE SAID PRODUCT AS WELL AS THE HABITS AND ECONOMIC OPPORTUNITIES OF VENDORS AND PURCHASERS MUST BE CONSIDERED .

ARTICLE 86 OF THE TREATY REFERS IN EACH CASE TO THE POSITION OCCUPIED BY THE UNDERTAKING CONCERNED ON THE COMMON MARKET AS THE TIME WHEN THE LATTER ACTED IN A WAY WHICH IS ALLEGED TO AMOUNT TO AN ABUSE .

IN ORDER TO DETERMINE IN THE CASE OF A COMPLAINT MADE AGAINST AN UNDERTAKING UNDER THIS ARTICLE WHETHER A SPECIFIC AREA IS A SUBSTANTIAL PART OF THE COMMON MARKET IT IS THEREFORE ONLY NECESSARY TO COMPARE THE STATISTICAL DATA RELATING TO THIS AREA WITH THE CORRESPONDING DATA RELATING TO THE COMMON MARKET AS IT WAS WHEN THE FACTS GIVING RISE TO THESE PROCEEDINGS EXISTED; ANY SUBSEQUENT ENLARGEMENT OF THE COMMON MARKET CANNOT BE TAKEN INTO CONSIDERATION .

8 . IF AN ECONOMIC OPERATOR ADOPTS A SYSTEM OF LOYALTY REBATES LEADING TO THE APPLICATION OF DIFFERENT NET PRICES TO TWO CUSTOMERS WHO BOUGHT THE SAME AMOUNT FROM THE SAID OPERATOR IF ONE OF THEM PURCHASED FROM ANOTHER PRODUCER AS WELL, SUCH A SYSTEM AMOUNTS TO 'APPLYING DISSIMILAR CONDITIONS TO EQUIVALENT TRANSACTIONS WITH OTHER TRADING PARTIES' WITHIN THE MEANING OF ARTICLE 86 (C).

9 . IF A PRODUCER ADOPTS A SYSTEM OF LOYALTY REBATES WHICH GIVES PRODUCERS HAVING THEIR PLACES OF BUSINESS IN OTHER MEMBER STATES NO CHANCE OR RESTRICTS THEIR OPPORTUNITIES OF COMPETING WITH GOODS SOLD BY THE SAID PRODUCER, SUCH A SYSTEM AMOUNTS TO

'LIMITING MARKETS TO THE PREJUDICE OF CONSUMERS' WITHIN THE MEANING OF ARTICLE 86 (B).

10 . THERE IS NO REASON WHY THE COMMISSION AND THE COURT SHOULD NOT ACCEPT AS EVIDENCE OF AN UNDERTAKING'S CONDUCT CORRESPONDENCE EXCHANGED BETWEEN THIRD PARTIES, PROVIDED THAT THE CONTENT THEREOF IS CREDIBLE TO THE EXTENT TO WHICH IT REFERS TO THE SAID CONDUCT .

11 . FOR THE PURPOSE OF FIXING THE AMOUNT OF THE FINE UNDER ARTICLE 15 (2) OF REGULATION NO 17 REGARD SHALL BE HAD TO THE GRAVITY AND DURATION OF THE INFRINGEMENT, SO THAT PARTICULAR ACCOUNT HAS TO BE TAKEN OF THE LEGISLATIVE BACKGROUND AND ECONOMIC CONTEXT OF THE CONDUCT TO WHICH EXCEPTION IS TAKEN, THE NATURE OF THE RESTRICTIONS OF COMPETITION AS WELL AS THE NUMBER AND SIZE OF THE UNDERTAKINGS CONCERNED .

12 . IF A PRODUCER, ACTING INDEPENDENTLY, MAY BE JUSTIFIED IN ENDEAVOURING TO PREVENT THE SUGAR, WHICH HE HAS SOLD AT A RELATIVELY LOW PRICE FOR DENATURING, FROM BEING SOLD AT TOO LOW A PRICE ON THE MARKET FOR HUMAN CONSUMPTION, THE OBJECTIVES OF ARTICLE 39 OF THE TREATY DO NOT HOWEVER IN ANY WAY REQUIRE THAT HE PURSUES THIS AIM BY MEANS OF CONCERTED PRACTICES .

NEVERTHELESS, IF HE DOES SO, THE CONCERTED PRACTICES CANNOT COME WITHIN THE SCOPE OF THE SECOND EXCEPTION SPECIFIED IN THE FIRST SENTENCE OF ARTICLE 2 (1) OF REGULATION NO 26 .

13 . THERE IS NOTHING IN REGULATION NO 1009/67 TO JUSTIFY THE ASSERTION THAT THIS PRICE IS ALSO 'GUARANTEED' TO PRODUCERS FOR SUGAR WHICH THEY SUPPLY TO OTHER PRODUCERS OTHER THAN THE INTERVENTION AGENCIES REFERRED TO IN ARTICLE 9 OF THE SAID REGULATION .

14 . IT FOLLOWS FROM THE WORDING OF ARTICLE 17 (1) OF REGULATION NO 1009/67 THAT COMMUNITY INSTITUTIONS ARE NOT REQUIRED TO INTRODUCE A SYSTEM OF EXPORT REFUNDS AND STILL LESS TO FIX THE AMOUNT THEREOF IN SUCH A WAY THAT IF SUGAR PRODUCERS EXPORT THEY OBTAIN THIS INTERVENTION PRICE .

Parties

IN JOINED CASES

(1) 40/73 : COOPERATIEVE VERENIGING 'SUIKER UNIE' UA, HAVING ITS REGISTERED OFFICE AT ROTTERDAM, REPRESENTED BY ITS BOARD OF DIRECTORS, ASSISTED BY F . SALOMONSON, ADVOCATE OF THE DORDRECHT BAR, AND P . VOGELENZANG, ADVOCATE AT THE ROTTERDAM BAR,

(2) 41/73 : SOCIETE ANONYME GENERALE SUCRIERE, HAVING ITS REGISTERED OFFICE AT PARIS, REPRESENTED BY ITS CHAIRMAN AND MANAGING DIRECTOR, ANTOINE BOUCHON, ASSISTED BY HENRI RAMBAUD, LOYRETTE, VOILLEMOT AND DEMOYEN, ADVOCATES AT THE COUR D'APPEL, PARIS,

(3) 42/73 : NV CENTRALE SUIKER MAATSCHAPPIJ, HAVING ITS REGISTERED OFFICE AT AMSTERDAM, REPRESENTED BY ITS MANAGERS, W . G . A . LAMMERS AND G . M . L . VAN LOON, ASSISTED BY R . A . MORZER BRUYNS, ADVOCATE AT THE GERECHTSHOF, AMSTERDAM AND R . C . GISOLF, ADVOCATE AT THE ARRONDISSEMENTSRECHTSBANK, AMSTERDAM,

(4) 43/73 : SOCIETE DES RAFFINERIES ET SUCRERIES SAY, WHICH IN THE COURSE OF THE PROCEEDINGS BECAME SOCIETE BEGHIN-SAY, A COMPANY LIMITED BY SHARES HAVING ITS REGISTERED OFFICE AT PARIS, REPRESENTED BY ITS GENERAL MANAGER, JEAN BERNARD, ASSISTED BY BERNARD DU GRANRUT, ADVOCATE AT THE COUR D'APPEL, PARIS,

(5) 44/73 : SOCIETE F . BEGHIN, A COMPANY LIMITED BY SHARES, HAVING ITS REGISTERED OFFICE AT THUMERIES (NORD), FRANCE, REPRESENTED BY ITS

CHAIRMAN AND MANAGING DIRECTOR, FERDINAND BEGHIN, ASSISTED BY RENE BONDOUX, ADVOCATE AT THE COUR D'APPEL, PARIS,

THE LAST TWO APPLICANTS MERGED DURING THESE PROCEEDINGS AND BECAME THE BEGHIN-SAY COMPANY, REPRESENTED BY ITS CHAIRMAN AND MANAGING DIRECTOR, FERDINAND BEGHIN, ASSISTED BY THE ADVOCATES MENTIONED IN 4) AND 5) ABOVE;

(6) 45/73 : ZUCCHERIFICIO DEL VOLANO SPA, HAVING ITS REGISTERED OFFICE AT GENOA, REPRESENTED BY ITS LEGAL REPRESENTATIVE, COMMENDATORE MARIO MARALDI, ASSISTED BY MASSIMO SEVERO GIANNINI AND ROSARIO NICOLO, PROFESSORS, ADVOCATES OF THE ROME BAR,

(7) 46/73 : SOCIETA AGRICOLA INDUSTRIALE EMILIANA - AIE, HAVING ITS REGISTERED OFFICE AT BOLOGNA, REPRESENTED BY ITS LEGAL REPRESENTATIVE, COMMENDATORE MARIO MARALDI, ASSISTED BY MASSIMO SEVERO GIANNINI AND ROSARIO NICOLO, PROFESSORS, ADVOCATES AT THE ROME BAR,

(8) 47/73 : RAFFINERIE TIRLEMONTAISE, A COMPANY LIMITED BY SHARES, HAVING ITS REGISTERED OFFICE AT BRUSSELS, REPRESENTED BY ITS BOARD OF DIRECTORS, ASSISTED BY G . VAN HECKE, PROFESSOR, ADVOCATE AT THE COUR DE CASSATION OF BELGIUM, AND A . DERINGER, ADVOCATE AT THE OBERLANDESGERICHT, COLOGNE,

(9) 48/73 : SOCIETE ANONYME SUCRES ET DENREES, HAVING ITS REGISTERED OFFICE AT PARIS, REPRESENTED BY VARSANO, ROBOH AND CORIAT, MEMBERS OF ITS BOARD OF DIRECTORS, ASSISTED BY JACQUES LASSIER, ADVOCATE OF THE COUR DE PARIS, AND JEAN-DENIS BREDIN, ADVOCATE AT THE COUR D'APPEL, PARIS,

(10) 50/73 : SOCIETA SADAM SPA HAVING ITS REGISTERED OFFICE AT BOLOGNA, REPRESENTED BY ITS CHAIRMAN, DR . ANGELO MACCAFERRI,

ASSISTED BY GIORGIO BERNINI, PROFESSOR, ADVOCATE AT THE BOLOGNA BAR,

(11) 54/73 : SUEDEDEUTSCHE ZUCKER-AKTIENGESELLSCHAFT, HAVING ITS REGISTERED OFFICE AT MANNHEIM, REPRESENTED BY ITS BOARD OF DIRECTORS, ASSISTED BY GLEISS, LUTZ, HOOTZ AND HIRSCH, DOCTORS OF LAW, ADVOCATES AT THE LANDGERICHT, STUTTGART AND THEIR PARTNERS,

(12) 55/73 : SUEDEZUCKER-VERKAUF GMBH, HAVING ITS REGISTERED OFFICE AT OBERURSEL (GERMANY), REPRESENTED BY ITS MANAGERS, HEINZ BRICK AND HORSTMAR STAUBER, DOCTORS OF LAW, ASSISTED BY GLEISS, LUTZ, HOOTZ AND HIRSCH, DOCTORS OF LAW, ADVOCATES AT THE LANDGERICHT, STUTTGART, AND THEIR PARTNERS,

(13) 56/73 : FIRMA PFEIFER UND LANGEN, HAVING ITS REGISTERED OFFICE AT COLOGNE, REPRESENTED BY ITS PARTNERS, DR HELMUT BOERNER AND JOACHIM PFEIFER, ASSISTED BY DR WERNER VON SIMSON, PROFESSOR AT THE UNIVERSITY OF FRIBOURG-EN-BRISGAU, AND DR FERDINAND HERMANN, ADVOCATE AT THE AMTSGERICHT AND LANDGERICHT, COLOGNE,

(14) 111/73 : CAVARZERE PRODUZIONI INDUSTRIALI SPA, HAVING ITS REGISTERED OFFICE AT PADUA, REPRESENTED BY ITS GENERAL MANAGER, DR LEONARDO MONTESI, ASSISTED BY GIUSEPPE CELONA, ADVOCATE AT THE CORTE D'APPELLO, MILAN AND AT THE CORTE DI CASSAZIONE, ITALY,

(15) 113/73 : SOCIETA ITALIANA PER L'INDUSTRIA DEGLI ZUCCHERI SPA, HAVING ITS REGISTERED OFFICE AT ROME, REPRESENTED BY ITS MANAGERS, DR ALDO DURANTE AND ATTILIO LERCARI, ASSISTED BY MASSIMO MEDINA AND CORRADO MEDINA, PROFESSOR, ADVOCATES AT THE COUR D'APPEL, GENOA AND THE CORTE DI CASSAZIONE, ITALY,

(16) 114/73 : 'ERIDANIA' ZUCCHERIFICI NAZIONALI SPA, HAVING ITS REGISTERED OFFICE AT GENOA, REPRESENTED BY ITS MANAGING DIRECTOR AND LEGAL REPRESENTATIVE, PROFESSOR GIUSEPPE DE ANDRE, ASSISTED BY

ANTONIO SORRENTINO, ADVOCATE AT THE ROME BAR AND MAURO DE ANDRE, ADVOCATE AT THE CHIAVARI BAR,

WITH THE FOLLOWING ADDRESSES FOR SERVICE IN LUXEMBOURG :

- THE APPLICANTS IN CASES 40/73, 43/73, 44/73, 47/73, 48/73, 50/73 AND 114/73 : AT THE CHAMBERS OF ERNEST ARENDT, CASE POSTALE 39;

- THE APPLICANTS IN CASES 41/73, 54/73 AND 55/73 : AT THE CHAMBERS OF GEORGES REUTER, 1 AVENUE DE L'ARSENAL;

- THE APPLICANTS IN CASES 42/73, 45/73 AND 46/73 : AT THE CHAMBERS OF ALEX BONN, 22 COTE D'EICH;

- THE APPLICANT IN CASE 56/73 : AT THE OFFICE OF ANDRE ROBERT, DOCTOR OF LAW, 13 RUE JOSEPH TOCKERT;

- THE APPLICANT IN CASE 111/73 : AT THE CHAMBERS OF GEORGES MARGUE, 20 RUE PHILIPPE-II;

- THE APPLICANT IN CASE 113/73 : AT THE CHAMBERS OF LOULOU BEISSEL-HEYARD, 47 RUE DES GLACIS; APPLICANTS,

V

COMMISSION OF THE EUROPEAN COMMUNITIES, IN BRUSSELS, REPRESENTED BY ITS LEGAL ADVISERS, DOCTORS BASTIAAN VEN DER ESCH, ERICH ZIMMERMANN, ANTONIO MARCHINI CAMIA AND JEAN-PIERRE DUBOIS, ACTING AS AGENTS, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICES OF PIERRE LAMOUREUX, LEGAL ADVISER TO THE COMMISSION, 4 BOULEVARD ROYAL, DEFENDANT,

SUPPORTED IN CASES 41/73, 43 TO 48/73, 50/73, 111/73 AND 114/73, TO THE EXTENT TO WHICH THEY RELATE TO THE COMPLAINT OF CONCERTED PRACTICES HAVING AS THEIR OBJECT THE PROTECTION OF THE ITALIAN MARKET, BY :

UNIONE NAZIONALE CONSUMATORI, HAVING ITS REGISTERED OFFICE AT ROME, REPRESENTED BY ITS CHAIRMAN, ODDONE FANTINI, AND ITS SECRETARY-GENERAL, VINCENZO DONA, ASSISTED BY GIOVANNI MARIA UBERTAZZI AND FAUSTO CAPELLI, ADVOCATES AT THE MILAN BAR, WITH AN ADDRESS FOR SERVICE AT THE OFFICES OF LOUIS SCHILTZ, 83 BOULEVARD GRANDE-DUCHESSE CHARLOTTE, INTERVENER,

Subject of the case

APPLICATIONS FOR THE ANNULMENT - AND IN CERTAIN CASES APPLICATIONS IN THE ALTERNATIVE FOR RECTIFICATION - OF THE DECISION OF THE COMMISSION NO COM (72) 1600 'RELATING TO PROCEEDINGS UNDER ARTICLES 85 AND 86 OF THE EEC TREATY (IV/26.918 - EUROPEAN SUGAR INDUSTRY)', OF 2 JANUARY 1973 (OJ L 140, P . 17 ET SEQ .),

Grounds

GENERAL

I

1 THE SUBJECT-MATTER OF THE PRESENT APPLICATIONS IS COMMISSION DECISION NO COM (72) 1600 OF 2 JANUARY 1973 WHICH WAS ADDRESSED AND NOTIFIED TO THE APPLICANTS AND TO OTHER UNDERTAKINGS AS WELL AND PUBLISHED AT A LATER DATE IN OJ L 140 OF 26 . 5 . 1973, PP . 17 TO 48, TO WHICH THE QUOTATIONS IN THIS JUDGMENT REFER .

2 ARTICLE 1 OF THE DECISION MAKES NINE COMPLAINTS SPREAD OVER THE 1968/69 TO 1971/72 SUGAR MANUFACTURING YEARS RELATING EACH TIME TO ONE OR MORE OF THE BEFOREMENTIONED UNDERTAKINGS . THEY TOGETHER

BLAME EACH OF THE LATTER UNDERTAKINGS FOR HAVING COMMITTED ONE OR MORE INFRINGEMENTS OF ARTICLE 85 OF THE EEC TREATY, OF ARTICLE 86 THEREOF OR OF BOTH OF THE SAID ARTICLES .

3 SUBPARAGRAPHS 1 TO 4 OF THE SAID ARTICLE 1 (1) REFER TO FOUR CONCERTED PRACTICES WHICH HAD AS THEIR OBJECT AND EFFECT, IN BREACH OF ARTICLE 85, THE PROTECTION OF THE SUGAR MARKETS OF ITALY, THE NETHERLANDS, THE WESTERN AND SOUTHERN PARTS OF GERMANY RESPECTIVELY .

4 PARAGRAPH 2 OF THIS ARTICLE STATES THAT 'IN THE CONTEXT OF THE ABOVEMENTIONED CONCERTED PRACTICES' THE COMMISSION FOUND THAT CERTAIN 'MEASURES CONSTITUTE IN THEMSELVES INFRINGEMENTS OF ARTICLES 85 AND 86 '.

5 PARAGRAPH 3 OF ARTICLE 1 FINDS THAT THE UNDERTAKINGS TO WHICH IT REFERS, IN BREACH OF ARTICLE 85, ENGAGED IN CONCERTED ACTIONS, AT THE TIME OF THE INVITATIONS TO TENDER FOR REFUNDS ON EXPORTS TO THIRD COUNTRIES, IN CONNEXION WITH THE AMOUNT OF THE REFUNDS FOR WHICH APPLICATIONS WERE MADE AND ALSO THE QUANTITIES WHICH WERE OFFERED .

6 ARTICLE 2 REQUIRES THE UNDERTAKINGS TO WHICH THE DECISION IS ADDRESSED TO 'PUT AN END IMMEDIATELY TO THE INFRINGEMENTS FOUND AS AFORESAID '.

7 ARTICLE 3 IMPOSES FINES RANGING FROM 100 000 TO 1 500 000 U.A . ON EACH OF THE APPLICANTS, WHEREAS THE OTHER UNDERTAKINGS REFERRED TO IN THE DECISION HAVE NOT BEEN FINED .

8 FINALLY ARTICLE 4 GIVES THE NAMES OF THE UNDERTAKINGS TO WHICH THE DECISION WAS ADDRESSED .

9 EACH OF THE APPLICANTS BY LODGING APPLICATIONS AT THE COURT REGISTRY BETWEEN 12 AND 23 MARCH 1973 BROUGHT AN ACTION MAINLY FOR THE ANNULMENT OF THE CONTESTED DECISION SO FAR AS IT AFFECTED EACH OF THEM .

10 IF THE COURT SHOULD CONFIRM ARTICLES 1 AND 2 OF THE DECISION, SOME OF THE APPLICANTS SUBMIT THAT IN ANY EVENT THE FINES IMPOSED ON THEM BY ARTICLE 3 SHOULD BE CANCELLED OR AT LEAST REDUCED .

11 BECAUSE THESE CASES ARE RELATED IT IS ADVISABLE THAT FOR THE PURPOSE OF THE JUDGMENT THEY BE DEALT WITH JOINTLY .

II

12 BEFORE DEALING WITH EACH OF THE NINE COMPLAINTS SEPARATELY IT IS ADVISABLE TO CONSIDER A GENERAL QUESTION, NAMELY WHETHER, AS SEVERAL APPLICANTS ASSERT, THE COMMON ORGANIZATION OF THE SUGAR MARKET IS ARRANGED IN SUCH A WAY THAT IT ELIMINATES ANY EFFECTIVE COMPETITION .

13 THE PROVISIONS RELATING TO THIS ORGANIZATION PROVIDE IN PARTICULAR FOR THE FIXING OF A MINIMUM PRICE TO BE PAID BY SUGAR MANUFACTURERS FOR THE PURCHASE OF SUGAR BEET, A THRESHOLD PRICE, A TARGET PRICE AND INTERVENTION PRICES AT WHICH NATIONAL AGENCIES HAVE TO BUY THE SUGAR WHICH THEY ARE OFFERED, THE COLLECTION OF AN IMPORT LEVY AND THE GRANT OF EXPORT REFUNDS, OF DENATURING PREMIUMS AND, FOR THE CHEMICAL INDUSTRY, REFUNDS TO PRODUCERS .

14 THE COMMON ORGANIZATION OF THE SUGAR MARKET UNLIKE THOSE OF THE OTHER AGRICULTURAL MARKETS ALSO PROVIDES THAT EACH MEMBER STATE SHALL FIX, ON THE BASIS OF THE QUANTITY ALLOCATED TO IT FOR EACH FACTORY OR UNDERTAKING PRODUCING SUGAR IN ITS TERRITORY, A BASIC QUOTA AND A MAXIMUM QUOTA, IT BEING UNDERSTOOD, ON THE ONE HAND, THAT MEMBER STATES SHALL COLLECT FROM THE MANUFACTURER A

PRODUCTION LEVY ON SUGAR WHICH IS OUTSIDE THE BASIC QUOTA BUT WITHIN THE MAXIMUM QUOTA AND, ON THE OTHER HAND, THAT THE QUANTITY OF SUGAR IN EXCESS OF THE MAXIMUM QUOTA SHALL NOT BE DISPOSED OF ON THE DOMESTIC MARKET .

15 FROM THE ECONOMIC POINT OF VIEW THE MAIN FEATURES OF THE SUGAR MARKET ARE THAT SUGAR IS FOR THE MOST PART A HOMOGENEOUS AND STANDARDIZED PRODUCT, THAT TRANSPORT COSTS OF SUGAR ARE RELATIVELY HIGH AND THAT FREIGHT RATES MAKE THE TRANSPORTATION OF SUGAR BEET OVER LONG DISTANCES OUT OF THE QUESTION .

16 IT IS BEYOND DOUBT THAT, AS THE BEFOREMENTIONED SYSTEM OF NATIONAL QUOTAS STOPPED PRODUCTION MOVING GRADUALLY TO AREAS PARTICULARLY SUITABLE FOR THE CULTIVATION OF SUGAR BEET AND, IN ADDITION PREVENTED ANY LARGE INCREASE IN PRODUCTION, IT CUT DOWN THE QUANTITIES WHICH PRODUCERS CAN SELL IN THE COMMON MARKET .

17 THIS RESTRICTION TOGETHER WITH THE RELATIVELY HIGH TRANSPORT COSTS, IS LIKELY TO HAVE A NOT INCONSIDERABLE EFFECT ON ONE OF THE ESSENTIAL ELEMENTS IN COMPETITION, NAMELY THE SUPPLY, AND CONSEQUENTLY ON THE VOLUME AND PATTERN OF TRADE BETWEEN MEMBER STATES .

18 SIMILARLY THE FACT THAT A UNIFORM INTERVENTION PRICE WAS FIXED FOR ALL MEMBER STATES EXCEPT ITALY WAS LIKELY TO PREVENT A RAPID INCREASE OF INTRA-COMMUNITY TRADE CAPABLE OF MAKING COMPETITION MORE INTENSE AND ALL THE MORE SO BECAUSE, ON THE ONE HAND, THE ORIGINAL MEMBER STATES WITH THE EXCEPTION OF ITALY AND LUXEMBOURG WERE ABLE TO MEET THEIR REQUIREMENTS TO A GREATER OR LESSER EXTENT FROM THEIR OWN PRODUCTION AND, ON THE OTHER HAND, THE SUGAR FACTORIES WITH VERY FEW EXCEPTIONS WERE MORE FAVOURABLY LOCATED IN RELATION TO THE AREAS OF CONSUMPTION OF THEIR RESPECTIVE COUNTRIES THAN THE PRODUCERS OF THE OTHER MEMBER STATES .

19 HOWEVER THE COMMUNITY SYSTEM ALSO CONTAINS ELEMENTS WHICH EITHER PROMOTE THE DEVELOPMENT OF TRADE BETWEEN MEMBER STATES AND, CONSEQUENTLY, EFFECTIVE COMPETITION, OR AT LEAST ARE LIKELY TO MODERATE THE OPPOSITE EFFECTS ARISING OUT OF THE BEFOREMENTIONED FACTS .

20 IN THE FIRST PLACE THE DISTINCTIVE FEATURE OF THIS SYSTEM - WHICH MOREOVER HAS ALLOWED AREAS HAVING A SURPLUS AS WELL AS AREAS HAVING A DEFICIT TO CONTINUE IN BEING - IS THE DISAPPEARANCE OF INTRA-COMMUNITY BARRIERS .

21 FURTHER THE 'PRICES' FIXED OR PROVIDED FOR BY THE COMMUNITY SYSTEM ARE NOT SALE PRICES FOR DEALERS, USERS AND CONSUMERS AND, CONSEQUENTLY, ALLOW PRODUCERS SOME FREEDOM TO DETERMINE THEMSELVES THE PRICE AT WHICH THEY INTEND TO SELL THEIR PRODUCTS .

22 MOREOVER THERE IS A GOOD DEAL OF EVIDENCE ON THE COURT'S FILE, INCLUDING STATEMENTS BY SEVERAL APPLICANTS, TO SHOW THAT, WHEN THE OPPORTUNITY PRESENTED ITSELF, THE SALE PRICE, FAR FROM APPEARING TO THE PERSONS CONCERNED TO BE A VALUE PREDETERMINED IN PRACTICE BY COMMUNITY RULES, WAS THE SUBJECT OF TOUGH NEGOTIATIONS .

23 FINALLY THE COMMON ORGANIZATION OF THE MARKET HAS NO APPRECIABLE EFFECT, EVEN INDIRECT, ON CERTAIN MATTERS WHICH ARE ALSO CAPABLE OF BEING THE SUBJECT OF, OR ENSURING EFFECTIVE COMPETITION, SUCH AS THE VOLUME OF DEMAND AND CONDITIONS OF SALE OTHER THAN THOSE RELATING TO THE PRICE OR QUALITY OF SERVICE .

24 WHATEVER CRITICISMS MAY BE MADE OF A SYSTEM, WHICH IS DESIGNED TO CONSOLIDATE A PARTITIONING OF NATIONAL MARKETS BY MEANS OF NATIONAL QUOTAS, THE EFFECTS OF WHICH WILL BE EXAMINED LATER, THE FACT REMAINS THAT IF IT LEAVES IN PRACTICE A RESIDUAL FIELD OF

COMPETITION, THAT FIELD COMES WITHIN THE PROVISIONS OF THE RULES OF COMPETITION .

III

25 AS SEVERAL OF THE COMPLAINTS MADE BY THE COMMISSION BLAME THE UNDERTAKINGS CONCERNED FOR HAVING ENGAGED IN 'CONCERTED PRACTICES' WITHIN THE MEANING OF ARTICLE 85 OF THE TREATY, IT IS ADVISABLE TO RESTATE THE SCOPE OF THIS CONCEPT AND THE WAY IN WHICH IT MUST BE APPLIED IN A CASE OF THIS KIND .

26 THE CONCEPT OF A 'CONCERTED PRACTICE' REFERS TO A FORM OF COORDINATION BETWEEN UNDERTAKINGS, WHICH, WITHOUT HAVING BEEN TAKEN TO THE STAGE WHERE AN AGREEMENT PROPERLY SO-CALLED HAS BEEN CONCLUDED, KNOWINGLY SUBSTITUTES FOR THE RISKS OF COMPETITION, PRACTICAL COOPERATION BETWEEN THEM WHICH LEADS TO CONDITIONS OF COMPETITION WHICH DO NOT CORRESPOND TO THE NORMAL CONDITIONS OF THE MARKET, HAVING REGARD TO THE NATURE OF THE PRODUCTS, THE IMPORTANCE AND NUMBER OF THE UNDERTAKINGS AS WELL AS THE SIZE AND NATURE OF THE SAID MARKET .

27 SUCH PRACTICAL COOPERATION AMOUNTS TO A CONCERTED PRACTICE, PARTICULARLY IF IT ENABLES THE PERSONS CONCERNED TO CONSOLIDATE ESTABLISHED POSITIONS TO THE DETRIMENT OF EFFECTIVE FREEDOM OF MOVEMENT OF THE PRODUCTS IN THE COMMON MARKET AND OF THE FREEDOM OF CONSUMERS TO CHOOSE THEIR SUPPLIERS .

28 IN A CASE OF THIS KIND THE QUESTION WHETHER THERE HAS BEEN A CONCERTED PRACTICE CAN ONLY BE PROPERLY EVALUATED IF THE FACTS RELIED ON BY THE COMMISSION ARE CONSIDERED NOT SEPARATELY BUT AS A WHOLE, AFTER TAKING INTO ACCOUNT THE CHARACTERISTICS OF THE MARKET IN QUESTION .

CHAPTER 1 :

COMPLAINT OF A CONCERTED PRACTICE HAVING AS ITS OBJECT THE PROTECTION OF THE ITALIAN MARKET

29 UNDER SUBPARAGRAPH 1 OF ARTICLE 1 (1) ERIDANIA, ZUCCHERIFICI, CAVARZERE, INDUSTRIA DEGLI ZUCCHERI, ROMANA, VOLANO, EMILIANA, SADAM, SERMIDE, ON THE ONE HAND, AND SUCRES ET DENREES, BEGHIN, SUCRE-UNION, SAY, GENERALE SUCRIERE, LEBAUDY-SUC, RT AND SZAG, ON THE OTHER HAND, ARE BLAMED FOR HAVING SINCE THE END OF THE 1968/69 MARKETING YEAR COMMITTED INFRINGEMENTS OF ARTICLE 85 (1) BY ENGAGING IN A CONCERTED PRACTICE HAVING AS ITS OBJECT AND EFFECT THE CONTROL OF DELIVERIES OF SUGAR ON THE ITALIAN MARKET AND CONSEQUENTLY THE PROTECTION OF THAT MARKET .

I - SUMMARY OF THE RELEVANT STATEMENTS OF THE DECISION AND OF THE MAIN ARGUMENTS OF THE PARTIES

30 THE COMMISSION TAKES THE VIEW THAT THE CONDUCT OF THE APPLICANTS AMOUNTS TO A CONCERTED PRACTICE PROHIBITED BY ARTICLE 85 OF THE TREATY IN THAT 'ALL COMPETITION ON THE ITALIAN MARKET BETWEEN THE BEFOREMENTIONED FRENCH, BELGIAN AND GERMAN SUPPLIERS AND THE GROUP OF ITALIAN IMPORTERS WAS ELIMINATED '.

31 THE RESTRICTIONS ON COMPETITION ARE 'PARTICULARLY OBVIOUS, BECAUSE, ON THE ONE HAND, THE SUPPLIERS SHARE OUT BETWEEN THEM, ACCORDING TO THE QUOTAS, THE AMOUNTS TO BE SUPPLIED ... AND, ON THE OTHER HAND, THE FRENCH AND BELGIAN SUPPLIERS CONCENTRATED THEIR OFFERS THROUGH SUCRES ET DENREES, THE ITALIAN PRODUCERS BEING REPRESENTED BY THE ERIDANIA COMPANY '.

32 'HAD IT NOT BEEN FOR THE SALES BETWEEN PRODUCERS ... THE SUGAR MANUFACTURERS OF THE COUNTRIES HAVING A SURPLUS WOULD HAVE SOLD THEIR SUGAR INDIVIDUALLY ON THE ITALIAN MARKET, FIXING THE QUANTITIES, PRICES AND DISTRIBUTIVE NETWORKS' SO THAT IT MUST BE

ACKNOWLEDGED THAT 'IN CONSIDERATION OF THE AMOUNTS SOLD TO THEIR COMPETITORS, THE PRODUCERS THUS GIVE UP ANY INDEPENDENT COMMERCIAL OPERATIONS ON THE ITALIAN MARKET '.

33 THE DISPUTED PRACTICES AMOUNT TO A RESTRICTION OF COMPETITION WHICH MAY AFFECT TRADE BETWEEN MEMBER STATES AND HAVE AN ADVERSE EFFECT ON ATTAINMENT OF THE OBJECTIVES OF A SINGLE MARKET BETWEEN MEMBER STATES .

34 TO THE EXTENT TO WHICH THE APPLICANTS DO NOT DISPUTE THE CONDUCT FOR WHICH THEY ARE BLAMED BY THE DECISION THEY SUBMIT THAT IT DOES NOT FALL WITHIN THE PROHIBITION LAID DOWN IN ARTICLE 85 OF THE TREATY, BECAUSE, ON THE ONE HAND, COMMUNITY RULES TOGETHER WITH THE MEASURES TAKEN BY NATIONAL AUTHORITIES LEFT NO OPPORTUNITY FOR ANY COMPETITION ON THE ITALIAN SUGAR MARKET WHICH WAS CAPABLE OF BEING PREVENTED, RESTRICTED OR DISTORTED AND BECAUSE, ON THE OTHER HAND, THE PRACTICES COMPLAINED OF WERE THE INEVITABLE CONSEQUENCE OF THE SAID MEASURES .

35 THE COMMISSION REPLIES, ON THE ONE HAND, THAT COMMUNITY AND ITALIAN REGULATIONS DID NOT PREVENT EFFECTIVE COMPETITION AND THAT, ON THE OTHER HAND, THE ITALIAN MEASURES DID NOT COMPEL THE APPLICANTS TO BEHAVE AS THEY DID .

II - EXAMINATION OF THE SUBMISSION

36 IT IS ADVISABLE TO EXAMINE FIRST OF ALL WHAT EFFECT THE ITALIAN RULES AND OTHER MEASURES ADOPTED BY THE ITALIAN AUTHORITIES HAVE ON THE EVALUATION OF THIS DISPUTE .

37 1 . DURING THE YEARS IN QUESTION THE 'COMITATO INTERMINISTERIALE DEI PREZZI' (COMITE INTERMINISTERIEL DES PRIX, INTERDEPARTMENTAL COMMITTEE ON PRICES), AN ITALIAN PUBLIC BODY, (HEREINAFTER CALLED 'CIP ') ADOPTED A SERIES OF ORDERS (' PROVVEDIMENTI ') INCLUDING THE

GRANT OF AIDS INTENDED MAINLY TO BENEFIT ITALIAN OPERATORS (SUGAR BEET PRODUCERS, SUGAR FACTORIES, SUGAR EXPORTERS) AND PAYABLE BY THE 'CASSA CONGUAGLIO ZUCCHERO' (SUGAR EQUALIZATION FUND), AN ITALIAN PUBLIC BODY (HEREINAFTER CALLED 'CCZ '), WHICH UNDER THE RELEVANT LEGISLATION WAS ASSIGNED THE TASK OF ARRANGING 'THE REQUISITE EQUALIZATIONS WITH A VIEW TO INTEGRATING BY PROGRESSIVE STAGES THE ITALIAN SUGAR ECONOMY INTO THAT OF THE COMMUNITY IN ORDER TO ATTAIN A COMMON MARKET IN THE SUGAR SECTOR '.

38 THESE AIDS ARE FINANCED BY A LEVY (' SOVRAPREZZO ') OF LIT . 23 PER KG, WHICH WAS EQUIVALENT TO THE DIFFERENCE BETWEEN THE PRICES APPLIED IN ITALY AND THE COMMUNITY DERIVED INTERVENTION PRICE APPLICABLE IN THIS COUNTRY AND WAS IMPOSED UPON NATIONAL AS WELL AS IMPORTED SUGAR . HOWEVER THE LEVY ON IMPORTED SUGAR WAS REDUCED FOR THE PURPOSE OF OFFSETTING THE COST OF FOREIGN SUGAR, TO THE EXTENT TO WHICH IT EXCEEDED THE COST OF NATIONAL SUGAR AND THUS FACILITATING IMPORTS UP TO THE AMOUNT CONSIDERED NECESSARY TO MAKE GOOD THE AMOUNT BY WHICH NATIONAL PRODUCTION FELL SHORT OF DEMAND .

39 PROVISION WAS MADE FOR THIS REDUCTION BECAUSE THE REQUIREMENT OF THE WHOLE OF THE 'SOVRAPREZZO' TOGETHER WITH THE IMPACT OF TRANSPORT COSTS WOULD HAVE MADE IT IMPOSSIBLE TO IMPORT COMMUNITY SUGAR INTO ITALY, SINCE FOREIGN SUPPLIERS COULD NOT HAVE OFFERED THEIR PRODUCTS AT A PRICE HIGHER THAN THE MAXIMUM PRICE FIXED BY THE ITALIAN AUTHORITIES, WHICH ACCORDING TO CIP WOULD HAVE BEEN 'CONTRARY TO THE OBJECTIVES WHICH WERE PURSUED '.

40 THE SAID ORDERS PROVIDED FOR THE ORGANIZATION BY CCZ OF PUBLIC INVITATIONS TO TENDER OPEN TO ALL OPERATORS WISHING TO IMPORT AT LEAST 1 000 METRIC TONS OF COMMUNITY SUGAR, AND COVERING THE AMOUNT OF THE REDUCED 'SOVRAPREZZO' WHICH THE PERSONS CONCERNED WERE PREPARED TO PAY, PROVIDED THAT THE TOTAL AMOUNTS WHICH MIGHT BE AWARDED AND THEREFORE BENEFIT FROM A REDUCED

'SOVRAPREZZO' WERE NOT TO EXCEED THE CEILING FIXED ON EACH OCCASION BY CIP .

41 SINCE THE PRINCIPLE UPON WHICH THIS SYSTEM IS BASED IS THE INTENTION OF THE ITALIAN ADMINISTRATION TO OBTAIN FROM SUCCESSFUL TENDERERS THE HIGHEST AMOUNT OF THE 'SOVRAPREZZO' HAVING DUE REGARD TO THE MAXIMUM PRICES, CCZ WAS GIVEN THE POWER TO FIX SECRETLY THE PROPORTION OF THE 'SOVRAPREZZO' WHICH IT CONSIDERED TO BE ADEQUATE (' PREZZO CONGRUO ') AND AWARD IMPORT QUOTAS ACCORDING TO THE QUANTITY AND AMOUNT OF THE 'SOVRAPREZZO' OFFERED BY THE APPLICANTS .

42 FOR THE PURPOSE OF ENSURING THAT IMPORTS ARE EFFECTED IN ACCORDANCE WITH THE PRESCRIBED CONDITIONS THE PERSONS CONCERNED MUST GIVE SECURITY OF A RELATIVELY HIGH AMOUNT UNDER THE APPLICABLE PROVISIONS WHICH PROVIDE THAT THE WHOLE OF THE 'SOVRAPREZZO' MUST BE PAID IF THE SAID CONDITIONS ARE NOT FULFILLED .

43 SINCE 'ALL COMMERCIAL OPERATORS CANNOT HAVE AN ORGANIZATION WHICH ENABLES THEM TO TAKE PART IN OPEN TENDERS', CIP AUTHORIZED CCZ TO ALLOW NOT MORE THAN 1 000 METRIC TONS TO BE IMPORTED OUTSIDE THE INVITATIONS TO TENDER AND IN CONSIDERATION OF A REDUCED 'SOVRAPREZZO', PROVIDED THAT, IF THE TOTAL AMOUNT FOR WHICH APPLICATIONS WERE MADE IN THIS WAY EXCEEDED 10 000 METRIC TONS, THE QUANTITIES FOR WHICH EACH APPLICANT APPLIED WERE REDUCED IN PROPORTION .

44 ORDER ISSUED AT A LATER DATE STATED THAT THE AMOUNTS IMPORTED OUTSIDE THE INVITATIONS TO TENDER WERE TO BE RESERVED FOR INDUSTRIAL CONSUMERS AND WERE NOT TO EXCEED IN THE AGGREGATE 20 PER CENT - LATER 25 PER CENT - OF THE MAXIMUM AMOUNT FIXED FOR EACH INVITATION TO TENDER .

45 THE CLEAR OBJECTIVE OF THE INVITATIONS TO TENDER AND IMPORTS OUTSIDE THESE INVITATIONS TO TENDER WAS ONLY TO PERMIT THE QUANTITY OF SUGAR TO BE IMPORTED WHICH WAS ABSOLUTELY NECESSARY TO MAKE GOOD THE AMOUNT BY WHICH NATIONAL PRODUCTION FELL SHORT OF DEMAND .

46 AFTER HAVING ABOLISHED THE SYSTEM OF MAXIMUM CONSUMER PRICES IN FORCE BEFORE THE ESTABLISHMENT OF THE COMMUNITY SYSTEM THE ITALIAN AUTHORITIES 'IN ORDER TO SHIELD ITALIAN CONSUMERS FROM INCREASES WHICH ARE NOT DUE TO VARIATIONS OF COMMUNITY PRICES' ISSUED IN 1969, ORDER NO 1236, WHICH IN FACT ACHIEVES THIS RESULT BY MEANS OF A DECISION UNDER WHICH THE MAXIMUM LIMITS OF THE 'PRICE DIFFERENTIALS' FOR THE VARIOUS QUALITIES AND KINDS OF SUGAR, OF THE CHARGES FOR PACKAGING THE PRODUCT AS WELL AS THE TRADING MARGINS ON THE SALE OF THIS PRODUCT TO THE CONSUMER MUST REMAIN 'THOSE WHICH ARE DETERMINED BY A COMPARISON WITH THE QUOTATIONS IN ORDER NO 1119 OF 1965' BOTH FOR SALES BY PRODUCERS AND TO THE CONSUMER .

47 CIRCULAR NO 1237 WHICH FOLLOWED ORDER NO 1236 GAVE THE EX WORKS PRICE OF SUGAR, FROM WHICH THE MAXIMUM STANDARD CONSUMER PRICE IS DIRECTLY DERIVED, SINCE IT IS THE RESULT OF ADDING TOGETHER ITEMS, OF WHICH SOME ARE TAKEN FROM THE COMMUNITY PROVISIONS FIXING THE DERIVED INTERVENTION PRICE AND THE REMAINDER FROM THE PROVISIONS ADOPTED BY CIP .

48 IT APPEARS THAT MAXIMUM PRICES, WHICH APPLIED NOT ONLY AT THE CONSUMPTION BUT ALSO AT THE PRODUCTION LEVEL, APPLIED IN PARTICULAR TO SALES OF SUGAR TO INDUSTRIAL CONSUMERS .

49 ALTHOUGH THE ITALIAN CONSEIL D'ETAT ANNULLED ORDER NO 1236 AND CIRCULAR NO 1237, ATTENTION MUST BE DRAWN TO THE FACT THAT, ON THE ONE HAND, THIS DECISION WAS NOT MADE UNTIL 29 FEBRUARY 1972, AND, ON THE OTHER HAND, THAT IT CONFIRMED THAT THE DISPUTED MEASURES WERE

IN SUBSTANCE LAWFUL AND FINALLY THAT THE BEFOREMENTIONED SYSTEM OF PRICES CONTINUED IN FACT TO BE APPLIED .

50 2 . A - THE COMMISSION DOES NOT SERIOUSLY DENY THAT THESE REGULATIONS AS WELL AS THE WAY IN WHICH THEY HAVE BEEN IMPLEMENTED AFFECTED THE APPLICANTS' CONDUCT TO WHICH EXCEPTION IS TAKEN .

51 IN THE FIRST PLACE IN THE ENUMERATION OF THE PARTICULARS OF THIS COMPLAINT THE COMMISSION REFERS, INTER ALIA, TO THE INVITATIONS TO TENDER ORGANIZED BY CCZ AND RECORDS IN PARTICULAR 'THAT ... THE IMPORTERS' GROUP TOOK APPROXIMATELY 75 PER CENT OF THE TOTAL AMOUNT OF IMPORTS PUT UP FOR TENDER (DECISION P . 24 UNDER C 13), ALL THE SUGAR TAKEN BY ERIDANIA OR ANY OTHER MEMBER OF THE GROUP WAS SUPPLIED BY THE SUPPLIERS' GROUP (LOC CIT .) AND THAT THE CONCERTED ACTION BETWEEN PRODUCER-IMPORTERS IS EVIDENT ... FROM THE FACT THAT THEY OFFERED SIMILAR RATES OF THE "SOVRAPREZZO" AT THE INVITATIONS TO TENDER (IN PRACTICE FROM THE FACT THAT THEY MADE JOINT PURCHASES PURSUANT TO AGREEMENTS AND DISTRIBUTION ARRANGEMENTS AGREED UPON BEFOREHAND ') (STATEMENT OF DEFENCE IN CASE 114/73, P . 58), A PRACTICE WHICH HAD THE EFFECT THAT 'INVITATIONS TO TENDER (WERE UNABLE) TO PLAY THE PART ASSIGNED TO THEM' (LOC . CIT . P . 42).

52 FURTHER THE COMMISSION BLAMES THE APPLICANTS IN A MORE GENERAL WAY FOR HAVING 'MADE USE OF THE ITALIAN RULES IN ORDER TO RESTRICT OPPORTUNITIES FOR COMPETITION' (REJOINDER IN CASE 48/73, P . 17) AND ASSERTS THAT THESE RULES 'DO NOT EXPLAIN EVERYTHING' (LOC . CIT . , P . 19), WHICH IS TANTAMOUNT TO AN ADMISSION THAT THEY AT LEAST EXPLAIN CERTAIN ASPECTS OF THE APPLICANTS' ACTIONS .

53 MOREOVER A 'REPORT ON AN INVESTIGATION INTO INVITATIONS TO TENDER', ANNEX NO 16 TO THE STATEMENT OF DEFENCE IN CASE 44/73, DRAWN UP BY AGENTS OF THE COMMISSION (DIRECTORATE-GENERAL FOR

COMPETITION) STATES INTER ALIA THAT 'THE PROCEDURE IN FACT ADOPTED AT INVITATIONS TO TENDER UNDOUBTEDLY ENCOURAGES THE CONCERTED ACTION BY ITALIAN PRODUCERS TO CONTROL ALL IMPORTS OF SUGAR ' .

54 FINALLY THE COMMISSION HAS NOT REFUTED CERTAIN STATEMENTS, WHICH ERIDANIA PRODUCED, PARTLY AS EVIDENCE UPON WHICH IT RELIES, NAMELY, ON THE ONE HAND, THAT THE ITALIAN GOVERNMENT NEVER CONCEALED THE FACT THAT IT ALWAYS 'WANTED AND REQUESTED' ITALIAN PRODUCERS 'TO TAKE PART IN AND PROCEED ... TO IMPORT THE REQUISITE QUANTITIES OF SUGAR TO MAKE GOOD THE AMOUNT BY WHICH NATIONAL PRODUCTION FALLS SHORT OF DEMAND' AND TO DO SO 'IN A RATIONALIZED WAY' THAT IS TO SAY BY CONCERTED ACTION, AND, ON THE OTHER HAND, THAT THE SAID GOVERNMENT 'ALWAYS PURSUED THE FUNDAMENTAL OBJECTIVE OF A UNIFORM PRICE FOR SUGAR ... BOTH FOR CONSUMPTION AS FOOD AND FOR THE SUGAR PROCESSING INDUSTRY' (REPLY IN CASE 114/73, P . 57, 78 TO 79; CF . ALSO THE APPLICATION IN THIS CASE, P . 25).

55 NOR HAS THE COMMISSION REFUTED THE STATEMENTS, WHICH SUCRES ET DENREES PRODUCED AS EVIDENCE UPON WHICH IT RELIES, THAT, ON THE ONE HAND, A SENIOR ITALIAN OFFICIAL INFORMED SUCRES ET DENREES 'OF THE NEED TO HARMONIZE SUPPLIES ABOVE AND BELOW THE FRANCO-ITALIAN FRONTIER, IN SUCH A WAY THAT A UNIFORM PRICE CAN BE MAINTAINED ON ITALIAN TERRITORY ..., AN ABSOLUTELY ESSENTIAL ECONOMIC AND SOCIAL REQUIREMENT FOR THE ITALIAN AUTHORITIES' AND, ON THE OTHER HAND, THAT 'THE SYSTEM OF INVITATIONS TO TENDER ... WAS ADOPTED AS A MEANS OF OBTAINING SUCH A UNIFORM PRICE, THANKS TO THE UNDERTAKING GIVEN BY THE PRINCIPAL ITALIAN IMPORTER TO MAINTAIN THE SAID UNIFORM PRICE' (APPLICATION IN CASE 48/73, P . 18 TO 19).

56 MOREOVER THESE STATEMENTS TALLY WITH THE AIMS INDICATED IN THE REGULATIONS IN QUESTION, IN THAT THEY ARE DESIGNED TO LIMIT IMPORTS TO THE MINIMUM REQUIRED TO MAKE GOOD THE AMOUNT BY WHICH ITALIAN PRODUCTION FALLS SHORT OF DEMAND, TO HARMONIZE THE COST OF

FOREIGN SUGAR WITH THAT OF NATIONAL SUGAR AND TO KEEP PRICES IN ITALY AT A UNIFORM LEVEL AND RELATIVELY LOW .

57 B - APART FROM THESE CONSIDERATIONS THE SAID REGULATIONS - TOGETHER WITH THE INFLUENCE EXERTED BY THE ITALIAN AUTHORITIES ON THE OPERATIONS OF THE PRODUCERS CONCERNED - WERE IN MANY RESPECTS LIKELY TO BRING ABOUT THE CONCENTRATION OF DEMAND IN ITALY IN THE HANDS OF THE LARGE PRODUCERS AND THE FORMATION OF GROUPS OF PRODUCER-IMPORTERS AND ALSO OF SUPPLIER-EXPORTERS .

58 FIRST OF ALL QUOTA RESTRICTIONS ON IMPORTS BENEFITING FROM A REDUCED 'SOVRAPREZZO' CONSIDERED TOGETHER WITH THE RISKS ATTACHING TO THE INVITATIONS TO TENDER WERE LIKELY TO INDUCE THE PERSONS CONCERNED TO SHARE OUT THE SUPPLY AS WELL AS THE DEMAND AND TO COME TO AN AGREEMENT ON THE AMOUNT OF THE 'SOVRAPREZZO' TO BE OFFERED, WITH THE OBJECT OF PREVENTING ONE OR THE OTHER OF THEM FROM BEING EXCLUDED FROM THE SUPPLIES IN QUESTION, BECAUSE THE AMOUNT OF THE 'SOVRAPREZZO' WHICH HE OFFERED WAS TOO LOW .

59 THIS IS IN PARTICULAR WHAT HAPPENS, ON THE ONE HAND, TO FOREIGN SUPPLIERS FORCED TO SELL LARGE SURPLUSES AND, ON THE OTHER HAND, TO SMALL ITALIAN PRODUCERS WHO CANNOT DEAL IN LARGE AMOUNTS .

60 FURTHER, FIXING LARGE MINIMUM AMOUNTS (1 000 METRIC TONS) FOR EACH INDIVIDUAL TENDER SUBMITTED FOR AN AWARD - TOGETHER WITH THE ABSENCE OF ANY INDEPENDENT DISTRIBUTIVE NETWORK AND THE FACT THAT IT WAS ALMOST IMPOSSIBLE FOR INDUSTRIAL CONSUMERS, WHO HAVE NO STORAGE FACILITIES AND MORE OFTEN THAN NOT HAVE TO OBTAIN THEIR SUPPLIES ON A DAY TO DAY BASIS, TO TAKE PART IN THE INVITATIONS TO TENDER - OF NECESSITY RESULTED IN ITALIAN PRODUCERS, IN ACCORDANCE WITH THE WISH OF THE NATIONAL AUTHORITIES, ALONE BEING ABLE TO ATTEND THE INVITATIONS TO TENDER AND THIS WAS BOUND TO MAKE FOREIGN SUPPLIERS OFFER THE SAID PRODUCERS A LARGE PROPORTION OF THE SUGAR WHICH THEY INTENDED TO EXPORT TO ITALY .

61 MOREOVER, THE FACT THAT THE AMOUNTS FOR WHICH APPLICATIONS FOR THE PURPOSE OF IMPORTING WERE MADE OUTSIDE THE INVITATIONS TO TENDER WERE REDUCED IN PROPORTION WHEN THEY EXCEEDED IN THE AGGREGATE THE CEILING OF 10 000 METRIC TONS WAS LIKELY TO DISSUADE THOSE CONCERNED FROM MAKING USE OF THIS SYSTEM OF IMPORTING AND INDUCE THEM TO OBTAIN THEIR SUPPLIES DIRECT FROM NATIONAL PRODUCERS .

62 FURTHER THE SAID FIXING OF MINIMUM QUANTITIES COULD FORCE SMALL ITALIAN PRODUCERS, WHO WERE ANXIOUS TO CONTINUE TO BE ABLE TO PARTICIPATE IN IMPORT OPERATIONS, TO COOPERATE WITH THEIR COUNTERPARTS WHO CARRY ON BUSINESS ON A LARGER SCALE .

63 THE CENTRALIZATION OF BOTH SUPPLY AND DEMAND MAY BE CONSIDERED TO BE THE RESULT OF THE ITALIAN REGULATIONS AND WAS ENCOURAGED IN ADDITION BY THE FACT THAT, BECAUSE OF THE SIZE OF THE AMOUNTS PUT UP FOR TENDER, BUYERS FOUND THAT THERE WAS A STRONG INCENTIVE FOR THEM TO TURN TO EXPORTERS, WHOSE OUTPUT WAS ADEQUATE, WHO COULD GUARANTEE REGULAR BULK DELIVERIES AND ENTER INTO AGREEMENTS AT ATTRACTIVE PRICES, MAINLY BECAUSE THEY COULD GET UNUSUALLY SATISFACTORY FREIGHT RATES WHICH RAILWAY UNDERTAKINGS COULD NOT HAVE OFFERED FOR SMALLER AMOUNTS .

64 THESE CIRCUMSTANCES COULD, ON THE ONE HAND, INDUCE PRODUCER-EXPORTERS TO APPOINT A SOLE AGENT, NAMELY SUCRES ET DENREES, WHICH COULD GIVE THE NECESSARY GUARANTEES FOR THE SUCCESSFUL COMPLETION OF THESE OPERATIONS, TO CARRY OUT THE EXPORT OPERATIONS, AND, ON THE OTHER HAND, ALSO INDUCE PRODUCER-IMPORTERS TO CENTRALIZE NEGOTIATIONS BY GIVING ERIDANIA, A LARGE ITALIAN PRODUCER, THE NECESSARY AUTHORITY .

65 3 . ALL THESE CONSIDERATIONS SHOW THAT ITALIAN REGULATIONS AND THE WAY IN WHICH THEY HAVE BEEN IMPLEMENTED HAD A DETERMINATIVE

EFFECT ON SOME OF THE MOST IMPORTANT ASPECTS OF THE COURSE OF CONDUCT OF THE UNDERTAKINGS CONCERNED WHICH THE COMMISSION CRITICIZES, SO THAT IT APPEARS THAT, HAD IT NOT BEEN FOR THESE REGULATIONS AND THEIR IMPLEMENTATION, THE COOPERATION, WHICH IS THE SUBJECT-MATTER OF THESE PROCEEDINGS, EITHER WOULD NOT HAVE TAKEN PLACE OR WOULD HAVE ASSUMED A FORM DIFFERENT FROM THAT FOUND TO HAVE EXISTED BY THE COMMISSION .

66 IT EMERGES FROM THE CONTESTED DECISION THAT THE COMMISSION HAS NOT MADE SUFFICIENT ALLOWANCE FOR THE EFFECT OF THOSE REGULATIONS AND HAS CONSEQUENTLY OVERLOOKED A CRUCIAL FACTOR IN THE EVALUATION OF THE INFRINGEMENTS WHICH IT ALLEGES .

67 4 . FURTHER THE OBJECT AND EFFECT OF ITALIAN REGULATIONS AND THE WAY IN WHICH THEY HAVE BEEN IMPLEMENTED WAS TO MATCH SUPPLY EXACTLY WITH DEMAND AND THEREBY REMOVE A VITAL ELEMENT OF NORMAL COMPETITION .

68 FURTHERMORE THE SYSTEM DESCRIBED ABOVE HAS SUBSTANTIALLY REDUCED THE OPPORTUNITIES AVAILABLE TO THE PARTIES CONCERNED TO NEGOTIATE A PRICE WHICH WOULD HAVE RESULTED FROM THE FREE MARKET FORCES OF SUPPLY AND DEMAND .

69 IN ADDITION, THE ITALIAN REGULATIONS IMPEDED, INDIRECTLY BUT FUNDAMENTALLY, THE BUYER'S FREEDOM TO CHOOSE HIS SUPPLIER AND VICE VERSA .

70 MOREOVER THE ONLY EFFECTIVE COMPETITION, WHICH THESE REGULATIONS, AT LEAST OSTENSIBLY, ALLOWED TO REMAIN, NAMELY COMPETITION RELATING TO THE AMOUNTS OF THE 'SOVRAPREZZO' TO BE TENDERED FOR THE PURPOSES OF THE ADJUDICATIONS TO TENDER, WAS LIKELY TO INCREASE A NOT INCONSIDERABLE ITEM OF THE COST PRICE OF ANY PURCHASER AND, CONSEQUENTLY, THE PRICES APPLIED WHEN THE SUGAR AWARDED IS RESOLD, WHEREAS THE PROVISIONS OF THE TREATY

RELATING TO COMPETITION ARE ON THE CONTRARY DESIGNED, INTER ALIA, TO PREVENT CARTELS ALLOWING ITS MEMBERS TO APPLY UNJUSTIFIED PRICES .

71 ALTHOUGH, AS HAS BEEN INDICATED EARLIER, THE SYSTEM OF NATIONAL QUOTAS, BY TENDING TO PARTITION NATIONAL MARKETS, ONLY LEAVES A RESIDUAL FIELD FOR THE OPERATION OF THE RULES OF COMPETITION, THAT FIELD IS IN TURN TO A GREAT EXTENT FUNDAMENTALLY RESTRICTED IN ITS SCOPE BY THE SPECIAL ORGANIZATION OF THE ITALIAN MARKET .

72 THESE CONSIDERATIONS SHOW THAT THE CONDUCT COMPLAINED OF COULD NOT APPRECIABLY IMPEDE COMPETITION AND DOES NOT THEREFORE COME WITHIN THE PROHIBITION OF ARTICLE 85 OF THE TREATY .

73 SUBPARAGRAPH 1 OF ARTICLE 1 (1) OF THE CONTESTED DECISION MUST THEREFORE BE ANNULLED .

CHAPTER 2

THE COMPLAINT OF A CONCERTED PRACTICE HAVING AS ITS OBJECT THE PROTECTION OF THE NETHERLANDS MARKET

74 SUBPARAGRAPH 2 OF ARTICLE 1 (1) OF THE CONTESTED DECISION BLAMES SU AND CSM, ON THE ONE HAND, AND RT AND PFEIFER UND LANGEN, ON THE OTHER HAND, FOR HAVING 'SINCE THE 1968/69 MARKETING YEAR (PFEIFER UND LANGEN ONLY SINCE THE 1970/71 MARKETING YEAR)' - THAT IS TO SAY FROM THE 1968/69 TO THE 1971/72 MARKETING YEAR - 'COMMITTED INFRINGEMENTS OF ARTICLE 85 (1) BY ENGAGING IN A CONCERTED PRACTICE HAVING AS ITS OBJECT AND EFFECT THE CONTROL OF DELIVERIES OF SUGAR ON THE NETHERLANDS MARKET FROM BELGIUM AND THE WESTERN PART OF GERMANY AND CONSEQUENTLY THE PROTECTION OF THAT MARKET '.

SECTION 1 : PRELIMINARY SUBMISSION : THE 'COOPERATIVE VERENIGING SUIKER, UNIE (UA' (SU) WAS NOT A LEGAL ENTITY DURING PART OF THE PERIOD TO WHICH THIS COMPLAINT REFERS

75 I - SU SUBMITS THAT IT ONLY COMMENCED BUSINESS ON 2 JANUARY 1971 SO THAT THERE IS NO FOUNDATION FOR THE FINDING IN THE DECISION THAT THE APPLICANT COMMITTED INFRINGEMENTS 'FROM THE 1968/69 MARKETING YEAR '.

76 SIMILARLY THE COMMISSION INFRINGED REGULATION NO 17, AND IN PARTICULAR ARTICLE 15 (2) THEREOF, BY IMPOSING ON THE APPLICANT A FINE FOR AN INFRINGEMENT WHICH IT COULD NOT HAVE COMMITTED DURING MOST OF THE PERIOD UNDER CONSIDERATION .

77 THE COURT FILE SHOWS THAT IN 1966 FOUR NETHERLANDS SUGAR PRODUCING COOPERATIVES, THE MEMBERS OF WHICH WERE BEET GROWERS, FORMED AN ASSOCIATION KNOWN AS 'COOPERATIEVE VERENIGING SUIKER UNIE UA', HEREINAFTER CALLED 'THE FORMER ASSOCIATION', HAVING AS ITS OBJECT, IN PARTICULAR, THE COORDINATION OF THE OPERATIONS OF THE SAID COOPERATIVES WHICH HAD TO CARRY OUT THE INSTRUCTIONS OF THE ASSOCIATION, ESPECIALLY FOR MAKING THE BEST POSSIBLE USE OF PLANT, INVESTMENTS AND PRICES .

78 PROMPTED BY THE WISH TO ATTAIN CLOSER COOPERATION AMOUNTING TO AN ACTUAL MERGER THE FOUR COOPERATIVES FORMED ON 16 JULY 1970 A COMPANY ALSO CALLED 'COOPERATIEVE VERENIGING SUIKER UNIE UA', WHICH BROUGHT TOGETHER UNDER ITS WING THE MEMBERS OF THE SAID COOPERATIVES AS DIRECT PARTICIPATORS, COMMENCED BUSINESS ON 1 JANUARY 1971 AND IS THE APPLICANT IN THIS CASE .

79 AFTER THE FORMER ASSOCIATION HAD CHANGED ITS NAME TO 'COOPERATIEVE VERENIGING SUIKER UNIE BEHEER UA', IT CEASED TRADING WHEN THE APPLICANT COMMENCED BUSINESS AND WAS DISSOLVED WITH EFFECT FROM 1 JUNE 1971 .

80 THE FOUR COOPERATIVES WHICH WERE MEMBERS OF THE FORMER ASSOCIATION WERE DISSOLVED ON 31 DECEMBER 1970 AND ON 1 JANUARY 1971 THE APPLICANT ASSUMED ALL THEIR RIGHTS AND LIABILITIES .

81 THE APPLICANT STATES THAT IT CANNOT BE HELD RESPONSIBLE FOR ACTS AND THINGS DONE BY THE FORMER ASSOCIATION WHICH IS NOT ITS PREDECESSOR (' RECHTSVOORGANGER ') AND WHICH HAD NEITHER ANY GOODWILL NOR ANY ASSETS WHICH IT COULD HAVE TRANSFERRED TO THE APPLICANT, QUITE APART FROM THE FACT THAT A TRANSFER OF GOODWILL IS NOT KNOWN IN NETHERLANDS LAW .

82 THE APPLICANT IS ONLY THE LEGAL AND ECONOMIC SUCCESSOR OF THE FOUR COOPERATIVES, THE NAMES OF WHICH MOREOVER NEVER INCLUDED THE WORDS 'SUIKER UNIE ' .

83 EVEN IF IT MUST BE TREATED AS THE LEGAL SUCCESSOR OF THE FORMER ASSOCIATION, THERE IS A CASE FOR TAKING ACCOUNT OF THE FACT THAT THIS ASSOCIATION WAS NOT LIABLE FOR THE OBLIGATIONS ARISING OUT OF THE DECISION, WHICH WERE THE DIRECT LIABILITY OF SU .

84 II - AS THE APPLICANT ASSUMED ALL THE RIGHTS AND LIABILITIES OF THE FOUR COOPERATIVES OF THE OLD ASSOCIATION, IT MUST BE TREATED AS THE ECONOMIC SUCCESSOR BOTH OF THE OLD ASSOCIATION AND OF ITS MEMBERS, WHICH INDEED IS WHAT THOSE MEMBERS INTENDED .

85 THE APPLICANT MOREOVER DOES NOT DENY THAT THE NAME 'SUIKER UNIE' ALWAYS COVERED THE SAME UNDERTAKINGS, WHICH WERE RUN FOR THE MOST PART BY THE SAME PERSONS AND HAD THEIR REGISTERED OFFICES AT THE SAME ADDRESS .

86 IT DOES NOT EVEN CLAIM THAT ITS CONDUCT ON THE SUGAR MARKET DIFFERED FROM THAT OF THE FORMER ASSOCIATION .

87 IN THESE CIRCUMSTANCES, SO FAR AS THE SUGAR MARKET IS CONCERNED, THE MAIN FEATURE OF THE CONDUCT OF THE APPLICANT AND ITS PREDECESSOR WAS ITS OBVIOUS CONTINUITY, WHICH MEANS THAT THE WHOLE OF THIS BEHAVIOUR MUST BE ATTRIBUTED TO THE APPLICANT .

88 THEREFORE THIS SUBMISSION IS UNFOUNDED .

SECTION 2 : PROCEDURAL AND FORMAL SUBMISSIONS

I - SUBMISSIONS CONCERNING THE ADMINISTRATIVE PROCEDURE

1 . PREMATURE PUBLICATION A BREACH OF THE PRINCIPLE THAT EVERYONE HAS THE RIGHT TO A FAIR TRIAL

89 SU, CSM AND PFEIFER UND LANGEN BLAME THE COMMISSION FOR HAVING INFRINGED THE PRINCIPLE THAT EVERYONE HAS THE RIGHT TO A FAIR TRIAL BY ISSUING CERTAIN PUBLIC STATEMENTS GIVING THE IMPRESSION THAT THE INFRINGEMENTS ALLEGED HAD BEEN FOUND TO EXIST . WHAT IS MORE THEY DID SO BEFORE THE UNDERTAKINGS CONCERNED HAD EVEN BEEN ABLE TO DEFINE THEIR POSITION ON THE COMPLAINTS AFFECTING THEM .

90 THUS THE COMMISSION DEPRIVED ITSELF OF THE OPPORTUNITY OF DETERMINING IMPARTIALLY THE FACTS OF THE CASE AND THE ARGUMENTS PUT FORWARD BY THE APPLICANTS .

91 THERE IS NOTHING IN THE COURT'S FILE TO SUPPORT THE PRESUMPTION THAT THE CONTESTED DECISION WOULD NOT HAVE BEEN TAKEN OR WOULD HAVE BEEN DRAWN UP IN A DIFFERENT WAY, IF THE PUBLIC STATEMENTS WHICH ARE THE SUBJECT-MATTER OF THIS SUBMISSION HAD NOT BEEN MADE, WHETHER OR NOT THEY ARE OPEN TO CRITICISM UNDER ANOTHER LEGAL HEAD .

92 MOREOVER THE DECISION HAS NOT UPHELD ALL THE COMPLAINTS SET OUT IN THE NOTIFICATION OF OBJECTIONS .

93 THIS SUBMISSION MUST THEREFORE BE DISMISSED .

2 . UNDULY SHORT TIME-LIMITS FOR SUBMISSION OF OBSERVATIONS

94 SU, CSM AND PFEIFER UND LANGEN SUBMIT THAT BY GRANTING THE UNDERTAKINGS CONCERNED A TIME-LIMIT OF ONLY TWO MONTHS FOR SUBMISSION OF THEIR OBSERVATIONS ON THE NOTIFICATION OF OBJECTIONS THE COMMISSION INFRINGED ARTICLE 11 OF REGULATION NO 99/63 UNDER WHICH IN FIXING THE TIME-LIMITS PROVIDED FOR BY THIS REGULATION 'THE COMMISSION SHALL HAVE REGARD TO THE TIME REQUIRED FOR PREPARATION OF COMMENTS ' .

95 THE TIME-LIMIT FIXED IN THIS WAY WAS TOO SHORT, ESPECIALLY IF ACCOUNT IS TAKEN OF THE FACT THAT THE COMMISSION ITSELF TOOK MORE THAN TWO YEARS TO CARRY OUT ITS INVESTIGATION .

96 ACCORDING TO ARTICLE 11 THE TIME-LIMIT IN QUESTION 'SHALL NOT BE LESS THAN TWO WEEKS' WHICH SHOWS THAT, WHEN THE COMMISSION FIXED IT AT TWO MONTHS, IT GRANTED THE UNDERTAKINGS CONCERNED A PERIOD MUCH LONGER THAN THE MINIMUM PRESCRIBED BY THIS ARTICLE .

97 FURTHER, SINCE ARTICLE 11 ALSO REQUIRES THE 'URGENCY OF THE CASE' TO BE TAKEN INTO ACCOUNT, THE COMMISSION, BECAUSE IT CONSIDERED, RIGHTLY OR WRONGLY, THAT IT WAS FACED WITH A SERIES OF CARTELS OF A PARTICULARLY DAMAGING KIND, COULD HAVE COME TO THE CONCLUSION THAT IT WAS BOUND TO EXPEDITE THE ADMINISTRATIVE PROCEDURE WITH A VIEW TO BEING ABLE TO BRING THE COURSE OF CONDUCT COMPLAINED OF TO AN END AS QUICKLY AS POSSIBLE .

98 A COMPARISON, ON THE ONE HAND, OF THE TIME WHICH ELAPSED BETWEEN THE OPENING AND CLOSING OF THE INVESTIGATION AND, ON THE OTHER HAND, OF THE DISPUTED TIME-LIMIT OF TWO MONTHS IS IRRELEVANT, AS THE COMMISSION HAD TO COLLECT A CONSIDERABLE NUMBER OF FACTS

RELATING TO A LARGE NUMBER OF UNDERTAKINGS WHEREAS EACH OF THE LATTER ONLY HAD IN THE MAIN TO EXPLAIN ITS OWN CONDUCT .

99 THIS SUBMISSION CANNOT THEREFORE BE UPHELD .

3 . FAILURE BY THE COMMISSION TO HAVE TAKEN INTO ACCOUNT CERTAIN FACTS PUT FORWARD BY THE APPLICANT

100 SU SUBMITS THAT THE COMMISSION INFRINGED ARTICLE 19 (1) OF REGULATION NO 17 AND ARTICLE 1 OF REGULATION NO 99/63, WHEN A MEMBER OF THE COMMISSION STATED AT A PRESS CONFERENCE ON 18 DECEMBER 1972 THAT NONE OF THE UNDERTAKINGS AFFECTED BY THE DECISION HAD SUBMITTED THAT IT FIXED THE PRICE OF SUGAR IN AGREEMENT WITH THE COMPETENT AUTHORITY OF THE RESPECTIVE MEMBER STATE, EVEN THOUGH SU EXPRESSLY STATED IN THE ADMINISTRATIVE PROCEDURE THAT IT HAD DONE SO .

101 THESE ARTICLES SHOW THAT, BEFORE TAKING A DECISION AND CONSULTING THE ADVISORY COMMITTEE ON RESTRICTIVE PRACTICES AND MONOPOLIES, THE COMMISSION IS UNDER A DUTY TO GIVE UNDERTAKINGS CONCERNED 'THE OPPORTUNITY OF BEING HEARD ON THE MATTERS TO WHICH THE COMMISSION HAS TAKEN OBJECTION '.

102 SU'S STATEMENTS SHOW THAT IT HAD THE OPPORTUNITY OF DEFINING ITS POSITION ON THE POINT IN QUESTION .

103 IF A MEMBER OF THE COMMISSION HAS GIVEN THE PRESS INCORRECT INFORMATION CONCERNING STATEMENTS PUT FORWARD BY AN UNDERTAKING DURING AN ADMINISTRATIVE PROCEDURE, THIS DOES NOT PROVE THAT THE COMMISSION DID NOT TAKE THE SAID STATEMENTS INTO CONSIDERATION .

104 THE SUBMISSION IS THEREFORE UNFOUNDED .

4 . INFRINGEMENT OF ARTICLE 4 OF REGULATION NO 99/63

105 ACCORDING TO SU THE COMMISSION INFRINGED ARTICLE 4 OF REGULATION NO 99/63 WHICH READS - 'THE COMMISSION SHALL IN ITS DECISION DEAL ONLY WITH THOSE OBJECTIONS RAISED AGAINST UNDERTAKINGS AND ASSOCIATIONS OF UNDERTAKINGS IN RESPECT OF WHICH THEY HAVE BEEN AFFORDED THE OPPORTUNITY OF MAKING KNOWN THEIR VIEWS '.

106 THE DECISION TREATS THE PURCHASES OF THE NETHERLANDS PRODUCERS FROM RT AND PFEIFER UND LANGEN AS SEPARATE INFRINGEMENTS, WHEREAS THE NOTIFICATION OF OBJECTIONS MERELY REGARDED THEM AS EVIDENCE OF A CONCERTED PRACTICE .

107 IT IS CLEAR FROM THE LETTER AND SPIRIT OF THE DECISION THAT THE COMMISSION DOES NOT MAINTAIN THAT DELIVERIES FROM PRODUCER TO PRODUCER AS SUCH ARE UNLAWFUL BUT HAS INFERRED THE ILLEGALITY OF THESE OPERATIONS FROM THE FACT THAT THEY ARE CONSTITUENT PARTS OF CONCERTED PRACTICES .

108 AS THE DECISION DOES NOT DIFFER FROM THE NOTIFICATION OF OBJECTIONS ON THIS POINT THE SUBMISSION IS UNFOUNDED .

II - SUBMISSIONS RELATING TO THE DRAFTING AND NOTIFICATION OF THE DECISION

1 . INFRINGEMENT OF THE RIGHT TO DEFEND BY THE ADOPTION OF A SINGLE DECISION; INFRINGEMENT OF THE FIRST PARAGRAPH OF ARTICLE 191 (2) OF THE TREATY AND OF ARTICLE 3 OF REGULATION 1 (1)

109 A - SU AND CSM BLAME THE COMMISSION FOR HAVING INFRINGED THEIR RIGHT TO DEFEND THEMSELVES BY ADOPTING A SINGLE DECISION, ALTHOUGH IT WAS TAKING ACTION RELATING TO A LARGE NUMBER OF

UNDERTAKINGS AND A SERIES OF ALLEGED INFRINGEMENTS WHICH WERE NOT CONNECTED WITH EACH OTHER .

110 THIS PROCEDURE LEFT THE UNDERTAKINGS TO WHICH THE DECISION WAS ADDRESSED UNCERTAIN AS TO THE EXACT NATURE OF THE COMPLAINTS MADE AGAINST EACH OF THEM INDIVIDUALLY AND MIGHT LEAD TO THE INFRINGEMENTS WHICH AN UNDERTAKING MAY HAVE COMMITTED BEING ATTRIBUTED TO ANOTHER UNDERTAKING AS WELL .

111 THERE IS NO REASON AT ALL WHY THE COMMISSION SHOULD NOT MAKE A SINGLE DECISION COVERING SEVERAL INFRINGEMENTS, EVEN IF SOME OF THE UNDERTAKINGS TO WHICH IT IS ADDRESSED ARE UNCONNECTED WITH SOME OF THESE INFRINGEMENTS, PROVIDED THAT THE DECISION PERMITS EACH ADDRESSEE TO OBTAIN A CLEAR PICTURE OF THE COMPLAINTS MADE AGAINST IT .

112 AS THE CONTESTED DECISION FULFILLED THIS REQUIREMENT SO FAR AS SU AND CSM IS CONCERNED, THIS SUBMISSION IS UNFOUNDED .

113 B - SU SUBMITS THAT THE COMMISSION HAS INFRINGED PARAGRAPH 2 OF ARTICLE 191 OF THE TREATY AND ALSO REGULATION NO 1 (3) BY SENDING IT NOT ONLY THE DUTCH VERSION OF THE DECISION BUT ALSO THE GERMAN, FRENCH AND ITALIAN VERSIONS AND WITHOUT CALLING ATTENTION TO THE FACT THAT THE DUTCH TEXT ALONE IS AUTHENTIC SO FAR AS SU IS CONCERNED .

114 COMMUNITY INSTITUTIONS ARE UNDER A DUTY TO SEND AN UNDERTAKING TO WHICH A DECISION IS ADDRESSED A COPY OF THAT DECISION IN THE LANGUAGE OF THE MEMBER STATE TO WHICH THIS UNDERTAKING BELONGS .

115 AS THIS REQUIREMENT WAS FULFILLED IN THIS CASE, THE FACT THAT THE COMMISSION ALSO SENT THE APPLICANTS COPIES OF THE DECISION IN OTHER LANGUAGES IS NOT SUCH AS TO CALL INTO QUESTION ITS VALIDITY .

116 THEREFORE THIS SUBMISSION CANNOT BE UPHELD .

2 . INFRINGEMENT OF ARTICLE 190 OF THE TREATY

117 SU AND CSM SUBMIT THAT SOME OF THE ASSERTIONS IN THE STATEMENT OF THE REASONS UPON WHICH THE DECISION IS BASED ARE TOO VAGUE TO FULFIL THE REQUIREMENTS OF ARTICLE 190 OF THE TREATY .

118 EVEN IF IT IS ASSUMED THAT THE PASSAGES TO WHICH SU AND CSM HAVE DRAWN ATTENTION WERE NOT DRAWN UP WITH THE ACCURACY TO BE DESIRED, THIS FACT HAS NEITHER PREVENTED THE APPLICANTS NOR THE COURT FROM GRASPING THE NATURE AND EXTENT OF THE COMPLAINT MADE BY THE COMMISSION AND FROM DETERMINING WHETHER IT IS WELL-FOUNDED OR UNFOUNDED, SO THAT THERE CAN BE NO QUESTION OF AN INFRINGEMENT OF ANY ESSENTIAL PROCEDURAL REQUIREMENT WITHIN THE MEANING OF ARTICLE 173 OF THE TREATY .

119 TO THE EXTENT TO WHICH THIS SUBMISSION AIMS AT DISPUTING THE FACTS ALLEGED BY THE COMMISSION OR THEIR EVALUATION BY THE LATTER IT BELONGS TO THE SUBSTANCE OF THE CASE .

120 THEREFORE IT CANNOT BE UPHELD .

3 . LACK OF CLARITY IN THE OPERATIVE PART OF THE DECISION

121 SU, CSM AND RT SUBMIT RESPECTIVELY THAT THE COMMISSION HAS INFRINGED AN ESSENTIAL PROCEDURAL REQUIREMENT, THE PRINCIPLE OF LEGAL CERTAINTY OR REGULATION NO 17 (3) IN THAT, EITHER SUBPARAGRAPH 2 OF ARTICLE 1 (1) OF THE DECISION DOES NOT ACCURATELY DESCRIBE THE COURSES OF CONDUCT WHICH CONSTITUTE THE INFRINGEMENT AND WHICH THE APPLICANTS ARE CALLED UPON TO PUT AN END TO UNDER ARTICLE 2 OF THE DECISION, OR THAT IT IS IMPOSSIBLE TO ASCERTAIN FROM THIS LATTER PROVISION, EVEN IF IT IS CONSIDERED IN THE

LIGHT OF THE STATEMENT OF REASONS UPON WHICH THE DECISION IS BASED, WHETHER SALES FROM PRODUCER TO PRODUCER, OWING TO THE FACT THAT THEY HAVE BEEN TREATED AS BEING UNLAWFUL PER SE, MUST BE DISCONTINUED .

122 IN ORDER TO EVALUATE THIS SUBMISSION IT IS ADVISABLE TO REFER NOT ONLY TO THE OPERATIVE PART OF THE DECISION WHICH IS OF NECESSITY CONCISE BUT ALSO TO THE STATEMENT OF THE REASONS UPON WHICH THE DECISION IS BASED .

123 IF THE OPERATIVE PART OF THE DECISION, WHICH IS CRITICIZED, IS CONSIDERED IN THE LIGHT OF THE STATEMENT OF REASONS, IT SHOWS WITH SUFFICIENT CLARITY CONDUCT FOR WHICH THE APPLICANTS ARE BLAMED AND WHICH THEY MUST PUT AN END TO PURSUANT TO ARTICLE 2 OF THE DECISION .

124 SO FAR IN PARTICULAR AS THE DELIVERIES FROM PRODUCER TO PRODUCER ARE CONCERNED, IT HAS ALREADY BEEN STATED THAT THEY WERE NOT REGARDED AS BEING PROHIBITED AS SUCH, BUT THAT THE COMMISSION INFERRED THEIR ILLEGALITY FROM THE FACT THAT THEY ARE CONSTITUENT PARTS OF CONCERTED PRACTICES .

125 THIS SUBMISSION MUST BE REJECTED .

SECTION 3 : SUBMISSIONS ON THE SUBSTANCE OF THE CASE

I - INFRINGEMENT OF ARTICLE 85 OF THE TREATY

126 THE ESSENCE OF THE SUBMISSIONS PUT FORWARD BY SU, CSM, RT AND PFEIFER UND LANGEN IS THAT, IN THE ABSENCE OF ANY CONCERTED ACTION, THE COURSES OF CONDUCT FOR WHICH THE APPLICANTS ARE BLAMED DO NOT AMOUNT TO CONCERTED PRACTICES, SO THAT BY APPLYING ARTICLE 85 OF THE TREATY TO THESE COURSES OF CONDUCT THE COMMISSION WAS IN BREACH OF THIS PROVISION .

1 . SUMMARY OF THE RELEVANT STATEMENT IN THE DECISION

127 THE PRACTICES, FOR WHICH THE APPLICANTS OR SOME OF THEM ARE BLAMED, CAN BE SUBDIVIDED INTO THREE GROUPS OF ACTIONS OR OMISSIONS .

128 THE FIRST COMPLAINT MADE AGAINST THEM IS THAT THEY CHANNELLED VERY NEARLY ALL EXPORTS IN THE NETHERLANDS TO SPECIFIC CONSIGNEES OR DESTINATIONS, NAMELY NETHERLANDS PRODUCERS, CERTAIN INDUSTRIES, WHICH THESE PRODUCERS HAD PERMITTED THEM TO SUPPLY, AND FOR DENATURING OR EXPORT AT A LATER DATE TO THIRD COUNTRIES .

129 FURTHER THEY ARE BLAMED FOR HAVING REFUSED TO SUPPLY OPERATORS WISHING TO IMPORT SUGAR INTO A NEIGHBOURING MEMBER STATE .

130 FINALLY THE COMMISSION MADE THE COMPLAINT AGAINST RT, ON THE ONE HAND, AND SU AND CSM ON THE OTHER HAND, THAT THEY RESPECTIVELY COMPELLED BELGIAN AND NETHERLANDS DEALERS TO ADOPT THEIR POLICY .

2 . EXAMINATION OF THE SUBMISSION

A - THE RELATIONS BETWEEN RT, ON THE ONE HAND, AND SU AND CSM, ON THE OTHER HAND

(A) THE EVIDENCE

(AA) THE EVIDENCE RELATING TO THE ACTUAL CONDUCT OF THE APPLICANTS

1 . CHANNELLING OF BELGIAN EXPORTS TO SPECIFIC CONSIGNEES OR DESTINATIONS

131 IT IS CLEAR FROM SEVERAL DOCUMENTS ON THE COURT'S FILE THAT RT AND OTHER BELGIAN PRODUCERS WHICH IT CONTROLS (RAFFINERIE NOTRE-DAME AT OREYE; SUCRERIES DES FLANDRES AT MOERBEKE-WAAS), IN GENERAL AND IN CONNEXION WITH SPECIFIC DELIVERIES TO NETHERLANDS CUSTOMERS OTHER THAN SU OR CSM SYSTEMATICALLY LAID DOWN THAT EXPORT AND HOTTLET SHOULD ONLY DELIVER THE AMOUNTS IN QUESTION TO CERTAIN GROUPS OF CONSIGNEES OR CERTAIN DESTINATIONS .

132 THUS RT IN A LETTER TO EXPORT OF 24 JULY 1969 (ANNEX I 43 TO THE STATEMENTS OF DEFENCE), AFTER HAVING REMINDED THIS FIRM THAT IT 'INFORMED IT EARLIER OF OUR POLICY TOWARDS OUR FOREIGN COLLEAGUES' FORBIDS THEM TO EXPORT TO THE NETHERLANDS, FOR THE CONSUMER MARKET, THE AMOUNTS OF SUGAR ORIGINALLY SOLD FOR DENATURING BUT WHICH CAN NO LONGER BE USED FOR THIS PURPOSE BECAUSE OF THE ABOLITION OF THE DENATURING PREMIUM .

133 THE MINUTES DATED 23 APRIL 1970 OF A MEETING BETWEEN THIS COMPANY AND RT ON 20 APRIL 1970 (ANNEX I 74 OF THE STATEMENTS OF DEFENCE) WHICH EXPORT DREW UP, STATE THAT 'MR ROLIN OF RT TOOK EXCEPTION TO EXPORT'S OPERATIONS DURING THE 1969/70 MARKETING YEAR IN THE NETHERLANDS AND TO THE PURCHASES FROM INDEPENDENT MANUFACTURERS NOT LONG BEFORE THE COMMENCEMENT OF THE SUGAR MARKETING YEAR '. THIS PASSAGE CAN ONLY BE UNDERSTOOD IN THE CONTEXT OF THE OTHER DOCUMENTS ON THE COURT'S FILE AS MEANING THAT RT BLAMED EXPORT FOR HAVING SUPPLIED, POSSIBLY WITH THE HELP OF BELGIAN MANUFACTURERS INDEPENDENT OF RT, NETHERLANDS CUSTOMERS OTHER THAN THOSE TO WHICH RT INTENDED TO RESTRICT ITS EXPORTS .

134 RT IN A TELEX MESSAGE TO EXPORT OF 20 AUGUST 1970 (ANNEX I 82 TO THE STATEMENTS OF DEFENCE), AFTER HAVING TAKEN NOTE THAT EXPORT HAD ACCORDED ITS AGREEMENT WITH THE POLICY TO BE ADOPTED ON THE NETHERLANDS MARKET, INFORMS THIS FIRM THAT 'WE ARE THEREFORE

MAKING SUGAR AVAILABLE TO YOU FOR THE NETHERLANDS CONDENSED MILK INDUSTRY ...'.

135 EXPORT IN A TELEX MESSAGE OF 20 AUGUST 1970 (ANNEX I 83 TO THE STATEMENTS OF DEFENCE) STATES THAT IT AGREES TO COMPLY WITH THE 'CARTEL' CONCLUDED BETWEEN RT AND THE NETHERLANDS PRODUCERS AND MAKES IT CLEAR THAT UNDER THE TERMS OF THIS CARTEL IT MUST NOT SUPPLY IN THE NETHERLANDS SUGAR 'FOR HUMAN CONSUMPTION' OR 'THE SWEET MANUFACTURING INDUSTRY', WHEREAS IT REMAINS FREE TO DO BUSINESS WITH THE MILK PROCESSING AND CHEMICAL INDUSTRY AS WELL AS THE 'DENATURING TRADE '.

136 THE MILK PRODUCTS INDUSTRY IS MENTIONED, SOMETIMES TOGETHER WITH SU, AS THE ONLY NETHERLANDS CUSTOMER TO BE TAKEN INTO ACCOUNT IN A SERIES OF OTHER DOCUMENTS, NAMELY A TELEX MESSAGE FROM RT TO EXPORT OF 20 AUGUST 1970, A CONFIRMATION OF SALE BY EXPORT TO JACOBSON OF 1 OCTOBER 1970, A TELEX MESSAGE FROM EXPORT TO JACOBSON OF THE SAME DATE, TWO LETTERS FROM OREYE TO EXPORT OF 2 AND 7 OCTOBER 1970, A CONTRACT FOR SALE OF HOTTLET OF 16 DECEMBER 1970, NINE PURCHASE CONTRACTS OR CONTRACTS FOR SALE ENTERED INTO BY EXPORT OR HOTTLET WITH RT, OTHER BELGIAN MANUFACTURERS OR JACOBSON BETWEEN 16 DECEMBER 1970 AND 7 JANUARY 1972, A TELEX MESSAGE FROM EXPORT TO RT OF 17 SEPTEMBER 1970, A LETTER FROM EXPORT TO OREYE OF 5 OCTOBER 1970, A TELEX MESSAGE FROM EXPORT TO RT OF 21 SEPTEMBER 1970 (ANNEXES I 84, 88, 89, 91 TO 97, 100 TO 104, 112 TO 114 TO THE STATEMENTS OF DEFENCE).

137 A CONFIRMATION OF PURCHASE FROM EXPORT TO RT OF 5 OCTOBER 1970 (ANNEX I 128 TO THE STATEMENTS OF DEFENCE) READS : 'DESTINATION : HOLLAND, IN PRINCIPLE ONLY THE MILK PROCESSING INDUSTRY, SUGAR INTENDED FOR THE ULTIMATE TAKERS-PURCHASERS-CONSUMERS WHICH THE NETHERLANDS SUGAR INDUSTRY PERMITS TO BE SUPPLIED ...'.

2 . REFUSAL TO SUPPLY

138 SOME OF THE DOCUMENTS CONFIRM THIS DESCRIPTION OF RT'S RESTRICTIVE POLICY BECAUSE THEY SHOW THAT THEY SOMETIMES REFUSED TO ACCEPT OFFERS TO PURCHASE FROM NETHERLANDS OPERATORS OTHER THAN SUGAR PRODUCERS AND THE MILK PRODUCTS AND CHEMICAL INDUSTRIES .

139 THUS EITHER RT OR EXPORT OR THE SUGAR MARKETING ORGANIZATION (LE COMPTOIR SUCRIER) OF ANTWERP, BY LETTERS OF 14, 23 AUGUST, 2 AND 3 SEPTEMBER 1968 (ANNEXES I 44 TO 47 TO THE STATEMENTS OF DEFENCE), ACTING IN ACCORDANCE WITH INSTRUCTIONS FROM RT OR OTHER BELGIAN PRODUCERS CONTROLLED BY RT REFUSED OFFERS TO PURCHASE FROM SUCH OPERATORS, ON THE GROUND THAT THE AMOUNTS AVAILABLE LEFT NO SCOPE FOR EXPORT .

140 EXPORT CONFIRMS IN AN INTERNAL MEMORANDUM OF 23 APRIL 1970 (ANNEX I 75 TO THE STATEMENTS OF DEFENCE) THAT 'THE REFINERS' POLICY MAKES IT IMPOSSIBLE' TO TAKE ADVANTAGE OF THE OPPORTUNITIES TO EXPORT 'ON THE FRONTIER REGIONS OF BENELUX' IN SPITE OF THE FACT THAT THERE IS A LARGE DEMAND IN THE NETHERLANDS .

3 . THE OBLIGATION IMPOSED BY RT ON BELGIAN DEALERS AND BY SU AND CSM ON NETHERLANDS DEALERS TO ADOPT THE POLICY DESCRIBED ABOVE

141 SO FAR AS THE RELATIONS BETWEEN RT AND THE BELGIAN DEALERS ARE CONCERNED MOST OF THE DOCUMENTS QUOTED SHOW THAT RT INSISTED THAT THESE DEALERS, AND IN PARTICULAR EXPORT, ONLY SUPPLY SUGAR WITHIN THE NETHERLANDS TO NETHERLANDS PRODUCERS, THE MILK PROCESSING INDUSTRY, THE CHEMICAL INDUSTRY OR FOR THE PURPOSE OF DENATURING .

142 EXPORT IN A TELEX MESSAGE TO RT OF 19 AUGUST 1970 (ANNEX I 81 TO THE STATEMENTS OF DEFENCE) SAYS 'HOLLAND : ON BASIS OF THE NETHERLANDS' IMPORT REQUIREMENTS OF EEC SUGAR, WE AGREE PRINCIPLE

MENTIONED AT LUNCH THE DAY BEFORE YESTERDAY TO CARRY ON BUSINESS IN ACCORDANCE WITH YOUR PLAN, THAT IS TO SAY DELIVERIES BETWEEN SUGAR PRODUCERS THROUGH TRADITIONAL BELGO-NETHERLANDS TRADING ORGANIZATIONS, ON TERMS SATISFACTORY FOR EXPORT . TO GIVE EFFECT TO YOUR PROPOSAL, WE ARE GETTING IN TOUCH WITH NETHERLANDS BUSINESS HOUSES ON THESE QUESTIONS ...'.

143 RT BY A TELEX MESSAGE OF THE SAME DATE IN ANSWER TO THE BEFOREMENTIONED TELEX MESSAGE (ANNEX 82 TO THE STATEMENTS OF DEFENCE), AFTER HAVING STATED THAT IT WAS 'VERY PLEASED INDEED' WITH EXPORT'S STATEMENT THAT IT WAS IN AGREEMENT, GOES ON TO SAY THAT 'WE ARE THEREFORE MAKING SUGAR AVAILABLE TO YOU FOR THE NETHERLANDS CONDENSED MILK INDUSTRY TO BE HANDLED THROUGH THE LONG ESTABLISHED TRADE ... ON THE OTHER HAND IF THE NETHERLANDS SUGAR INDUSTRY WERE TO ASK US TO SUPPLY ITS OWN REQUIREMENTS, ANY EXPORTS OF BELGIAN SUGAR WOULD LIKewise BE HANDLED WITH THE HELP OF OUR BUSINESS HOUSES . IT FOLLOWS FROM THE BEFOREMENTIONED ARRANGEMENTS THAT YOU WILL REFRAIN FROM MAKING ANY OTHER INITIATIVES ON THE NETHERLANDS MARKET SO THAT THE PATTERN OF THIS MARKET IS NOT DISTURBED '.

144 EXPORT REPLIED BY A TELEX MESSAGE OF 20 AUGUST 1970 (ANNEX I 83 TO THE STATEMENTS OF DEFENCE) GIVING PARTICULARS OF THE TERMS OF THE ARRANGEMENTS MADE AS FOLLOWS : 'EXPORT CONFIRMS THAT IT AGREES TO FOLLOW RT ... IN WORKING OUT AN AGREEMENT WITH SU AND CSM ... FOR THE 1970/71 SUGAR MARKETING YEAR UPON THE FOLLOWING LINES :

1 . EXPORT GIVES UP DEALING IN BELGIAN SUGAR WITH NETHERLANDS PURCHASER-CONSUMERS IN CONNEXION WITH WHAT WE CALL THE PARTICULAR REQUIREMENTS IN THE NETHERLANDS, THAT IS TO SAY, ON THE ONE HAND, FOR SUGAR IN ITS ORIGINAL STATE FOR HUMAN CONSUMPTION AND, ON THE OTHER HAND, FOR SUGAR FOR THE FACTORIES MANUFACTURING SWEETS TO BE CONSUMED IN THE NETHERLANDS ... THIS SWEET MANUFACTURING INDUSTRY DOES NOT INCLUDE THE MILK PROCESSING

INDUSTRY . THE DENATURING TRADE AND THE CHEMICAL INDUSTRY ARE ALSO EXCLUDED FROM THE TRADE WHICH EXPORT HAS GIVEN UP .

2 . GIVING UP THIS TRADE BY EXPORT IS LINKED ... SO FAR AS

2 . GIVING UP THIS TRADE BY EXPORT IS LINKED ... SO FAR AS THE NETHERLANDS IMPORT REQUIREMENTS OF EEC SUGAR ARE CONCERNED ... WITH THE CONDITION THAT THE DELIVERIES TO BE CARRIED OUT BETWEEN BELGIAN AND NETHERLANDS SUGAR MANUFACTURERS IN ORDER TO SUPPLY THIS NETHERLANDS MARKET SHALL BE EFFECTED THROUGH THE LONG ESTABLISHED BELGIAN AND NETHERLANDS TRADE ...'.

145 WITH REGARD TO THE RELATIONS BETWEEN SU AND CSM, ON THE ONE HAND, AND THE NETHERLANDS DEALERS, ON THE OTHER HAND, A NOTE OF 3 SEPTEMBER 1970 SENT BY MR KRONACKER OF EXPORT TO MR ROLIN OF RT (ANNEX I 86 TO THE STATEMENTS OF DEFENCE) REFERS TO A STATEMENT OF MR ROLIN THAT 'THE THREE TRADITIONAL NETHERLANDS IMPORTERS GAVE AN UNDERTAKING TO SU AND CENTRALE (CSM) NOT TO IMPORT SUGAR FOR CONSUMPTION IN THE NETHERLANDS EXCEPT WITH THEIR CONSENT' AND, ON THE OTHER HAND, THAT 'HE (MR ROLIN) WAS GIVEN AN UNDERTAKING BY CSM AND SU THAT, IF THERE IS ANY DEMAND FOR SUGAR FOR CONSUMPTION, THESE FIRMS WILL APPROACH RT IN ORDER TO ENSURE THAT THIS DEMAND IS MET AND RT UNDERTAKES TO DO BUSINESS THROUGH US', THAT IS TO SAY THROUGH EXPORT .

GROUNDNS CONTINUED UNDER DOC.NUM : 673J0040.1

146 A TELEX MESSAGE OF 24 SEPTEMBER 1970 FROM JACOBSON TO EXPORT (ANNEX I 87 TO THE STATEMENTS OF DEFENCE) STATES THAT 'THE SUGAR OF WHICH WE HAVE TO TAKE DELIVERY IS INTENDED FOR PURCHASERS WHICH THE NETHERLANDS INDUSTRY WILL READILY AGREE CAN BE SUPPLIED '.

147 A TELEX MESSAGE FROM EXPORT TO JACOBSON OF 1 OCTOBER 1970, WHICH CONFIRMS A SALE (ANNEX I 89 OF THE STATEMENTS OF DEFENCE)

STATES UNDER THE HEADING 'SPECIAL CLAUSES', THAT 'THE EXCLUSIVE RIGHT GRANTED BY RT' - THAT IS TO SAY THE EXCLUSIVE RIGHT TO SELL ITS GRANULATED SUGAR WHICH IT GRANTED EXPORT AND HOTTLET FOR THE 1970/71 MARKETING YEAR - 'DERIVES FROM AN UNDERTAKING GIVEN BY THE THREE OLD ESTABLISHED NETHERLANDS BUSINESS HOUSES THAT BELGIAN GRANULATED SUGAR COMPRISED IN THIS AND LATER CONTRACTS IN THE 1970/71 MARKETING YEAR WILL ONLY BE DELIVERED TO THE ULTIMATE TAKERS-PURCHASERS-CONSUMERS WHICH THE NETHERLANDS SUGAR INDUSTRY (CSM - SU) AGREES CAN BE SUPPLIED '.

(BB) THE EVIDENCE RELATING TO THE QUESTION WHETHER THE CONDUCT REFERRED TO ABOVE WAS CONCERTED

148 SOME OF THE DOCUMENTS QUOTED ABOVE MENTION THE EXISTENCE OF A CONCERTED ACTION, NAMELY THE TELEX MESSAGE FROM EXPORT TO RT OF 20 AUGUST 1970, THE NOTE FROM EXPORT TO RT OF 3 SEPTEMBER 1970, THE TELEX MESSAGE FROM JACOBSON TO EXPORT OF 24 SEPTEMBER 1970, THE TELEX MESSAGE FROM EXPORT TO JACOBSON OF 1 OCTOBER 1970 AND THE CONFIRMATION OF PURCHASE SENT BY EXPORT TO RT ON 5 OCTOBER 1970 .

149 A REPORT OF A DISCUSSION BETWEEN REPRESENTATIVES OF RT AND EXPORT ON 20 APRIL DRAWN UP BY EXPORT (ANNEX I 74 TO THE STATEMENTS OF DEFENCE) MENTIONS 'OBLIGATIONS UNDERTAKEN BY RT WITHIN THE FRAMEWORK ... OF THE CONCERTED ACTION BETWEEN EUROPEAN REFINERS' BY VIRTUE OF WHICH 'A SERIES OF DIRECT TRANSACTIONS BETWEEN REFINERS TO THE PRODUCER' - THE LAST TWO WORDS SHOULD PROBABLY READ 'OR PRODUCERS' - 'CEASE TO FORM PART OF THE BUSINESS RELATIONS BETWEEN RT AND EXPORT' IN ... THE NETHERLANDS (ON THE ONE HAND THE MANUFACTURE OF CSM TYPE LUMP SUGAR WITH IF NECESSARY EXCHANGE OF THE RAW MATERIAL OR A CERTIFICATE OF EXCHANGE, ON THE OTHER HAND, 'SUPPLYING GRANULATED SUGAR FOR INDUSTRIALISTS TO CUSTOMERS OF CSM/SU, AT THE REQUEST OF AND THROUGH THE LATTER)'.

150 IN A REPORT BY EXPORT DATED 6 MAY 1970 OF THE DISCUSSIONS BETWEEN REPRESENTATIVES OF THE SAME FIRMS ON 30 APRIL 1970 (ANNEX I 76 TO THE STATEMENTS OF DEFENCE) THERE IS THE SENTENCE 'THE BASIC PRINCIPLE ABOUT WHICH MR MAISIN' OF RT 'IS ADAMANT IS THE FOLLOWING ONE : EXPORT MUST ADOPT RT'S POLICY TOWARDS ITS EUROPEAN PARTNERS . HE DEFINES THIS POLICY AS FOLLOWS : NO MOVEMENT OF GOODS FROM COUNTRY TO COUNTRY SAVE BY AGREEMENT BETWEEN PRODUCER AND PRODUCER '.

151 A TELEX MESSAGE FROM RT TO EXPORT OF 20 AUGUST 1970 (ANNEX I 84 TO THE STATEMENTS OF DEFENCE) STATES THAT : 'IN THE CASE OF THE NETHERLANDS IMPORT REQUIREMENTS OF SUGAR FOR CONSUMPTION IN THE NETHERLANDS, YOU CEASE TO DEAL WITH ANY TRANSACTIONS OTHER THAN THE REQUESTS MADE BY THE NETHERLANDS SUGAR INDUSTRY WHICH INTENDS TO KEEP CONTROL OF THIS MARKET . THE NETHERLANDS SUGAR INDUSTRY, AS YOU MOREOVER HAVE CONFIRMED TO US, TOLD US THAT AT PRESENT THE SITUATION IN THE NETHERLANDS DOES NOT JUSTIFY IMPORT OPERATIONS . SINCE WE DO NOT INTEND TO DO ANYTHING AT ALL IN CONNEXION WITH CONSUMPTION IN THE NETHERLANDS WHICH IS NOT APPROVED BY OUR NETHERLANDS COLLEAGUES, THERE IS NO NEED TO EXAMINE AT THE MOMENT TRANSACTIONS IN BELGIAN SUGAR FOR THESE OUTLETS ... SUPPLYING THE MILK PRODUCTS INDUSTRY IS ANOTHER MATTER ...'

152 RT POINTS OUT TO EXPORT IN A LETTER OF 31 AUGUST 1970 (ANNEX I 85 TO THE STATEMENTS OF DEFENCE) THAT 'SO FAR AS THE NETHERLANDS ARE CONCERNED WE DO NOT WANT TO DO ANYTHING WHICH MIGHT UPSET SU OR CSM, JUST AS THEY DO NOT WANT TO DO ANYTHING WHICH WOULD DISTURB US '.

153 EXPORT IN A LETTER OF 10 OCTOBER 1970 TO JACOBSON CONFIRMING A SALE (ANNEX I 88 TO THE STATEMENTS OF DEFENCE) - AFTER HAVING POINTED OUT THAT RT GRANTED THIS FIRM AND HOTTLET FOR THE 1970/71 MARKETING YEAR THE EXCLUSIVE RIGHT TO SELL ITS GRANULATED SUGAR

FOR EXPORT AND AFTER EMPHASIZING THAT RT DID NOT INTEND TO DO ANYTHING ON THE NETHERLANDS MARKET 'WHICH HAS NOT BEEN APPROVED BY ITS TWO NETHERLANDS COLLEAGUES' - STATES THAT THESE EXCLUSIVE RIGHTS 'DERIVE FROM AN UNDERTAKING GIVEN BY THREE OLD ESTABLISHED NETHERLANDS BUSINESS HOUSES THAT THE BELGIAN GRANULATED SUGAR COMPRISED IN THIS AND THE LATER CONTRACTS IN THE 1970/71 MARKETING YEAR ARE INTENDED TO BE DELIVERED TO THE ULTIMATE TAKERS-PURCHASERS-CONSUMERS WHICH THE NETHERLANDS SUGAR INDUSTRY (CSM - SU) AGREES CAN BE SUPPLIED '.

154 EXPORT IN A TELEX MESSAGE TO A GERMAN DEALER OF 14 SEPTEMBER 1970 - WHICH REFERS TO A TELEX MESSAGE OF 11 SEPTEMBER IN WHICH THE SAID DEALER REFERRED TO 'DIFFERENT CUSTOMERS IN THE NETHERLANDS ... WHICH URGENTLY NEED OFFERS' (CF . ANNEXES I 107, 108 TO THE STATEMENTS OF DEFENCE) - MENTIONS INTER ALIA THAT 'REGARDING THE NETHERLANDS MARKET FOR WHICH YOU ASKED US ALSO OFFERS AND WROTE TO US FOR RATHER IMMEDIATE SELLING POSSIBILITIES OF AROUND 15 000 TONS OF BELGIAN CRYSTAL SUGAR ON THE 1970/71 CROP, WE CONFIRM YOU POSITIVELY THAT OUR MAIN BELGIAN SUGAR MANUFACTURERS, THE RT GROUP, WORKING THEMSELVES IN CLOSE CONTACT (THROUGH TRADE INTERMEDIARIES) WITH THE NETHERLANDS INDUSTRY GROUPS CSM AND SU, FOR THE NETHERLANDS CONSUMPTION HOME MARKET, ARE NOT PRESENTLY SELLERS FOR SUCH DESTINATION, OUTSIDE THEIR TRADITIONAL REFINERS CHANNEL, AND ANYWAY WAITING FOR NETHERLANDS SUGAR MANUFACTURERS EVENTUAL DEMANDS '.

155 FURTHER THE EXISTENCE OF A CONCERTED ACTION BETWEEN RT AND THE NETHERLANDS PRODUCERS IS ALSO SUPPORTED DIRECTLY AND INDIRECTLY BY CERTAIN OTHER DOCUMENTS (LETTER FROM THE SUGAR MARKETING ORGANIZATION OF ANTWERP (COMPTOIR SUCRIER D'ANVERS)) TO A NETHERLANDS CUSTOMER OF 3 SEPTEMBER 1968; INTERNAL MEMORANDUM OF EXPORT OF 23 APRIL 1970; TELEX MESSAGE FROM EXPORT TO RT OF 20 AUGUST 1970; TELEX MESSAGE FROM EXPORT TO RT OF 20 AUGUST 1970; MEMORANDUM FROM EXPORT TO RT OF 3 SEPTEMBER 1970; TELEX MESSAGE

FROM JACOBSON TO EXPORT OF 24 AND 30 SEPTEMBER 1970; TELEX MESSAGE FROM EXPORT TO RT OF 14 AND 17 SEPTEMBER 1970; TELEX MESSAGE FROM EXPORT TO JACOBSON OF 1 OCTOBER 1970; CONFIRMATION OF A PURCHASE BY EXPORT TO NAVEAU OF 31 JULY 1970 : ANNEXES I 47, 75, 83, 86, 87, 89, 90, 108, 112, 128, 129 TO THE STATEMENTS OF DEFENCE).

(B) EVALUATION OF THIS EVIDENCE

(AA) ITS EVIDENTIAL VALUE

156 RT SUBMITS THAT, ALTHOUGH THE BEFOREMENTIONED DOCUMENTS OF EXPORT CORRECTLY REPRODUCE THE STATEMENTS MADE BY RT TO THIS FIRM AND THE DOCUMENTS RELIED ON BY THE COMMISSION ARE 'DAMNING', THEY MUST NOT HOWEVER BE TAKEN 'LITERALLY '.

157 AS IN FACT EXPORT HAD UNSUCCESSFULLY TRIED TO OBTAIN FROM RT THE EXCLUSIVE RIGHT TO SELL RT'S SUGAR AND FEARED, WRONGLY, THAT IT WOULD BE GRADUALLY ELIMINATED FROM RT'S OPERATIONS, THE LATTER, IN ORDER TO REDUCE THE TENSION BETWEEN THESE TWO COMPANIES, 'DID NOT WANT TO EXPLAIN FRANKLY TO EXPORT THAT IT WAS IN ITS OWN INTERESTS TO ELIMINATE AGENTS IN CERTAIN TRANSACTIONS' SO THAT IT 'SEEMED COMMERCIALY SPEAKING TO BE MORE ADVISABLE TO TAKE REFUGE BEHIND ITS FOREIGN COLLEAGUES '.

158 IF THE STATEMENTS IN QUESTION CORRESPONDED TO THE FACTS 'IT WOULD BE VERY NAIVE TO SUGGEST THAT AN UNDERTAKING LIKE (RT) CANNOT BE REASONABLY ASSUMED TO HAVE RECORDED THEM IN WRITING '.

159 SU AND CSM TOGETHER SUBMIT THAT CORRESPONDENCE BETWEEN THIRD PARTIES, NAMELY RT AND EXPORT, CANNOT BE USED AGAINST THEM AND IN PARTICULAR BECAUSE RT'S STATEMENTS AS TO THE NEED NOT TO UPSET NETHERLANDS PRODUCERS ARE BASED ON MERE SPECULATION BY RT AND BECAUSE EXPORT, OWING TO THE STRAINED RELATIONS BETWEEN ITSELF AND RT WHICH WERE A MATTER OF COMMON KNOWLEDGE, HAD OBVIOUSLY

APPLIED ITSELF TO THE TASK OF PREPARING A CASE DETRIMENTAL TO THE LATTER .

160 ALTHOUGH THE DOCUMENTS IN QUESTION AS WELL AS THE OTHER DOCUMENTS PRODUCED FOR THE COURT'S FILE BY THE COMMISSION SHOW THAT RT AND EXPORT DISAGREED ON THE EXTENT OF THE AREA IN WHICH THE LATTER WAS TO BE ALLOWED TO OPERATE AND ON HOW MUCH FREEDOM OF ACTION IT SHOULD BE PERMITTED TO ENJOY, IT IS DIFFICULT TO ACCEPT THAT RT SIMPLY INVENTED WHAT IT SAID OR WROTE CONCERNING ITS RELATIONS WITH SU AND CSM .

161 SO FAR AS WHAT RT CALLS THE 'NAIVETY' OF ANY WRITTEN ADMISSION OF HAVING ENGAGED IN A CONCERTED ACTION AND ENDEAVOURED TO IMPLEMENT IT, ATTENTION MUST BE DRAWN TO THE FACT THAT IT WOULD BE EVEN MORE UNUSUAL FOR A VERY LARGE PRODUCER TO SIMULATE IN LETTERS AND DOCUMENTS CONDUCT LIKELY TO LAY IT OPEN TO SANCTIONS, MERELY IN ORDER TO REASSURE A DEALER WHO ECONOMICALLY ALMOST WHOLLY DEPENDS UPON IT .

162 FURTHER THE SUMMARY ASSERTION THAT THE STATEMENTS IN ISSUE MUST NOT BE TAKEN 'LITERALLY' LEAVES WIDE OPEN THE QUESTION TO WHAT EXTENT RT INTENDS TO ADMIT OR DENY THE TRUTH OF THESE STATEMENTS, AND CONSEQUENTLY, DOES NOT EVEN AMOUNT TO A SERIOUS ATTEMPT TO REJECT THIS EVIDENCE ADDUCED BY THE COMMISSION .

163 FURTHER IT IS USELESS TO DENY THE EVIDENTIAL VALUE OF THE DOCUMENTS IN QUESTION ON THE GROUND THAT EXPORT RECORDED OR KEPT THEM FOR THE SOLE PURPOSE OF RENDERING RT LIABLE TO BE PROCEEDED AGAINST BY THE COMMISSION .

164 CONTRARY TO THE VIEW OF SU AND CSM THERE IS NO REASON WHY THE COMMISSION AND THE COURT SHOULD NOT ACCEPT AS EVIDENCE OF AN UNDERTAKING'S CONDUCT CORRESPONDENCE EXCHANGED BETWEEN THIRD

PARTIES, PROVIDED THAT THE CONTENT THEREOF IS CREDIBLE TO THE EXTENT TO WHICH IT REFERS TO THE SAID CONDUCT .

165 IN PARTICULAR THE STATEMENTS IN THE DOCUMENTS IN DISPUTE TALLY WITH THE ACTUAL WAY THE PARTIES CONCERNED HAVE BEHAVED ON THIS MARKET .

166 HAVING REGARD TO ALL THESE CIRCUMSTANCES IT MUST BE HELD THAT THESE DOCUMENTS FORM A BODY OF CONSISTENT EVIDENCE AND THAT THEIR CONTENTS CORRESPOND, AT LEAST FOR THE MOST PART, TO THE FACTS .

(BB) THE EXISTENCE OF THE ALLEGED CONCERTED PRACTICES

167 1 . ALL THESE FINDINGS SHOW THAT THE APPLICANTS IN FACT BEHAVED IN THE WAY ALLEGED BY THE COMMISSION .

168 IT CAN THEREFORE BE TAKEN FOR GRANTED THAT ALMOST ALL THE EXPORTS IN THE NETHERLANDS OF RT AND THE PRODUCERS WHICH IT CONTROLS WERE CHANNELLED TO NETHERLANDS SUGAR PRODUCERS, THE MILK PRODUCTS OR CHEMICAL INDUSTRIES OR FOR DENATURING, THAT RT HARDLY EVER SUPPLIED THE LONG ESTABLISHED CUSTOMERS OF THE NETHERLANDS PRODUCERS AND THAT IT FORCED BELGIAN DEALER-IMPORTERS TO ADOPT THIS POLICY OF CHANNELLING DELIVERIES TO SPECIFIC CONSIGNEES .

169 LARGE AMOUNTS WERE CHANNELLED IN THIS WAY TO A RESTRICTED NUMBER OF CONSIGNEES OR DESTINATIONS AS IS SHOWN BY THE ACTUAL FIGURES PRODUCED BY RT IN ANNEX 4 TO ITS REPLY .

170 THESE FIGURES, WHICH EVEN THOUGH THEY ARE SOMETIMES HIGHER AND SOMETIMES LOWER THAN THOSE MENTIONED BY THE COMMISSION, ARE NEVERTHELESS OF THE SAME ORDER OF MAGNITUDE, SHOW THAT RT, DURING THE WHOLE OF THE FOUR MARKETING YEARS TO WHICH THE DECISION

REFERS, SUPPLIED SU, CSM AND THE NETHERLANDS MILK PROCESSING INDUSTRY RESPECTIVELY WITH 40 741, 35 099 AND 48 000 METRIC TONS OF REFINED SUGAR, IN THE AGGREGATE WITH 123 840 METRIC TONS, WHICH ARE LARGE FIGURES EVEN IF THE 10 587 METRIC TONS OF GRANULATED SUGAR WHICH CSM CONSIGNED TO RT FOR PROCESSING AND WHICH RT LATER RE-EXPORTED TO THE NETHERLANDS AS REFINED SUGAR ARE DEDUCTED FROM THESE FIGURES .

171 IT EMERGES FROM THE STATISTICS SUBMITTED BY THE COMMISSION (ANNEX I TO THE REJOINER IN CASE 47/73, TABLE VI) THAT THE 'CONTROLLED' DELIVERIES - THAT IS TO SAY THE DELIVERIES FROM PRODUCER TO PRODUCER, TO THE MILK PROCESSING INDUSTRY, FOR DENATURING OR EXPORT AT A LATER DATE TO THIRD COUNTRIES - INCREASED RESPECTIVELY DURING EACH OF THE FOUR MARKETING YEARS IN QUESTION TO 70 PER CENT; 28.4 PER CENT; 79.3 PER CENT AND 70 PER CENT OF THE TOTAL AMOUNT OF BELGIAN EXPORTS TO THE NETHERLANDS; THE COMMISSION STATES THAT THE RELATIVELY LOW FIGURE OF 28.4 PER CENT IS EXPLAINED BY THE FACT THAT IN 1969/70 TWO-THIRDS OF THESE EXPORTS WERE EFFECTED BY BELGIAN PRODUCERS WHO WERE NOT DEPENDENT ON RT .

172 2 . SU AND CSM SUBMIT THAT SINCE THE CONCEPT OF 'CONCERTED PRACTICES' PRESUPPOSES A PLAN AND THE AIM OF REMOVING IN ADVANCE ANY DOUBT AS TO THE FUTURE CONDUCT OF COMPETITORS, THE RECIPROCAL KNOWLEDGE WHICH THE PARTIES CONCERNED COULD HAVE OF THE PARALLEL OR COMPLEMENTARY NATURE OF THEIR RESPECTIVE DECISIONS CANNOT IN ITSELF BE SUFFICIENT TO ESTABLISH A CONCERTED PRACTICE; OTHERWISE EVERY ATTEMPT BY AN UNDERTAKING TO REACT AS INTELLIGENTLY AS POSSIBLE TO THE ACTS OF ITS COMPETITORS WOULD BE AN OFFENCE .

173 THE CRITERIA OF COORDINATION AND COOPERATION LAID DOWN BY THE CASE-LAW OF THE COURT, WHICH IN NO WAY REQUIRE THE WORKING OUT OF AN ACTUAL PLAN, MUST BE UNDERSTOOD IN THE LIGHT OF THE CONCEPT INHERENT IN THE PROVISIONS OF THE TREATY RELATING TO COMPETITION

THAT EACH ECONOMIC OPERATOR MUST DETERMINE INDEPENDENTLY THE POLICY WHICH HE INTENDS TO ADOPT ON THE COMMON MARKET INCLUDING THE CHOICE OF THE PERSONS AND UNDERTAKINGS TO WHICH HE MAKES OFFERS OR SELLS .

174 ALTHOUGH 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 AND ANTICIPATED CONDUCT OF THEIR COMPETITORS, IT DOES HOWEVER STRICTLY PRECLUDE ANY DIRECT OR INDIRECT CONTACT BETWEEN SUCH OPERATORS, THE OBJECT OR EFFECT WHEREOF IS EITHER TO INFLUENCE THE CONDUCT ON THE MARKET OF AN ACTUAL OR POTENTIAL COMPETITOR OR TO DISCLOSE TO SUCH A COMPETITOR THE COURSE OF CONDUCT WHICH THEY THEMSELVES HAVE DECIDED TO ADOPT OR CONTEMPLATE ADOPTING ON THE MARKET .

175 THE DOCUMENTS QUOTED SHOW THAT THE APPLICANTS CONTACTED EACH OTHER AND THAT THEY IN FACT PURSUED THE AIM OF REMOVING IN ADVANCE ANY UNCERTAINTY AS TO THE FUTURE CONDUCT OF THEIR COMPETITORS .

176 THEREFORE THE APPLICANTS' ARGUMENT CANNOT BE UPHELD .

177 SU AND CSM ALSO SUBMIT THAT BECAUSE THEIR CONDUCT ON THE MARKET CORRESPONDED TO THE HABITUAL ATTITUDE ADOPTED BY A PRODUCER IN THEIR SITUATION, IT DOES NOT AMOUNT TO A CONCERTED PRACTICE .

178 RT SUBMITS A SIMILAR ARGUMENT BUT IN MORE SPECIFIC TERMS, NAMELY 'THAT ... AN IMPORTANT ELEMENT IN THE LEGAL CONCEPT OF A "A CONCERTED PRACTICE" IS THE CAUSAL CONNEXION WHICH MUST EXIST BETWEEN THE ALLEGED CONCERTED ACTION AND THE PRACTICES WHICH WERE ADOPTED' AND WHICH IS ABSENT 'IF THESE PRACTICES ARE THE NATURAL CONSEQUENCE OF MARKET CONDITIONS WHICH WOULD HAVE

BEEN THE SAME EVEN IF THERE HAD BEEN NO CONTACTS BETWEEN PRODUCERS '.

179 THE DOCUMENTS PRODUCED ARE SUFFICIENT PROOF THAT SU AND CSM INTENDED TO WARD OFF THE RISK OF COMPETITION FROM RT, TO WHICH THEY COULD BY NO MEANS BE CERTAIN THAT THEY WOULD NOT BE EXPOSED, IF THERE WAS NO CONCERTED ACTION, HAVING REGARD TO THE CONSIDERABLE OVER-PRODUCTION OF BELGIAN SUGAR, THE SHORT-FALL OF NETHERLANDS PRODUCTION, THE FACT THAT BELGIAN PRICES WERE BELOW NETHERLANDS PRICES, THAT BELGIAN DEALERS WANTED TO EXPORT LARGE AMOUNTS FREELY AND ALSO BEARING IN MIND THE OPPORTUNITY WHICH ALL THESE FACTORS OFFERED RT OF AT LEAST SUPPLYING THE FRONTIER REGIONS OF THE NETHERLANDS .

180 THEREFORE THE CONCERTED ACTION IN QUESTION AND THE PRACTICES WHEREBY IT WAS IMPLEMENTED WERE LIKELY TO REMOVE ANY DOUBTS THE NETHERLANDS PRODUCERS HAD AS TO THEIR CHANCES OF MAINTAINING - TO THE DETRIMENT OF THE EFFECTIVE FREEDOM OF MOVEMENT OF THE PRODUCTS IN THE COMMON MARKET AND OF THE FREEDOM ENJOYED BY CONSUMERS TO CHOOSE THEIR SUPPLIERS - THE POSITION WHICH THEY HAD ESTABLISHED .

181 3 . THE APPLICANTS' SUBMISSION THAT ARTICLE 85 OF THE TREATY DOES NOT PROHIBIT DELIVERIES FROM PRODUCER TO PRODUCER .

182 THIS SUBMISSION IS IRRELEVANT, SINCE THE COMMISSION DOES NOT MAINTAIN THAT SUCH DELIVERIES ARE ILLEGAL PER SE BUT INFERS THAT THESE OPERATIONS ARE ILLEGAL FROM THE FACT THAT THESE DELIVERIES WERE A CONSTITUENT ELEMENT OF THE CONCERTED ACTION .

183 FURTHER, CONTRARY TO THE VIEW EXPRESSED BY SU, IT IS IMMATERIAL THAT THE LATTER, AS IT HAS STATED, PURCHASED MOST OF ITS SUGAR FROM RT NOT DIRECTLY BUT THROUGH INTERMEDIATE TRADERS .

184 IN FACT THE DETERMINING FACTOR IS THAT RT, WHICH CERTAINLY DID NOT GIVE MIDDLEMEN THE RIGHT TO SELECT THE CONSIGNEE, INTENDED TO AND IN FACT DID SUPPLY SU, EVEN THOUGH IT MADE EXPORT AND HOTTLET A PARTY TO THESE TRANSACTIONS .

185 THE DOCUMENTS QUOTED SHOW THAT RT FORCED BELGIAN DEALERS TO ADOPT ITS POLICY OF CHANNELLING BELGIAN EXPORTS TO THE NETHERLANDS, WITH THE RESULT THAT THE PARTICIPATION OF THESE DEALERS IN ALL OR PART OF THE CONTESTED DELIVERIES CANNOT MODIFY THEIR EVALUATION .

186 4 . SU AND CSM SUBMIT THAT THEY WERE NEVER ASKED TO APPROVE THE DESTINATION OF BELGIAN SUGAR TO BE EXPORTED TO THE NETHERLANDS .

187 THIS ARGUMENT, AS IS SHOWN BY THE DOCUMENTS QUOTED, DISREGARDS THE FACT THAT RT AND THE NETHERLANDS PRODUCERS AGREED ON THE BASIC CRITERIA TO BE APPLIED IN CONCERT WHEN SELECTING THE CONSIGNEES OR DESTINATIONS OF BELGIAN DELIVERIES TO THE NETHERLANDS AND IN FACT ADOPTED THEM .

188 5 . THE ARGUMENT OF SU AND OF CSM THAT NOT INCONSIDERABLE QUANTITIES OF BELGIAN SUGAR WERE IMPORTED INTO THE NETHERLANDS OUTSIDE THE SUPPLY SYSTEM WHICH IS CRITICIZED, SUCH AS SUPPLIES NEGOTIATED BY A GERMAN FIRM AND COMING FROM THE PRODUCTION OF BELGIAN MANUFACTURERS OTHER THAN RT, CANNOT EITHER BE TAKEN INTO CONSIDERATION .

189 THE FACT THAT SUCH DELIVERIES TOOK PLACE, WHICH MOREOVER THE COMMISSION DOES NOT DISPUTE, IN NO WAY DEFEATS THE ARGUMENT THAT RT, THE ONLY BELGIAN PRODUCER BLAMED IN THE DECISION, AS WELL AS SU AND CSM ENGAGED IN A CONCERTED PRACTICE CONCERNING THE DESTINATION OF THE BELGIAN COMPANY'S PRODUCTION .

190 6 . FINALLY WITH REGARD TO CSM'S ARGUMENT THAT THE NETHERLANDS PRODUCERS DID NOT AND COULD NOT OFFER RT ANY CONSIDERATION FOR THE POLICY OF TAKING THEIR INTERESTS INTO ACCOUNT WHICH THE LATTER ADOPTED TOWARDS THEM, ATTENTION MUST BE DRAWN TO THE FACT THAT THIS SUBMISSION, AND ITS LEGAL BASIS CAN MOREOVER BE DISPUTED, WOULD ONLY BE LIKELY TO WEAKEN THE FOUNDATION UPON WHICH THE COMPLAINT OF CONCERTED PRACTICES IS BASED, IF THE REST OF THE AVAILABLE EVIDENCE WERE INSUFFICIENT, BUT NOT IF THE EXISTENCE OF SUCH PRACTICES IS CLEARLY APPARENT FROM THE DOCUMENTS ON THE COURT'S FILE .

191 IT EMERGES FROM ALL THESE CONSIDERATIONS THAT THE PRACTICES IN THIS CASE DID NOT IN ANY WAY RESULT FROM INDEPENDENT DECISIONS BY THE PRODUCERS CONCERNED BUT WERE CONCERTED BETWEEN THEM BECAUSE THEY KNOWINGLY SUBSTITUTED FOR THE RISKS OF COMPETITION PRACTICAL COOPERATION BETWEEN THEM, WHICH CULMINATED IN A SITUATION WHICH DID NOT CORRESPOND TO THE NORMAL CONDITIONS OF THE MARKET, EVEN TAKING ACCOUNT OF ITS SPECIAL NATURE, AND ALLOWED NETHERLANDS PRODUCERS TO MAINTAIN POSITIONS WHICH THEY HAD ESTABLISHED TO THE DETRIMENT OF EFFECTIVE FREEDOM OF MOVEMENT OF THE PRODUCTS IN THE COMMON MARKET AND OF THE FREEDOM OF CONSUMERS TO CHOOSE THEIR SUPPLIERS .

192 THEREFORE THE APPLICANTS HAVE IN FACT ENGAGED IN CONCERTED PRACTICES HAVING AS THEIR OBJECT AND EFFECT THE PROTECTION OF THE NETHERLANDS MARKET .

(CC) THE QUESTION WHETHER THE CONCERTED PRACTICES WERE CAPABLE OF AFFECTING TRADE BETWEEN MEMBER STATES AND WHETHER THEY HAD AS THEIR OBJECT OR EFFECT THE PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION WITHIN THE COMMON MARKET

193 THE CONCERTED PRACTICES IN QUESTION HAVE AFFECTED TRADE BETWEEN MEMBER STATES BECAUSE THEY WERE RELATED TO SALES OF SUGAR BETWEEN BELGIUM AND THE NETHERLANDS .

194 THEIR OBJECT AND EFFECT IS TO ENSURE THAT SUGAR MANUFACTURED BY RT OR BY BELGIAN PRODUCERS, WHICH THIS COMPANY CONTROLS, WAS ONLY EXPORTED TO THE NETHERLANDS IN SUCH A WAY THAT IT DID NOT COMPETE THERE WITH SUGAR MANUFACTURED BY NETHERLANDS PRODUCERS .

195 THE OBJECT AND EFFECT OF THE SAID PRACTICES WHICH LIMIT OR CONTROL MARKETS AND ALSO SHARE MARKETS WITHIN THE MEANING OF ARTICLE 85 (B) AND (C) WAS TO INTERFERE WITH COMPETITION .

(DD) THE QUESTION WHETHER THE CONCERTED PRACTICES AFFECTED TRADE BETWEEN MEMBER STATES AND INTERFERED APPRECIABLY WITH COMPETITION

196 WITH REGARD TO THE QUESTION WHETHER THE CONCERTED PRACTICES IN QUESTION AFFECTED TRADE BETWEEN MEMBER STATES AND INTERFERED APPRECIABLY WITH COMPETITION IT IS ADVISABLE TO ASCERTAIN WHETHER THERE ARE GROUNDS FOR ASSUMING THAT, IF THE SAID PRACTICES HAD NOT BEEN CARRIED OUT, A LARGE PROPORTION OF THE VERY BIG AMOUNTS, WHICH RT CHANNELLED OR GOT THE BELGIAN DEALERS TO CHANNEL TO THE CONSIGNEES AND DESTINATIONS REFERRED TO ABOVE, WOULD HAVE BEEN SUPPLIED TO OTHER CUSTOMERS ESTABLISHED IN THE NETHERLANDS IN COMPETITION WITH NETHERLANDS PRODUCERS .

197 AN AFFIRMATIVE ANSWER TO THIS QUESTION IS GIVEN BY SOME OF THE DOCUMENTS QUOTED WHICH SHOW THAT, IF RT HAD NOT IMPOSED ITS RESTRICTIVE POLICY ON BELGIAN DEALERS, THEY WOULD HAVE BEEN ABLE AND WILLING TO MAKE SUCH DELIVERIES IN NOT INCONSIDERABLE QUANTITIES .

198 ALL THESE CONSIDERATIONS SHOW THAT RT, SU AND CSM HAVE ENGAGED IN CONCERTED PRACTICES WHICH AFFECTED TRADE BETWEEN MEMBER STATES AND APPRECIABLY INTERFERED WITH COMPETITION, AND HAVE THEREFORE INFRINGED ARTICLE 85 OF THE TREATY .

B - THE RELATIONS BETWEEN PFEIFER UND LANGEN, ON THE ONE HAND, AND SU AND CSM ON THE OTHER HAND

199 SINCE PFEIFER UND LANGEN DENIES THAT IT ALSO CONCERTED ITS COMMERCIAL POLICY WITH SU AND CSM, IT IS ADVISABLE TO CONSIDER WHETHER THE FACTS AND THE DOCUMENTS UPON WHICH THE COMMISSION RELIES PROVE THAT THERE WAS SUCH AN INFRINGEMENT FOR THE PERIOD COMMENCING 1 JULY 1970 WHICH ALONE IS THE RELEVANT PERIOD IN THESE PROCEEDINGS .

200 THE COMMISSION TAKES THE VIEW THAT THE CONCERTED ACTION IS ESTABLISHED, ON THE ONE HAND, BY CERTAIN DOCUMENTS PRODUCED FOR THE COURT'S FILE AND, ON THE OTHER HAND, BY THE VERY LARGE SUPPLIES BY THE COMPANY TO NETHERLANDS PRODUCERS WHEREAS THE QUANTITY OF SUGAR SUPPLIED TO OTHER NETHERLANDS CUSTOMERS WAS MINIMAL .

201 (A) AFTER EXTRACTING FROM THE SAID DOCUMENTS THOSE WHICH WERE STRAIGHT AWAY FOUND TO HAVE NO RELEVANCE TO THE COMPLAINT AS SET OUT IN THE OPERATIVE PART OF THE CONTESTED DECISION THERE ARE LEFT TWO INTERNAL MEMORANDA AND 'A NOTE' DRAWN UP BY EXPORT ON 23 APRIL AND 6 MAY 1970 GIVING A REPORT OF DISCUSSIONS BETWEEN THIS FIRM AND RT (ANNEXES I 74 TO 76 TO THE STATEMENTS OF DEFENCE).

202 THESE DOCUMENTS RELIED ON BY THE COMMISSION IN THE PRESENT CONTEXT TO PROVE THE REFUSALS BY PFEIFER UND LANGEN TO SUPPLY NETHERLANDS CUSTOMERS WHO WERE NOT PRODUCERS, ONLY REFER SPECIFICALLY TO THE RELATIONS BETWEEN EXPORT AND RT AND ALSO BETWEEN BELGIAN OPERATORS, ON THE ONE HAND, AND POSSIBLE FRENCH, GERMAN, NETHERLANDS AND ITALIAN CUSTOMERS, ON THE OTHER HAND,

AND DO NOT REFER AT ALL TO THE COURSE OF CONDUCT ADOPTED OR TO BE ADOPTED ON THE NETHERLANDS MARKET BY GERMAN PRODUCERS .

203 TO THE EXTENT TO WHICH THE SAID DOCUMENTS REFER TO COOPERATION ON A MUCH LARGER SCALE THROUGHOUT THE WHOLE OF THE COMMUNITY THE EXPRESSIONS USED BY EXPORT 'THE CONCERTED ACTION BETWEEN EUROPEAN REFINERS' AND 'TIRLEMONT ENTERED INTO AN AGREEMENT WITH THE OTHER REFINERS OF THE COMMON MARKET UNDER WHICH THEY GRANTED EACH OTHER EXCLUSIVE RIGHTS, AND THIS AGREEMENT SHOWS THAT MARKETING IN THE COUNTRY OF DESTINATION IS RESERVED TO THE REFINERS OF THAT COUNTRY' - WITHOUT PREJUDICE TO THEIR POSSIBLE RELEVANCE IN OTHER CONTEXTS, - APPEAR TO BE TOO VAGUE AND GENERAL EVEN TO CONSTITUTE EVIDENCE OF A PRACTICE BETWEEN PFEIFER UND LANGEN AND SU OR CSM AND ESPECIALLY AS THE COMMISSION HAS ITSELF EXPRESSLY STATED THAT IT DROPPED ITS ORIGINAL ARGUMENT THAT THERE WAS A GENERAL CONCERTED ACTION BETWEEN ALL THE LARGE COMMUNITY SUGAR PRODUCERS AND ONLY FOUND THAT THERE WERE A SERIES OF INFRINGEMENTS IN SPECIFIC LOCALITIES .

204 (B) WITH REGARD TO THE SUGAR SUPPLIED BY PFEIFER UND LANGEN TO THE NETHERLANDS THE COMMISSION HAS NOT CHALLENGED THE FIGURES PRODUCED BY PFEIFER UND LANGEN WHICH SHOW THAT DURING THE 1970/71 AND 1971/72 MARKETING YEARS THE LATTER ONLY SUPPLIED LARGE QUANTITIES (ALTOGETHER 15 000 METRIC TONS) TO THE LIMAKO UNDERTAKING, A SUBSIDIARY OF SU, WHEREAS THE AMOUNTS SUPPLIED DURING THIS PERIOD TO CSM (1.4 METRIC TONS) AND TO THIRD PARTIES (1.05 METRIC TONS) WERE MINIMAL .

205 IT IS NOT DENIED THAT LIMAKO CARRIES ON BUSINESS MAINLY AS AN EXPORTER OF SUGAR, THAT THE BEFOREMENTIONED 15 000 METRIC TONS - AS THE TYPE OF PACKING CHOSEN AND THE FACT THAT PFEIFER UND LANGEN DELIVERED THIS TONNAGE DIRECT TO A WAREHOUSE AT THE PORT OF ROTTERDAM MOREOVER PROVE - WERE INITIALLY INTENDED TO BE AND

WERE IN FACT RE-EXPORTED TO THIRD COUNTRIES EXCEPT FOR A LIMITED AMOUNT WHICH SU PROCESSED INTO LIQUID SUGAR .

206 THEREFORE, AS THE DELIVERY IN ISSUE IS NOT A DELIVERY FROM PRODUCER TO PRODUCER WITHIN THE MEANING ADOPTED BY THE CONTESTED DECISION - THAT IS TO SAY A DELIVERY TO ANOTHER OPERATOR IN HIS CAPACITY AS A PRODUCER AND DESIGNED TO AVOID ANY COMPETITION WITH HIM ON HIS 'OWN' MARKET - IT CANNOT BE REGARDED AS ADEQUATE EVIDENCE OF ANY CONCERTED ACTION BETWEEN SU AND PFEIFER UND LANGEN .

207 (C) WITH REFERENCE TO THE FACT THAT ONLY A SMALL AMOUNT OF SUGAR WAS SUPPLIED BY PFEIFER UND LANGEN TO NETHERLANDS CUSTOMERS WHO WERE NOT PRODUCERS, THERE WAS ACCORDING TO THE COMMISSION'S EVIDENCE (CF . ANNEX I TO THE REJOINER IN CASE 56/73, TABLE I) A SHORT-FALL IN GERMAN PRODUCTION IN 1970/71, WHEREAS IN 1971/72 BOTH GERMAN AND NETHERLANDS PRODUCTION WAS IN SURPLUS .

208 FURTHER THE GERMAN PRICE LEVEL DOES NOT APPEAR TO HAVE BEEN BELOW THAT OF THE NETHERLANDS .

209 IN THESE CIRCUMSTANCES IT MAY NOT HAVE BEEN IN THE INTERESTS OF PFEIFER UND LANGEN TO INVESTIGATE THE NETHERLANDS MARKET IN ORDER TO SELL SUGAR THERE ON AN OCCASIONAL AND SPORADIC BASIS INSTEAD OF CONTINUING TO SUPPLY ITS LONG ESTABLISHED CUSTOMERS WHO USUALLY PROVIDED IT WITH A GUARANTEED MARKET .

210 THE EFFECT OF ALL THE PRECEDING ARGUMENTS IS THAT, SINCE THE COMMISSION HAS NOT ADDUCED ADEQUATE EVIDENCE OF THE INFRINGEMENT FOR WHICH IT BLAMES PFEIFER UND LANGEN UNDER SUBPARAGRAPH 2 OF ARTICLE 1 (1) OF THE CONTESTED DECISION, THIS PROVISION MUST BE ANNULLED TO THE EXTENT TO WHICH IT STATES THAT PFEIFER UND LANGEN, ON THE ONE HAND, AND SU AND CSM ON THE OTHER HAND, ENGAGED IN A CONCERTED ACTION .

II - INFRINGEMENT OF REGULATION NO 26 OF THE COUNCIL

211 CSM AND RT SUBMIT THAT, EVEN IF IT IS ASSUMED THAT THE COURSES OF CONDUCT TO WHICH EXCEPTION IS TAKEN ARE CONCERTED PRACTICES WITHIN THE MEANING OF ARTICLE 85 OF THE TREATY, THEY ARE NONE THE LESS LAWFUL BECAUSE THEY COME WITHIN THE SECOND EXCEPTION SPECIFIED IN THE FIRST SENTENCE OF ARTICLE 2 (1) OF REGULATION NO 26, ACCORDING TO WHICH ARTICLE 85 (1) OF THE TREATY SHALL NOT APPLY, INTER ALIA, TO CONCERTED PRACTICES WHICH ARE 'NECESSARY FOR ATTAINMENT OF THE OBJECTIVES SET OUT IN ARTICLE 39 OF THE TREATY '.

212 1 . CSM SUBMITS THAT WITHOUT THE PURCHASES FROM RT ITS PLANT AND DISTRIBUTIVE NETWORK WOULD NOT HAVE BEEN FULLY UTILIZED, SO THAT IT WOULD NOT THEREFORE HAVE BEEN ABLE TO OFFER BEET GROWERS A PRICE ABOVE THE MINIMUM PRICE LAID DOWN BY COMMUNITY RULES .

213 THE CONTESTED DECISION THEREFORE WRONGLY FAILED TO APPLY THE BEFOREMENTIONED PROVISION OF REGULATION NO 26 .

214 THERE IS NO NEED TO CONSIDER WHETHER ONLY THE PAYMENT OF A PRICE ABOVE THE SAID MINIMUM PRICE WAS LIKELY TO 'ENSURE A FAIR STANDARD OF LIVING FOR THE AGRICULTURAL COMMUNITY', REPRESENTED IN THIS CASE BY BEET GROWERS, WHICH IS THE OBJECTIVE REFERRED TO IN ARTICLE 39 (1) (B) OF THE TREATY .

215 IT IS ONLY NECESSARY TO RECORD THAT IN ANY CASE CSM HAS NOT ATTEMPTED TO SHOW WITH ANY DEGREE OF ACCURACY THAT ONLY ITS PURCHASES FROM RT ENABLED IT TO OFFER SUCH A PRICE TO THE SAID PRODUCERS .

216 THIS SUBMISSION MUST THEREFORE BE REJECTED .

217 2 . RT OBJECTS TO THE STATEMENT IN THE CONTESTED DECISION (P . 43 LT . H . COL .) THAT THE BEFOREMENTIONED EXCEPTION OF REGULATION NO 26 CANNOT BENEFIT THE APPLICANTS BECAUSE 'THE PRACTICES IN QUESTION ARE NOT PART OF THE MEANS PROVIDED TO THIS END BY COMMUNITY RULES' IN ORDER TO GUARANTEE THE EMPLOYMENT AND STANDARDS OF LIVING OF BEET GROWERS .

218 ON THE CONTRARY RT TAKES THE VIEW THAT IT WAS ABSOLUTELY ESSENTIAL TO ADOPT ITS PARTICULAR POLICY IN AN ATTEMPT TO OBTAIN IN THE CASE OF THE SALE OF SUGAR PRODUCED WITHIN THE MAXIMUM QUOTA, RECEIPTS EQUAL TO THE INTERVENTION PRICE 'GUARANTEED TO PRODUCERS' AND TO WHICH THE LATTER WERE ENTITLED IN ORDER TO BE ABLE TO PAY BEET GROWERS THE MINIMUM PRICE FOR SUGAR BEET PRESCRIBED BY COMMUNITY RULES .

219 IN FACT RT WAS UNABLE TO OBTAIN THE INTERVENTION PRICE BY SELLING SUGAR TO THE BELGIAN INTERVENTION AGENCY, AS THE BELGIAN AUTHORITIES INFORMED IT THAT THEY DID NOT WANT SUCH SALES .

220 IN THESE CIRCUMSTANCES THE APPLICANT FOUND THAT IT WAS FORCED, ON THE ONE HAND, TO PREVENT CUSTOMERS, TO WHICH IT HAD SOLD SUGAR FOR DENATURING AND AT A RELATIVELY LOW PRICE, RESELLING IT ON THE MARKET FOR HUMAN CONSUMPTION AT A PRICE LOWER THAN THE INTERVENTION PRICE AND, ON THE OTHER HAND, TO REFUSE TO ACCEPT OFFERS TO PURCHASE AT A PRICE WHICH WAS TOO LOW, WHEN IT COULD OBTAIN A BETTER PRICE BY SELLING DIRECT TO CERTAIN LARGE PURCHASERS .

221 AS PROVIDED FOR IN ARTICLE 9 (1) OF REGULATION NO 1009/67 THE INTERVENTION AGENCIES 'SHALL BE REQUIRED' TO BUY IN THE SUGAR OFFERED TO THEM AND THE PRODUCER CONCERNED CAN INSIST THAT THIS REQUIREMENT IS OBSERVED .

222 SO FAR AS SUGAR SOLD AT A RELATIVELY LOW PRICE FOR DENATURING IS CONCERNED, A PRODUCER, ACTING INDEPENDENTLY, MAY BE JUSTIFIED IN ENDEAVOURING TO PREVENT THIS SUGAR BEING SOLD AT TOO LOW A PRICE ON THE MARKET FOR HUMAN CONSUMPTION, BUT THE OBJECTIVES OF ARTICLE 39 OF THE TREATY DO NOT HOWEVER IN ANY WAY REQUIRE THAT THIS PRODUCER PURSUES THIS AIM BY MEANS OF CONCERTED PRACTICES .

223 WITH REGARD TO RT'S PREFERENTIAL TREATMENT OF 'LARGE PRODUCERS' ITS ARGUMENT IS TANTAMOUNT TO SAYING THAT DIRECT SALES TO NETHERLANDS CONSUMERS, IN COMPETITION WITH NETHERLANDS PRODUCERS, COULD ENABLE THE LATTER TO OBTAIN MORE ADVANTAGEOUS PRICES, SO THAT RT'S POLICY WAS AT LEAST NOT DESIGNED TO FURTHER AND CERTAINLY NOT 'NECESSARY' FOR THE ATTAINMENT OF THE OBJECTIVE SET OUT IN SUBPARAGRAPH (E) OF ARTICLE 39 (1) OF THE TREATY, NAMELY 'TO ENSURE THAT SUPPLIES REACH CONSUMERS AT REASONABLE PRICES', WHICH IS JUST AS IMPORTANT AS THE OBJECTIVE OF ENSURING A FAIR STANDARD OF LIVING FOR THE AGRICULTURAL COMMUNITY .

224 WITH REGARD TO THE LATTER OBJECTIVE RT DID NOT SUBMIT ANY SPECIFIC ARGUMENT AND IN PARTICULAR PRODUCED NO FIGURES WHICH AMOUNT AT THE VERY LEAST TO PRIMA FACIE EVIDENCE OF THE STATEMENT THAT FAILURE TO APPLY REGULATION NO 26 (2) MEANT THAT IT WAS NO LONGER POSSIBLE TO PAY BEET GROWERS THE MINIMUM PRICE PRESCRIBED BY COMMUNITY RULES .

225 THIS SUBMISSION CANNOT THEREFORE BE UPHELD .

226 THE EFFECT OF THESE CONSIDERATIONS IS THAT THE APPLICATIONS OF SU, CSM AND RT MUST BE DISMISSED TO THE EXTENT TO WHICH THEY RELATE TO THE CONCERTED PRACTICES ENGAGED IN BY THESE THREE APPLICANTS, WHILE SUBPARAGRAPH 2 OF ARTICLE 1 (1) OF THE CONTESTED DECISION MUST BE ANNULLED TO THE EXTENT TO WHICH IT FINDS THAT PFEIFER UND LANGEN, SU AND CSM ENGAGED IN A CONCERTED PRACTICE .

CHAPTER 3 :

THE COMPLAINT OF A CONCERTED PRACTICE HAVING AS ITS OBJECT THE PROTECTION OF THE MARKET OF THE WESTERN PART OF THE FEDERAL REPUBLIC OF GERMANY

227 UNDER SUBPARAGRAPH 3 OF ARTICLE 1 (1) OF THE CONTESTED DECISION, AS PUBLISHED IN THE OFFICIAL JOURNAL, PFEIFER UND LANGEN, ON THE ONE HAND, AND RT, ON THE OTHER HAND, ARE BLAMED FOR HAVING COMMITTED 'FROM THE 1968/69 MARKETING YEAR ONWARDS INFRINGEMENTS OF ARTICLE 85 (1) BY ENGAGING IN A CONCERTED PRACTICE HAVING AS ITS OBJECT AND EFFECT THE CONTROL OF DELIVERIES OF BELGIAN SUGAR ON THE MARKET OF THE WESTERN PART OF GERMANY AND CONSEQUENTLY PROTECTION OF THAT MARKET '.

228 IN ITS WRITTEN REPLY TO THE QUESTIONS PUT BY THE COURT THE COMMISSION ADMITTED THAT 'IN THE FRENCH VERSION OF THE CONTESTED DECISION SENT TO RT', IT POINTED OUT THAT THE INFRINGEMENT IN QUESTION ONLY COMMENCED IN 1969/70 .

229 THE COMMISSION ASSERTS THAT THIS WAS DUE TO A MISTAKE, WHEREAS RT STATES THAT IT ABIDES BY THE TEXT OF THE DECISION OF WHICH IT WAS NOTIFIED .

230 ON THE ONE HAND THE NOTIFICATION OF OBJECTIONS INDICATED WITH SUFFICIENT CLARITY THAT THE COMMISSION INTENDED TO FIND THAT THE APPLICANT HAD ENGAGED IN A CONCERTED PRACTICE HAVING AS ITS OBJECT THE PROTECTION OF THE WESTERN PART OF GERMANY, WHICH BEGAN DURING THE 1968/69 MARKETING YEAR .

231 ON THE OTHER HAND THE PLEADINGS PRODUCED BY THE APPLICANT DURING THE WRITTEN PROCEDURE AND IN PARTICULAR PAGES 4 AND 12 OF AND ANNEX 5 TO THE REPLY SHOW THAT THIS IS ALSO THE INTERPRETATION WHICH THE APPLICANT PLACED ON THE CONTESTED DECISION .

232 IN THESE CIRCUMSTANCES THERE ARE GROUNDS FOR ASSUMING THAT THE DECISION FOUND THAT THERE WAS A CONCERTED PRACTICE WHICH HAD AS ITS OBJECT THE PROTECTION OF THE MARKET OF THE WESTERN PART OF GERMANY AND WAS ENGAGED IN FROM THE 1968/69 MARKETING YEAR ONWARDS .

SECTION 1 : PROCEDURAL AND FORMAL SUBMISSIONS; SUBMISSION ON THE SUBSTANCE OF THE CASE THAT REGULATION NO 26 OF THE COUNCIL HAS BEEN INFRINGED

I - SUBMISSIONS ALREADY DEALT WITH IN THE SECOND CHAPTER

233 RT'S SUBMISSIONS THAT THE OPERATIVE PART OF THE CONTESTED DECISION LACKED CLARITY AND THAT REGULATION NO 26 HAD BEEN INFRINGED, WHICH WERE ALSO MADE IN CONNEXION WITH THE SECOND COMPLAINT, MUST BE DISMISSED FOR THE REASONS GIVEN DURING THE EARLIER EXAMINATION OF THIS COMPLAINT .

234 SIMILARLY REFERENCE MUST BE MADE TO THE EARLIER ARGUMENTS IN SUPPORT OF PFEIFER UND LANGEN'S SUBMISSIONS THAT THE PRINCIPLE THAT EVERYONE HAS THE RIGHT TO A FAIR TRIAL HAS BEEN INFRINGED AND THAT THE TIME-LIMITS FOR SUBMISSIONS OF OBSERVATIONS WERE UNDULY SHORT .

II - INFRINGEMENT OF THE RIGHT TO DEFEND

235 PFEIFER UND LANGEN SUBMITS THAT THE REASONS FOR CERTAIN STATEMENTS IN THE NOTIFICATION OF OBJECTIONS ARE EITHER NOT GIVEN OR THE STATEMENTS THEMSELVES ARE INACCURATE .

236 THE EXAMINATION OF THE QUESTION WHETHER THE COMMISSION HAS OR HAS NOT PROVED THE INFRINGEMENT ALLEGED IS PART OF THE SUBSTANCE OF THE CASE .

III - INFRINGEMENT OF THE ACCEPTED PRINCIPLES FOR THE TAKING OF EVIDENCE

237 PFEIFER UND LANGEN COMPLAIN THAT THE COMMISSION BASED THE COMPLAINT MADE AGAINST IT UPON FACTS WHICH CANNOT JUSTIFY THE CONCLUSION THAT THERE WAS A CONCERTED PRACTICE BUT WHICH CAN BE EXPLAINED BY REASONS IN NO WAY CONNECTED WITH ANY CONCERTED ACTION .

238 FURTHER THE COMMISSION CANNOT BE PERMITTED, FOR THE PURPOSE OF PROVING AN INFRINGEMENT, TO RELY ON STATEMENTS OF PERSONS WHO ARE NOT PARTIES TO THE PROCEEDINGS AND ARE NOT IN A POSITION TO GIVE EVIDENCE AS TO THE FACTS WHICH THEY ALLEGE BUT CAN AT BEST EXPRESS AN OPINION ON EVENTS IN WHICH THEY HAVE NOT TAKEN PART .

239 THESE ARGUMENTS WHICH ARE DESIGNED BY THE APPLICANT TO PERSUADE THE COURT THAT THE COMMISSION HAS NOT PROVED THE INFRINGEMENT FOR WHICH IT IS BLAMED ARE PART OF THE SUBSTANCE OF THE CASE .

SECTION 2 : SUBMISSION ON THE SUBSTANCE OF THE CASE THAT ARTICLE 85 OF THE TREATY HAS BEEN INFRINGED

240 THE ESSENCE OF THE SUBMISSIONS OF RT AND PFEIFER UND LANGEN IS THAT, SINCE THERE WAS NO CONCERTED ACTION, THE COURSES OF CONDUCT FOR WHICH THE APPLICANTS ARE BLAMED, TO THE EXTENT TO WHICH THEY WERE IN FACT ADOPTED, DID NOT AMOUNT TO CONCERTED PRACTICES, SO THAT THE COMMISSION, BY APPLYING ARTICLE 85 OF THE TREATY TO THESE COURSES OF CONDUCT, INFRINGED THIS PROVISION .

I - SUMMARY OF THE RELEVANT STATEMENTS OF THE DECISION

241 THE PRACTICES FOR WHICH THE APPLICANTS ARE BLAMED ARE MADE UP OF FOUR GROUPS OF ACTIONS OR OMISSIONS .

242 THEY ARE FIRST OF ALL BLAMED FOR HAVING CHANNELLED MOST OF THE EXPORTS OF WHITE SUGAR COMING FROM THE RT GROUP INTO THE WESTERN PART OF GERMANY TO SPECIFIC CONSIGNEES, NAMELY PFEIFER UND LANGEN OR, FOR SPECIFIC PURPOSES, NAMELY DENATURING OR SUBSEQUENT EXPORT TO THIRD COUNTRIES .

243 WITH REGARD TO THE RELATIVELY SMALL VOLUME OF BELGIAN EXPORTS TO THE BEFOREMENTIONED REGION, WHICH WERE NOT CHANNELLED IN THIS WAY, THE RT GROUP IS BLAMED FOR HAVING COMPELLED BELGIAN DEALERS, AND IN PARTICULAR EXPORT, ONLY TO UNDERTAKE SUCH EXPORTS WITH PFEIFER UND LANGEN'S CONSENT OR BY APPLYING A PRICE ALIGNED ON THE GERMAN COMPANY'S PRICE .

244 FURTHER RT INSTRUCTED EXPORT TO REFUSE, OPENLY OR COVERTLY, OFFERS FROM GERMAN NON-PRODUCERS WISHING TO IMPORT BELGIAN SUGAR .

245 FINALLY, THE BELGIAN COMPANY SUPPLIED PFEIFER UND LANGEN WITH VERY LARGE QUANTITIES OF RAW SUGAR INSTEAD OF REFINING IT ITSELF AND EXPORTING THE WHITE SUGAR REFINED IN THIS WAY TO THE GERMAN FIRM'S SALES AREA .

II - EXAMINATION OF THE SUBMISSION

1 . WHITE SUGAR

A - THE EVIDENCE

(A) THE EVIDENCE OF THE ACTUAL CONDUCT OF THE APPLICANTS

(AA) CHANNELLING OF BELGIAN EXPORTS TO SPECIFIC CONSIGNEES OR PARTICULAR DESTINATIONS

246 1 . SEVERAL CONFIRMATIONS OF PURCHASES BY EXPORT OR HOTTLET EITHER TO RT OR TO OTHER BELGIAN PRODUCERS (ANNEXES II 28, 35 TO THE STATEMENT OF DEFENCE IN CASE 47/73) SHOW THAT THESE DEALERS UNDERTOOK ONLY TO RESELL THE SUGAR PURCHASED UNDER THESE TRANSACTIONS FOR DENATURING .

247 RT, IN A LETTER OF 24 JULY 1969 TO EXPORT (ANNEX I 43 TO THE STATEMENTS OF DEFENCE) - AFTER CONFIRMING THAT BELGIAN SUGAR IS AT THE PRESENT TIME EXPORTED TO GERMANY FOR HUMAN CONSUMPTION WHEREAS IT WAS ORIGINALLY SOLD FOR DENATURING - STATES THAT 'THESE DELIVERIES FOR HUMAN CONSUMPTION ... ARE ONLY POSSIBLE AT PRICES LESS THAN THOSE FOR WHICH GERMAN PRODUCERS ASK; THE LATTER CONSEQUENTLY DEEPLY DEPLORE THE PRESSURE BROUGHT TO BEAR ON THEIR MARKET BY BELGIAN SUGAR', AND GOES ON TO SAY : 'HAVING INFORMED YOU EARLIER OF OUR POLICY TOWARDS OUR FOREIGN COLLEAGUES AND HAVING RECEIVED YOUR ASSURANCE OF SINCERE COOPERATION, I MUST NOW INSIST THAT THE OPERATIONS NOW BEING CARRIED OUT IN GERMANY BE CONCLUDED AS SOON AS POSSIBLE AND THAT IN ANY EVENT NO NEW BUSINESS OF THIS KIND BE INITIATED ...'.

248 WHEN HOTTLET PURCHASED FROM RT AND SOLD TO A CUSTOMER TWO CONSIGNMENTS OF SUGAR AND THE CUSTOMER LATER REQUESTED HOTTLET TO RELEASE IT FROM THE OBLIGATION ONLY TO USE THIS SUGAR FOR DENATURING, RT WITHHELD ITS CONSENT AND CLAIMED COMPENSATION FROM HOTTLET, BECAUSE AS A RESULT OF THESE EVENTS THE LATTER DID NOT TAKE DELIVERY FROM RT OF THE REMAINDER OF THE SAID CONSIGNMENTS (CF . IN PARTICULAR LETTER OF RT TO HOTTLET OF 16 DECEMBER 1969, ANNEX I 42 TO THE STATEMENTS OF DEFENCE).

249 EXPORT, IN A REPORT OF 20 APRIL 1970 RECORDING A CONVERSATION BETWEEN RT AND EXPORT (ANNEX I 74 TO THE STATEMENTS OF DEFENCE),

AFTER REFERRING TO 'RT'S OBLIGATIONS UNDERTAKEN IN THE CONTEXT OF THE RATIONALIZATION OF THE EUROPEAN SUGAR INDUSTRY' AND OF THE 'CONCERTED ACTION BETWEEN EUROPEAN REFINERS' RECORDS THAT 'IN THIS WAY A SERIES OF DIRECT TRANSACTIONS BETWEEN REFINERS TO THE PRODUCER' - THE LAST TWO WORDS SHOULD PROBABLY READ 'OR PRODUCERS' - CEASE TO FORM PART OF THE BUSINESS RELATIONS BETWEEN RT AND EXPORT IN ... GERMANY (TRADE WITH PFEIFER UND LANGEN)'.

250 AN INTERNAL MEMORANDUM DRAWN UP BY EXPORT OF 23 APRIL 1970 (ANNEX I 75 TO THE STATEMENTS OF DEFENCE) STATES 'TIRLEMONT HAS ENTERED INTO AN AGREEMENT WITH THE OTHER REFINERS OF THE GERMAN MARKET GRANTING EACH OTHER EXCLUSIVE RIGHTS, UNDER WHICH MARKETING IN THE COUNTRY OF DESTINATION IS RESERVED TO THE REFINERS OF THAT COUNTRY . CONSEQUENTLY NO PLACE IS RESERVED FOR EXPORT ... IN GERMANY THE VOLUME OF IMPORTS HAS BEEN NEGLIGIBLE SINCE THE REVALUATION OF THE DM . NEVERTHELESS THERE ARE OPPORTUNITIES FOR TRADE IN THE FRONTIER REGIONS ... OF GERMANY ... THE REFINERS' POLICY ENSURES THE FAILURE OF THIS REGIONALIZATION ... IT IS DOUBTFUL WHETHER WE CAN OBTAIN A QUOTA, BECAUSE RT WILL NOT WISH TO GUARANTEE A POLICY WHICH RUNS COUNTER TO THE AGREEMENTS IT HAS ENTERED INTO WITH THE OTHER REFINERS '.

251 SEVERAL DOCUMENTS WHICH ORIGINATED BETWEEN 19 DECEMBER 1968 AND 15 AUGUST 1970, AND IN PARTICULAR A SERIES OF PURCHASE CONTRACTS CONCLUDED BY BELGIAN DEALERS (ANNEXES I 28 TO 32, 34, 35, 41, 43, 129 TO THE STATEMENTS OF DEFENCE) LOOKED AT AS A WHOLE SHOW THAT THE LATTER, IN ACCORDANCE WITH THE WISHES OF RT AND THE OTHER PRODUCERS ACTING AT THE REQUEST OR ON THE ADVICE OF THE LATTER, UNDERTOOK OR WERE PREPARED TO GIVE AN UNDERTAKING NOT TO EXPORT THE SUGAR COVERED BY THESE DOCUMENTS FOR HUMAN CONSUMPTION TO THE OTHER COUNTRIES OF THE COMMON MARKET INCLUDING GERMANY .

252 EXPORT IN ONE OF THESE DOCUMENTS (LETTER TO NAVEAU OF 31 JULY 1970, ANNEX I 129 TO THE STATEMENTS OF DEFENCE) STATES THAT RT

'GENERALLY' SOLD IN GERMANY BUT 'TO OUR KNOWLEDGE, THROUGH SPECIAL RELATIONSHIPS BETWEEN COLLEAGUES WHO ARE LARGE PRODUCER-REFINERS, EITHER DIRECT OR THROUGH ITS SUBSIDIARIES '.

253 EXPORT IN A TELEX MESSAGE TO A GERMAN DEALER OF 25 SEPTEMBER 1970 (ANNEX I 143 TO THE STATEMENTS OF DEFENCE) COMPLAINS THAT ANOTHER GERMAN FIRM WHICH BOUGHT SUGAR FROM RT THROUGH HOTTLET DID NOT HONOUR ITS UNDERTAKING NOT TO RESELL THIS SUGAR IN NORTH-RHINE WESTPHALIA .

254 2 . ACCORDING TO THE STATISTICS PRODUCED BY THE COMMISSION IN ANNEX 1 TO THE REJOINER IN CASE 47/73 THE PATTERN OF BELGIAN EXPORTS OF WHITE SUGAR TO GERMANY DURING THE PERIOD COVERED BY THE PROCEEDINGS, EXPRESSED IN METRIC TONS, IS AS FOLLOWS :

MARKETING YEAR : 1968/69 TOTAL EXPORTS : 23 800 'CONTROLLED' EXPORTS : DELIVERIES TO PFEIFER UND LANGEN OR TO WZV : 800 'CONTROLLED' EXPORTS : DELIVERIES MADE WITH THE AGREEMENT OF PFEIFER UND LANGEN : - 'CONTROLLED' EXPORTS : DELIVERIES FOR DENATURING OR EXPORT TO THIRD COUNTRIES : 19 400 'CONTROLLED' EXPORTS : DELIVERIES AT AN ADAPTED PRICE : - 'CONTROLLED' EXPORTS : TOTAL : 20 200;

MARKETING YEAR : 1969/70 TOTAL EXPORTS : 23 800 'CONTROLLED' EXPORTS : DELIVERIES TO PFEIFER UND LANGEN OR TO WZV : 900 'CONTROLLED' EXPORTS : DELIVERIES MADE WITH THE AGREEMENT OF PFEIFER UND LANGEN : 700 'CONTROLLED' EXPORTS : DELIVERIES FOR DENATURING OR EXPORT TO THIRD COUNTRIES : 11 700 'CONTROLLED' EXPORTS : DELIVERIES AT AN ADAPTED PRICE : - 'CONTROLLED' EXPORTS : TOTAL : 13 300;

MARKETING YEAR : 1970/71 TOTAL EXPORTS : 16 700 'CONTROLLED' EXPORTS : DELIVERIES TO PFEIFER UND LANGEN OR TO WZV : 200 'CONTROLLED' EXPORTS : DELIVERIES MADE WITH THE AGREEMENT OF PFEIFER UND LANGEN : - 'CONTROLLED' EXPORTS : DELIVERIES FOR DENATURING OR EXPORT TO THIRD

COUNTRIES : 2 500 'CONTROLLED' EXPORTS : DELIVERIES AT AN ADAPTED PRICE : 13 300 'CONTROLLED' EXPORTS : TOTAL : 16 000;

MARKETING YEAR : 1971/72 TOTAL EXPORTS : 24 500 'CONTROLLED' EXPORTS : DELIVERIES TO PFEIFER UND LANGEN OR TO WZV : 2 600 'CONTROLLED' EXPORTS : DELIVERIES MADE WITH THE AGREEMENT OF PFEIFER UND LANGEN : - 'CONTROLLED' EXPORTS : DELIVERIES FOR DENATURING OR EXPORT TO THIRD COUNTRIES : 1 600 'CONTROLLED' EXPORTS : DELIVERIES AT AN ADAPTED PRICE : 14 400 'CONTROLLED' EXPORTS : TOTAL : 18 600;

TOTAL EXPORTS : 88 800 'CONTROLLED' EXPORTS : DELIVERIES TO PFEIFER UND LANGEN OR TO WZV : TOTAL : 4 500 'CONTROLLED' EXPORTS : DELIVERIES MADE WITH THE AGREEMENT OF PFEIFER UND LANGEN : TOTAL : 700 'CONTROLLED' EXPORTS : DELIVERIES FOR DENATURING OR EXPORT TO THIRD COUNTRIES : TOTAL : 35 200 'CONTROLLED' EXPORTS : DELIVERIES AT AN ADAPTED PRICE : TOTAL : 27 700 'CONTROLLED' EXPORTS : TOTAL : 68 100;

255 ACCORDING TO THESE STATISTICS, 11 300 OF THE 20 700 METRIC TONS (88 800 LESS 68 100) OF FREE EXPORTS TO GERMANY CAME FROM SMALL BELGIAN PRODUCERS SO THAT THROUGHOUT THE MARKETING YEARS IN QUESTION THE FREE EXPORTS OF RT OR THE RT GROUP COULD AT MOST HAVE BEEN 20 700 LESS 11 300 = 9 400 METRIC TONS AND, MOREOVER, IT IS NOT CERTAIN WHETHER THEY WERE ALL SOLD IN PFEIFER UND LANGEN'S SALES AREA .

256 ALTHOUGH THESE FIGURES DO NOT ALWAYS TALLY WITH THE FIGURES PRODUCED ELSEWHERE EITHER BY THE APPLICANTS OR BY THE COMMISSION, THEIR ORDER OF MAGNITUDE IS NOT HOWEVER SERIOUSLY DISPUTED .

257 IT MUST MOREOVER BE BORNE IN MIND THAT IN THIS CONNEXION IT IS MORE IMPORTANT TO KNOW THE PATTERN OF SUGAR EXPORTED BY RT, OR BY THE PRODUCERS WHICH IT CONTROLS, DIRECT OR THROUGH THE DEALERS EXPORT AND HOTTLET, THAN THE VOLUME OF EXPORTS BY BELGIAN PRODUCERS INDEPENDENT OF RT .

(BB) THE OBLIGATION IMPOSED ON AGENTS ONLY TO UNDERTAKE FREE EXPORTS OF SUGAR WITH THE CONSENT OF PFEIFER UND LANGEN OR BY APPLYING A PRICE ALIGNED ON THE GERMAN COMPANY'S PRICE

258 EXPORT IN A LETTER TO MOERBEKE-WAAS OF 15 SEPTEMBER 1969 CONFIRMING A PURCHASE OF 5 000 METRIC TONS OF SUGAR (ANNEX I 54 TO THE STATEMENTS OF DEFENCE) STATES UNDER THE HEADING 'DESTINATION ': 'SALES TO THE FEDERAL REPUBLIC OF GERMANY FOR HUMAN CONSUMPTION SHALL BE SUBJECT TO THE APPROVAL OF THE PFEIFER UND LANGEN FIRM '.

259 EXPORT STATES IN A REPORT OF 30 APRIL 1970 ON DISCUSSIONS WHICH TOOK PLACE BETWEEN MR MAISIN OF RT AND A REPRESENTATIVE OF EXPORT (ANNEX I 76 TO THE STATEMENTS OF DEFENCE): 'THE BASIC PRINCIPLE UPON WHICH MR MAISIN IS ADAMANT IS AS FOLLOWS : EXPORT MUST ADOPT RT'S POLICY TOWARDS ITS EUROPEAN PARTNERS . RT DEFINES ITS POLICY AS FOLLOWS : NO MOVEMENT OF GOODS FROM COUNTRY TO COUNTRY, SAVE BY AGREEMENT BETWEEN PRODUCER AND PRODUCER '.

260 WHEN A GERMAN DEALER, ON BEHALF OF A CUSTOMER ESTABLISHED AT AIX-LA-CHAPELLE, ASKED EXPORT BY A TELEX MESSAGE OF 11 SEPTEMBER 1970 (ANNEX I 106 TO THE STATEMENTS OF DEFENCE) TO MAKE HIM AN OFFER OF 15 000 METRIC TONS AT THE PRICE OF BFRS 1 095.93, EXPORT IN A TELEX MESSAGE IN REPLY OF 14 SEPTEMBER 1970 (ANNEX I 107 TO THE STATEMENTS OF DEFENCE) - AFTER STATING THAT, 'AFTER HAVING TAKEN CLOSE CONTRACTS WITH THE GERMAN PFEIFER UND LANGEN REFINERS OF KOELN, TIRLEMONT TOLD US THAT THEY WOULD NOT, PROPERLY SPEAKING, DECLINE ANY BID OR REFUSE ANY OFFER FOR THE GERMAN MARKET . THEIR TARGET BEING BY NO WAY TO DISTURB THE PFEIFER UND LANGEN HOME MARKET, THEY ASKED THE KOELN REFINERS TO INFORM THEM ABOUT THEIR INTERNAL PRICES, DELIVERED POINTS OF DESTINATION IN THE RUHR AREA, AS WELL AS CLOSE THE BELGIAN BORDER (AACHEN FOR INSTANCE)' - GIVES SOME PRICE CALCULATIONS ON THE BASIS OF GERMAN PRICES AND ADDS THAT 'THE TIRLEMONT GROUP SAYS ... THAT THEY MIGHT BE POSSIBLY SELLERS OF BELGIAN ... SUGAR FOR THE GERMAN CONSUMPTION MARKET ... IF THEY

COULD GET SUCH PRICE, EVEN IF IT IS IN LINE (AND SPECIALLY FOR THAT REASON) WITH THE GERMAN INTERNAL PRICE, PFEIFER UND LANGEN GERMAN CLIENTS WILL HAVE PRACTICALLY NO INTEREST AT ALL TO CHANGE OF SUPPLIERS '.

261 IT EMERGES FROM A SERIES OF TELEX MESSAGES FOLLOWING THIS CORRESPONDENCE AND EXCHANGED BETWEEN 14 AND 21 SEPTEMBER - NAMELY FIVE FROM EXPORT TO RT, ONE FROM EXPORT TO THE SAID GERMAN DEALER AND ONE FROM RT TO EXPORT (ANNEXES I 108 TO 112, 114, 115 TO THE STATEMENTS OF DEFENCE) - WHEN THEY ARE READ TOGETHER THAT :

- EXPORT ENDEAVOURED TO PERSUADE RT TO MEET THE GERMAN DEALER'S REQUEST THROUGH ITS AGENT .

- MR ROLIN (OF RT) TOLD MR LEMAIRE (OF EXPORT) THAT HE WISHED 'TO DO NOTHING WHICH WOULD DISTURB THE PATTERN OF THE GERMAN SUGAR MARKET SO FAR AS PFEIFER UND LANGEN'S CUSTOMERS (IN THE RHINELAND AND THE BELGIAN FRONTIER REGION) ARE CONCERNED'; CONSIDERED THAT 'THE GERMAN PRICE ... CORRESPONDS TO BFRS 1 180 PER 100 KG (ACCORDING TO INFORMATION WITH WHICH PFEIFER UND LANGEN SUPPLIED HIM)'; BROUGHT DOWN 'THIS EX-BELGIAN SUGAR FACTORY PRICE IN THE FOLLOWING WAY' (CALCULATIONS THEN FOLLOW THEIR RESULT BEING THAT THE SUGAR IS OFFERED AT BFRS 1 120 EX-BELGIAN SUGAR FACTORIES).

- AFTER LONG DISCUSSIONS AN AGREEMENT WAS CONCLUDED BETWEEN EXPORT AND RT ON THE BASIS OF BFRS 1 100, BUT IT CAME TOO LATE WITH THE RESULT THAT THE DEAL NEVER MATERIALIZED .

- WITH REGARD TO RT EXPORT REFERS TO ITS 'SUCCESSIVE REFUSALS BASED ON THE PRINCIPLES IT HAS ADOPTED FOR INTRA-COMMUNITY SALES OF SUGAR' AND ALSO TO ITS INTENTION 'ALREADY MENTIONED BY MR ROLIN TO BARON KRONACKER (OF EXPORT) (MEMORANDUM ON THE CONVERSATION ... OF 31 AUGUST 1970 ON THE AGREEMENT BY GERMAN MANUFACTURERS - PFEIFER UND LANGEN KOELN - NOT TO BUY SUGAR BEET FROM THE BELGIAN

SUGAR FACTORY AT LIERS) AND TO MR LEMAIRE NOT TO DO ANYTHING WHICH MAY DISTURB THE PATTERN OF THE GERMAN SUGAR MARKET '.

- EXPORT COMPLAINED THAT, FOLLOWING INFORMATION WHICH REACHED IT FROM GERMANY, RT HAD IN THE MEANTIME SOLD TO PFEIFER UND LANGEN AT A PRICE BELOW THAT OFFERED BY EXPORT .

262 IT IS EVIDENT FROM A SERIES OF CONFIRMATIONS OF OR OFFERS TO PURCHASE SENT EITHER BY EXPORT OR HOTTLET TO BELGIAN PRODUCERS (RT, COUPLET, OREYE) OR BY OREYE TO EXPORT (ANNEXES I 55, 91, 92, 113, 119 TO THE STATEMENTS OF DEFENCE) BETWEEN 17 SEPTEMBER 1969 AND 7 OCTOBER 1970 THAT THESE PRODUCERS ASKED IN THE CASE OF SALES TO GERMANY A HIGHER EX WORKS PRICE THAN THAT WHICH THEY WERE WILLING TO ACCEPT IN THE CASE OF SUGAR TO BE SOLD ELSEWHERE (BFRS 1 100 PER 100 KG INSTEAD OF BFRS 1 092.50 ACCORDING TO A LETTER FROM OREYE TO EXPORT OF 7 OCTOBER 1970).

(CC) REFUSAL TO SELL

263 LA SUCRERIE ET RAFFINERIE DE DONSTIENNES IN A LETTER TO EXPORT OF 12 AUGUST 1970 (ANNEX I 130 TO THE STATEMENTS OF DEFENCE) STATES THAT RT 'ADVISED IT NOT TO ENTER INTO ANY EXPORT CONTRACTS AT THE PRESENT TIME '.

264 EXPORT SAYS IN A TELEX MESSAGE OF 10 SEPTEMBER 1970 TO A GERMAN DEALER (ANNEX I 105 TO THE STATEMENTS OF DEFENCE): 'REGARDING THE GERMAN MARKET, FOR WHICH YOU ASKED US AN OFFER, WE WOULD LIKE TO ASK YOU TO WAIT A BIT BEFORE GETTING OFFERS FROM US, DUE TO THE FACT THAT OUR PRINCIPAL SUGAR MANUFACTURER, THE RT GROUP, IS NOT ON THE MARKET AT THE MOMENT FOR SUCH DESTINATION '.

265 IT APPEARS FROM SOME OF THE DOCUMENTS WHICH HAVE BEEN QUOTED - NAMELY THE TELEX MESSAGE OF EXPORT TO A GERMAN DEALER OF 14 SEPTEMBER 1970 AND ALSO THE SERIES OF TELEX MESSAGES EXCHANGED

DURING THE PERIOD FROM 14 TO 21 SEPTEMBER 1970 BETWEEN RT AND EXPORT AND BETWEEN THE LATTER AND THE GERMAN DEALER - THAT RT EITHER REFUSED, ALBEIT COVERTLY, TO SUPPLY NONPRODUCERS ESTABLISHED IN PFEIFER UND LANGEN'S SALES AREA OR OFFERED SUCH OPERATORS WHO WERE PROSPECTIVE PURCHASERS OR PROCURED THAT THEY BE OFFERED A PRICE WHICH MIGHT WELL PUT THEM OFF, ALTHOUGH THERE WAS A CONSIDERABLE DEMAND IN GERMANY WHICH EXPORT WISHED TO MEET .

266 THIS SITUATION IS ALSO CONFIRMED BY A TELEX MESSAGE FROM A GERMAN DEALER TO EXPORT OF 2 NOVEMBER 1970 (ANNEX I 116 TO THE STATEMENTS OF DEFENCE), IN WHICH, AFTER REFERRING TO SEVERAL TELEX MESSAGES WHICH HE HAD SENT TO EXPORT, HE SAYS : 'WE WOULD ... AS WE TOLD YOU MANY TIMES IN THE ABOVE TELEXES AND ON MANY PHONE CONVERSATIONS WE HAD TOGETHER ... VERY MUCH LIKE TO CONCLUDE BUSINESS WITH YOUR COMPANY IN BELGIAN CRYSTAL SUGAR FOR THE WEST GERMAN MARKET FOR THE NEW 1970/71 CROP . WE ARE PREPARED TO TRY AT THE MAXIMUM TO REACH THE LEVEL WHERE BUSINESS COULD BE CONCLUDED . WE WOULD LIKE FROM YOUR SIDE TO GET ORDERS AND BIDS TO ENABLE US TO BE IN A POSITION TO MATERIALIZE SUCH BUSINESS . WE AWAIT YOUR COMMENTS, ORDERS AND BIDS WITH THE KEENEST INTEREST ' .

GROUND'S CONTINUED UNDER DOC.NUM : 673J0040.2

267 A GERMAN FIRM IN A LETTER TO EXPORT OF 11 NOVEMBER 1970 (ANNEX I 118 TO THE STATEMENTS OF DEFENCE) WHICH ALSO CONFIRMS THIS SITUATION, AFTER STATING THAT IT ENTERED INTO SEVERAL LARGE CONTRACTS - PROBABLY WITH GERMAN BUSINESS HOUSES - GOES ON TO SAY THAT DURING THE NEGOTIATIONS PRECEDING EACH OF THESE AGREEMENTS 'WE CONSULTED YOU BUT UNFORTUNATELY - AND WE MUST REPEAT THIS - WE DID NOT RECEIVE ANY OFFERS FROM YOU WHICH ARRIVED IN SUFFICIENT TIME AND AT A SUFFICIENTLY INTERESTING PRICE TO ENABLE US TO COMPETE . NOW IT IS ONLY A QUESTION OF MEETING POSSIBLE ADDITIONAL REQUIREMENTS WHICH WILL HAPPEN FROM TIME TO TIME ' .

268 FINALLY GEDELFI OF COLOGNE, A WHOLESALE BUYER OF FOODSTUFFS, IN A LETTER TO THE GEMAS COMPANY IN BRUSSELS OF 10 MARCH 1972 (ANNEX II 9 TO THE STATEMENTS OF DEFENCE IN CASES 54 TO 56/73) STATES : 'IN DEN LETZTEN 4 JAHREN IST VON DER GEDELFI KEIN ZUCKER AUS EWG-LAENDERN IMPORTIERT WORDEN . UNSERE VERGEBLICHEN VERSUCHE VOR EINIGEN JAHREN SIND IHNEN AUS UNSEREN GESPRAECHEN BEKANNT . DAMALS HABEN WIR AUF UNSERE ANFRAGEN KEINE OFFERTEN ERHALTEN . GEGENWAERTIG WERDEN AUF ANFRAGEN OFFERTEN GENANNT, DIE SICH ABER AUS FRACHTGRUENDEN UND DESHALB PREISGRUENDEN NICHT REALISIEREN LASSEN '. (' DURING THE LAST FOUR YEARS GEDELFI HAS NOT IMPORTED ANY SUGAR COMING FROM EEC COUNTRIES . OUR DISCUSSIONS HAVE MADE YOU FAMILIAR WITH THE UNSUCCESSFUL ATTEMPTS WE MADE SOME YEARS AGO . AT THAT TIME OUR ENQUIRIES WERE NOT FOLLOWED UP BY ANY OFFER . AT PRESENT OUR ENQUIRIES PRODUCE OFFERS, WHICH FOR REASONS CONNECTED WITH FREIGHT AND THEREFORE PRICES ARE NOT ACCEPTABLE ').

(B) THE EVIDENCE RELATING TO THE QUESTION WHETHER THE CONDUCT REFERRED TO ABOVE WAS CONCERTED

269 THE COMMISSION TAKES THE VIEW THAT SOME OF THE DOCUMENTS REFERRED TO ABOVE SHOW THAT THERE WAS A CONCERTED ACTION, NAMELY THE LETTER OF RT OF 24 JULY 1969, EXPORT'S REPORT OF 20 APRIL 1970, EXPORT'S MEMORANDUM OF 23 APRIL 1970, EXPORT'S LETTER TO MOERBEKE-WAAS OF 15 SEPTEMBER 1969, THE TELEX MESSAGE OF 14 SEPTEMBER 1970 FROM EXPORT TO A GERMAN DEALER AS WELL AS THE SERIES OF TELEX MESSAGES DURING THE PERIOD FROM 14 TO 21 SEPTEMBER 1970 BETWEEN EXPORT AND RT OR A GERMAN DEALER .

270 FURTHER, THE COMMISSION SUBMITS THAT RT'S RESERVED ATTITUDE TOWARDS PROSPECTIVE GERMAN PURCHASERS OTHER THAN PFEIFER UND LANGEN CANNOT BE DUE TO A DECISION WHICH THE BELGIAN COMPANY TOOK INDEPENDENTLY IN ACCORDANCE WITH ITS OBJECTIVE INTERESTS, SINCE THE LARGE BELGIAN SUGAR SURPLUS (174 000, 251 000, 193 000 AND 277

000 METRIC TONS RESPECTIVELY DURING EACH OF THE FOUR MARKETING YEARS IN QUESTION; CF . ANNEX 1 TO THE REJOINER IN CASE 47/73, TABLE I) COMPARED WITH THE BY NO MEANS INCONSIDERABLE DEMAND FROM THE WESTERN REGION OF THE FEDERAL REPUBLIC OF GERMANY OUGHT IN THE NORMAL COURSE OF EVENTS TO HAVE PROVIDED RT WITH AN INCENTIVE TO COMPETE WITH PFEIFER UND LANGEN ON THE MARKET OF THE SAID REGION .

B - THE EVALUATION OF THE EVIDENCE

271 (A) WITH REGARD TO THE EVIDENTIAL VALUE OF THE DOCUMENTS WHICH HAVE BEEN QUOTED RT AND PFEIFER UND LANGEN PUT FORWARD ARGUMENTS SIMILAR TO THOSE SUBMITTED BY RT, ON THE ONE HAND, AND SU AND CSM, ON THE OTHER HAND, IN RELATION TO THE SAME OR OTHER DOCUMENTS PREPARED BY EXPORT OR TO THE DOCUMENTS SENT TO EXPORT BY RT IN THE CONTEXT OF THE SECOND COMPLAINT; THESE ARGUMENTS WERE SET OUT IN CHAPTER 2 AND MUST BE DISMISSED FOR THE REASONS THEREIN STATED .

272 MORE PARTICULARLY PFEIFER UND LANGEN'S ARGUMENT THAT EXPORT'S STATEMENTS ARE NOT CREDIBLE, AS THE INTERESTS OF THIS FIRM CONFLICTED WITH THOSE OF RT, CANNOT BE UPHOLD .

273 ALTHOUGH IT IS TRUE THAT THE EFFECT OF RT'S SALES POLICY WAS THAT MANY TRANSACTIONS IN WHICH EXPORT WANTED TO PARTICIPATE DID NOT TAKE PLACE OR WERE EFFECTED WITHOUT EXPORT'S PARTICIPATION, THIS CONFLICT OF INTERESTS DOES NOT ALTER THE FACT THAT, ACCORDING TO RT'S OWN STATEMENTS, EXPORT HAS CORRECTLY RECORDED THE STATEMENTS WHICH THE LATTER MADE TO IT AND THAT, FOR THE REASONS GIVEN WHEN CONSIDERING THE SECOND COMPLAINT THESE DECLARATIONS MUST BE REGARDED AS TRUTHFUL .

274 IN THESE CIRCUMSTANCES THE DOCUMENTS PRODUCED BY EXPORT ARE ADMISSIBLE IN EVIDENCE AND MAY BE USED ALSO AGAINST PFEIFER UND LANGEN .

275 (B) IT IS CLEAR FROM THE DOCUMENTS WHICH HAVE BEEN MENTIONED THAT THE APPLICANTS IN FACT ADOPTED ON THE MARKET THE COURSE OF CONDUCT AVERRED BY THE COMMISSION .

276 THERE ARE THEREFORE GROUNDS FOR HOLDING THAT IT HAS BEEN PROVED THAT THE GREATER PART OF THE WHITE SUGAR EXPORTED BY RT AND BY THE BELGIAN PRODUCERS WHICH IT CONTROLS TO THE WESTERN PART OF THE FEDERAL REPUBLIC OF GERMANY WAS SUPPLIED IN SUCH A WAY AS NOT TO COMPETE EFFECTIVELY WITH PFEIFER UND LANGEN'S PRODUCTS, EITHER BECAUSE IT WAS CHANNELLED TO PFEIFER UND LANGEN, WZF, FOR DENATURING OR SUBSEQUENT EXPORT TO THIRD COUNTRIES OR BECAUSE IT WAS SOLD WITH PFEIFER UND LANGEN'S CONSENT OR AT A PRICE ALIGNED ON THE LATTER'S PRICE .

277 THE AMOUNTS EXPORTED IN THESE CIRCUMSTANCES AMOUNTED DURING THE WHOLE OF THE FOUR MARKETING YEARS IN QUESTION TO 68 000 METRIC TONS AND WERE THEREFORE VERY LARGE .

278 FURTHERMORE THERE IS NO DOUBT THAT RT INSTRUCTED EXPORT TO REFUSE, OPENLY OR COVERTLY, TO SELL TO GERMAN NON-PRODUCERS WISHING TO IMPORT BELGIAN SUGAR .

279 (C) 1 . PFEIFER UND LANGEN SUBMITS THAT RT'S STATEMENT IN ITS LETTER OF 24 JULY 1969 'THAT GERMAN PRODUCERS DEEPLY DEPLORE THE PRESSURE BROUGHT TO BEAR IN THIS WAY ON THEIR MARKET BY BELGIAN SUGAR' DOES NOT MENTION IT BY NAME .

280 NEVERTHELESS THERE APPEARS TO BE NO DOUBT THAT THIS FIRM, WHICH IS EXPRESSLY MENTIONED IN OTHER DOCUMENTS WHICH HAVE BEEN QUOTED, WAS ONE OF THE PRODUCERS WHICH MADE SUCH COMPLAINTS, IN PARTICULAR BECAUSE, TAKING INTO ACCOUNT THE RELATIVELY SHORT DISTANCES, PFEIFER UND LANGEN'S SALES AREA WAS THE MOST SUITABLE OF ALL THE VARIOUS GERMAN REGIONS FOR EXPORTS OF BELGIAN SUGAR .

281 PFEIFER UND LANGEN SEEKS TO MINIMIZE THE SIGNIFICANCE OF RT'S STATEMENT BY CALLING ATTENTION, ON THE ONE HAND, TO THE FACT THAT, IF 'GERMAN PRODUCERS WERE NOT PLEASED WITH FOREIGN IMPORTS, THEIR REACTION WAS NOT SURPRISING' (APPLICATION IN CASE 56/73, P . 30) AND, ON THE OTHER HAND, TO THE FACT THAT IT 'NEVER ATTEMPTED TO EXERT ANY INFLUENCE ON RT WHEN IT WAS DECIDING WHAT IT INTENDED TO DO' (LOC . CIT ., P . 31).

282 HOWEVER THE BEFOREMENTIONED LETTER SHOWS CLEARLY THAT THE GERMAN PRODUCERS TO WHICH IT REFERRED - AMONG WHOM PFEIFER UND LANGEN MUST BE INCLUDED FOR THE REASONS WHICH HAVE JUST BEEN MENTIONED - NEVER AT ANY TIME KEPT THEIR DISSATISFACTION TO THEMSELVES BUT TOLD RT ABOUT IT .

283 IF AN ECONOMIC OPERATOR ACCEPTS THE COMPLAINTS MADE TO HIM BY ANOTHER OPERATOR IN CONNEXION WITH THE COMPETITION TO WHICH THE PRODUCTS MANUFACTURED BY THE FORMER OPERATOR EXPOSE THE LATTER, THE CONDUCT OF THE OPERATORS CONCERNED AMOUNTS TO A CONCERTED PRACTICE .

284 2 . PFEIFER UND LANGEN ASSERTS THAT 'ASSUMING THAT A DISCUSSION ON PRICES BETWEEN RT AND THE APPLICANT TOOK PLACE, THE EFFECT OF THIS DISCUSSION ... WAS MOST CERTAINLY NOT A REFUSAL BY RT TO SUPPLY THE GERMAN MARKET BUT THE OFFER TO RESERVE SUGAR FOR EXPORT TO GERMANY' AND THAT 'THE FACT THAT ON THIS OCCASION RT ATTEMPTED TO OBTAIN THE SAME PRICE AS THE APPLICANT IS DUE TO ELEMENTARY COMMERCIAL COMMON SENSE' (APPLICATION IN CASE 56/73, P . 36).

285 THE FACT THAT A VENDOR ALIGNS HIS PRICE ON THE HIGHEST PRICE CHARGED BY A COMPETITOR IS NOT NECESSARILY EVIDENCE OF A CONCERTED PRACTICE BUT MAY BE EXPLAINED BY AN ATTEMPT TO OBTAIN THE MAXIMUM PROFIT . THE SITUATION IS DIFFERENT IN THIS CASE .

286 IN FACT IT APPEARS FROM ALL THE DOCUMENTS WHICH HAVE BEEN QUOTED THAT RT'S CHIEF MOTIVE FOR THUS ALIGNING ITS PRICES - WHICH MOREOVER IS ACCEPTED BY ALL PARTIES - WAS TO AVOID ANNOYING PFEIFER UND LANGEN, ONE OF RT'S IMPORTANT CUSTOMERS FOR WHITE SUGAR, BY ADOPTING A COMMERCIAL POLICY LIKELY TO ENTICE SOME OF ITS CUSTOMERS FROM THE GERMAN COMPANY .

287 FINALLY, PFEIFER UND LANGEN'S STATEMENTS CONSIDERED IN THE LIGHT OF THE DOCUMENTS REFERRED TO CAN BE SAID TO CONFIRM THE ARGUMENT THAT THE ALIGNMENT OF PRICES IN QUESTION CREATED A CONCERTED PRACTICE .

288 IN FACT ALL THESE FACTORS SHOW, ON THE ONE HAND, THAT PFEIFER UND LANGEN DOES NOT SERIOUSLY DENY THAT IT COMMUNICATED ITS PRICES TO RT AND, ON THE OTHER HAND, THAT THIS INFORMATION WAS REQUESTED AND SUPPLIED FOR A COMMON PURPOSE DIRECTED AGAINST COMPETITION, WHICH IS A CLASSIC EXAMPLE OF PRACTICAL COOPERATION WHICH THE PARTIES CONCERNED KNOWINGLY SUBSTITUTED FOR THE RISKS OF COMPETITION .

289 3 . RT'S ARGUMENT THAT THE PRACTICES COMPLAINED OF '(WERE THE CONSEQUENCE OF) MARKET CONDITIONS AND THEREFORE WOULD HAVE BEEN THE SAME EVEN IF THERE HAD BEEN NO CONTACT BETWEEN PRODUCERS' HAS ALREADY BEEN REJECTED IN CHAPTER 2 HEREOF .

290 4 . RT REFERS TO CERTAIN OF ITS DELIVERIES TO NON-PRODUCERS ESTABLISHED IN THE RHINELAND IN ORDER TO PROVE THAT IT NEVER SYSTEMATICALLY ADOPTED A POLICY DIRECTED AGAINST COMPETITION .

291 HOWEVER, IN ORDER TO ESTABLISH THAT THERE ARE CONCERTED PRACTICES WITHIN THE MEANING OF ARTICLE 85 OF THE TREATY, IT IS SUFFICIENT TO SHOW THAT COMPETITION HAS BEEN RESTRICTED AND IT IS UNNECESSARY TO PROVE THAT IT HAS BEEN PREVENTED .

292 FURTHERMORE, RT DID NOT SERIOUSLY DENY THAT THE VOLUME OF THESE FREE DELIVERIES WAS SMALL .

293 ALL THESE FACTORS SHOW THAT THE PRODUCERS CONCERNED DID NOT INDIVIDUALLY DECIDE TO ADOPT THESE PRACTICES BUT CAME TO A MUTUAL UNDERSTANDING TO ENGAGE IN THEM THEREBY KNOWINGLY SUBSTITUTING PRACTICAL COOPERATION BETWEEN THEM FOR THE RISKS OF COMPETITION; THIS COOPERATION CULMINATED IN A SITUATION WHICH DID NOT CORRESPOND TO NORMAL MARKET CONDITIONS AND ENABLED PFEIFER UND LANGEN TO MAINTAIN THE POSITION WHICH IT HAD ESTABLISHED ON THE MARKET TO THE DETRIMENT OF EFFECTIVE FREE MOVEMENT OF GOODS IN THE COMMON MARKET AND OF THE FREEDOM ENJOYED BY CONSUMERS TO CHOOSE THEIR SUPPLIERS .

294 THEREFORE THE APPLICANTS IN FACT ENGAGED IN CONCERTED PRACTICES DESIGNED TO PROTECT THE MARKET OF THE WESTERN PART OF THE FEDERAL REPUBLIC OF GERMANY .

2 . RAW SUGAR

295 THE COMMISSION MAINTAINS THAT PFEIFER UND LANGEN BOUGHT QUANTITIES OF WHITE SUGAR FROM RT AMOUNTING TO 8 361, 24 853 AND 23 419 METRIC TONS RESPECTIVELY FOR THE THREE MARKETING YEARS FROM 1969 TO 1972 AND THAT THESE PURCHASES WERE ALSO A CONSTITUENT PART OF THE PROHIBITED CONCERTED PRACTICE .

296 THE ESSENCE OF THE COMMISSION'S ARGUMENT IS THAT RT WAS ABLE TO REFINER THESE AMOUNTS ITSELF AND THAT IT WAS IN ITS INTERESTS TO DO SO IN ORDER TO SUPPLY THE GERMAN MARKET WITH THE AMOUNTS OF WHITE SUGAR WHICH IT PRODUCED .

297 MOREOVER THE FIGURES PRODUCED BY PFEIFER UND LANGEN SHOW THAT ITS OWN PRODUCTION OF RAW SUGAR TOGETHER WITH ADDITIONAL PURCHASES FROM PRODUCERS IN NORTH GERMANY WOULD HAVE BEEN

SUFFICIENT TO UTILIZE TO THE FULL THIS COMPANY'S REFINING CAPACITY, WHICH ON A PROPER EVALUATION IS ESTIMATED AT 180 000 TO 200 000 METRIC TONS PER ANNUM .

298 ACCORDING TO THE TABLE WHICH PFEIFER UND LANGEN HAS PRODUCED THE LARGE AMOUNTS IT PURCHASED IN NORTH GERMANY VARIED VERY LITTLE IN QUANTITY SO THAT IT CANNOT BE ACCEPTED THAT PURCHASES FROM RT WERE INTENDED TO FILL A GAP .

299 IN FACT PFEIFER UND LANGEN BOUGHT RT'S RAW SUGAR AT SUCH A HIGH PRICE THAT IT COULD NOT EVEN OBTAIN THE NORMAL PROCESSING MARGIN .

300 THE COMMISSION THEREFORE TAKES THE VIEW THAT THE CONDUCT OF THESE APPLICANTS CANNOT BE REGARDED AS THE USUAL COURSE OF CONDUCT ADOPTED BY ECONOMIC OPERATORS IN COMPETITION WITH EACH OTHER AND CAN ONLY BE EXPLAINED BY THEIR COMMON WISH TO MAKE PFEIFER UND LANGEN ABSORB THE AMOUNTS OF RAW SUGAR IN ISSUE, IN ORDER TO ENSURE THAT, AFTER THEY HAVE BEEN PROCESSED INTO WHITE SUGAR, THEY DO NOT COMPETE IN PFEIFER UND LANGEN'S SALES AREA WITH THE WHITE SUGAR PRODUCED BY THIS FIRM .

301 THE DOCUMENTS REFERRED TO EARLIER ONLY DEAL WITH WHITE SUGAR SO THAT, SO FAR AS TRANSACTIONS IN RAW SUGAR ARE CONCERNED, IT IS NECESSARY TO CONSIDER WHETHER THE CONDUCT WHICH THE COMMISSION ALLEGES AND REGARDS AS A CONSTITUENT PART OF THE CONCERTED PRACTICE CAN ONLY REASONABLY BE EXPLAINED BY THE EXISTENCE OF A CONCERTED ACTION .

302 IF, WITHIN THE FRAMEWORK OF A CONCERTED POLICY INTENDED TO PROTECT THE RESPECTIVE MARKET SHARES, WHICH IS CLEARLY THE AIM OF THE PRACTICES RELATING TO WHITE SUGAR, IT APPEARS THAT DELIVERIES OF RAW SUGAR AT A PRICE, WHICH RT FINDS TO BE VERY ATTRACTIVE, MAY BE AN ADDITIONAL CONSTITUENT ELEMENT OF THE CONCERTED ACTION, IT IS

NO LESS TRUE THAT THE FACT THAT OWING TO ITS REFINING CAPACITY BEING INADEQUATE RT REGULARLY DESPATCHED RAW SUGAR TO DIFFERENT PRODUCERS IS NOT DISPUTED .

303 ON THE OTHER HAND IT HAS ALSO BEEN SHOWN THAT PFEIFER UND LANGEN BOUGHT REGULARLY LARGE QUANTITIES OF RAW SUGAR FROM PRODUCERS OTHER THAN RT IN ORDER TO REFINED THEM IN ITS OWN FACTORIES .

304 IN THESE CIRCUMSTANCES IT CANNOT BE RULED OUT THAT THIS PART OF THE TRANSACTIONS IN ISSUE IS NOT TO BE REGARDED AS A CONSTITUENT PART OF A CONCERTED PRACTICE BUT CAN BE EXPLAINED IN A DIFFERENT WAY .

3 . THE QUESTION WHETHER THE CONCERTED PRACTICES RELATING TO WHITE SUGAR AFFECTED TRADE BETWEEN MEMBER STATES AND INTERFERED WITH COMPETITION

305 THE CONCERTED PRACTICES IN QUESTION AFFECTED TRADE BETWEEN MEMBER STATES, BECAUSE THEY AFFECTED THE SUGAR TRADE BETWEEN BELGIUM AND THE FEDERAL REPUBLIC OF GERMANY .

306 THEIR OBJECT AND EFFECT WAS TO ENSURE THAT THE SUGAR MANUFACTURED BY RT OR BY BELGIAN PRODUCERS WHICH IT CONTROLS WAS IN MOST CASES ONLY EXPORTED TO GERMANY IN SUCH A WAY THAT IT DID NOT COMPETE WITH THE SUGAR MANUFACTURED BY PFEIFER UND LANGEN .

307 THE OBJECT AND EFFECT OF THE SAID PRACTICES, WHICH LIMIT OR CONTROL MARKETS AND ALSO SHARE MARKETS WITHIN THE MEANING OF ARTICLE 85 (B) AND (C) OF THE TREATY, WAS TO INTERFERE WITH COMPETITION .

308 FOR SIMILAR REASONS, MUTATIS MUTANDIS, TO THOSE GIVEN WHEN DEALING WITH THE SECOND COMPLAINT, IT MUST BE HELD THAT THE CONCERTED PRACTICES IN QUESTION AFFECTED TRADE BETWEEN MEMBER STATES AND INTERFERED APPRECIABLY WITH COMPETITION .

309 THE CONSEQUENCE OF THESE CONSIDERATIONS IS THAT, SINCE THE COMMISSION HAS PROVED THAT RT AND PFEIFER UND LANGEN HAVE COMMITTED AN INFRINGEMENT, THIS SUBMISSION MUST BE REJECTED .

310 AS SUBPARAGRAPH 3 OF ARTICLE 1 (1) OF THE DECISION DOES NOT DISTINGUISH BETWEEN SUPPLIES OF WHITE AND RAW SUGAR, THE FACT THAT THE INFRINGEMENT RELATING TO THE DELIVERIES OF THE LATTER SUGAR HAS NOT BEEN PROVED LEADS TO THE FINDING THAT THERE HAS BEEN NO INFRINGEMENT RELATING TO RAW SUGAR .

CHAPTER 4

THE COMPLAINT OF A CONCERTED PRACTICE HAVING AS ITS OBJECT THE PROTECTION OF THE MARKET OF THE SOUTHERN PART OF THE FEDERAL REPUBLIC OF GERMANY

311 SUBPARAGRAPH 4 OF ARTICLE 1 (1) OF THE CONTESTED DECISION BLAMES SZAG AND FRANKEN, ON THE ONE HAND, AND BEGHIN AND SUCRE-UNION, ON THE OTHER HAND, FOR HAVING COMMITTED 'FROM THE 1970/71 MARKETING YEAR ONWARDS ... INFRINGEMENTS OF ARTICLE 85 (1) BY ENGAGING IN A CONCERTED PRACTICE HAVING AS ITS OBJECT AND EFFECT THE CONTROL OF DELIVERIES OF FRENCH SUGAR ON THE MARKET OF THE SOUTHERN PART OF GERMANY AND CONSEQUENTLY PROTECTION OF THAT MARKET '.

312 TO SUM UP THE DECISION BLAMES THE APPLICANTS FOR HAVING CHANNELLED MOST OF THE EXPORTS TO THE SOUTHERN PART OF GERMANY TO SPECIFIC CONSIGNEES, NAMELY GERMAN PRODUCERS .

313 THE COMMISSION HAS STATED THAT THIS COMPLAINT IS ALSO DIRECTED AGAINST SZV AND ALSO SAID AT THE HEARING THAT IT WAS ONLY THROUGH INADVERTENCE THAT THIS COMPANY WAS NOT MENTIONED IN THE BEFOREMENTIONED SUBPARAGRAPH .

314 THE COMMISSION ARGUES THAT ITS INTENTION TO MAKE THIS COMPLAINT ALSO AGAINST SZV IS INDICATED, ON THE ONE HAND, IN THE STATEMENT OF THE REASONS UPON WHICH THE DECISION WAS BASED AND, ON THE OTHER HAND, IN THE INTRODUCTORY PART OF ARTICLE 1 (2) OF THE DECISION .

315 FOR THE PURPOSE OF DETERMINING THE PERSONS TO WHOM A DECISION, WHICH FINDS THAT THERE HAS BEEN AN INFRINGEMENT, APPLIES, ONLY THE OPERATIVE PART OF THIS DECISION MUST BE CONSIDERED, PROVIDED THAT IT IS NOT OPEN TO MORE THAN ONE INTERPRETATION .

316 SUBPARAGRAPH 4 OF ARTICLE 1 (1) SETS OUT CLEARLY THE UNDERTAKINGS BLAMED FOR THE INFRINGEMENT, NAMELY BEGHIN, SUCRE-UNION, SZAG AND FRANKEN .

317 THEREFORE THERE ARE GROUNDS FOR FINDING THAT THIS SUBPARAGRAPH DOES NOT APPLY TO SZV .

I - THE ACTUAL CONDUCT OF THE APPLICANTS

318 1 . IT IS AGREED THAT THE DELIVERIES FROM PRODUCER TO PRODUCER EXPRESSED IN METRIC TONS - APART FROM 4 600 METRIC TONS OF WHITE SUGAR SUPPLIED BY SUCRE-UNION TO THE 'GRUNDSTUECKSV-ERWALTUNGSGESELLSCHAFT' OF OBERURSEL, WHICH CANNOT BE TAKEN INTO ACCOUNT AS THEY WERE NOT INCLUDED IN THE FIGURES SET OUT IN THE DECISION - ARE CORRECTLY STATED IN THE FOLLOWING TABLE :

1970/71 :

BEGHIN TO SZAG : WHITE SUGAR : 286 RAW SUGAR : 11 200 BEGHIN TO FRANKEN
: WHITE SUGAR : - RAW SUGAR : - SUCRE-UNION TO SZAG : WHITE SUGAR : -
RAW SUGAR : - SUCRE-UNION TO FRANKEN : WHITE SUGAR : - RAW SUGAR : -

1971/72 :

BEGHIN TO SZAG : WHITE SUGAR : - RAW SUGAR : 13 900 BEGHIN TO FRANKEN
: WHITE SUGAR : - RAW SUGAR : 9 200 SUCRE-UNION TO SZAG : WHITE SUGAR :
4 500 RAW SUGAR : - SUCRE-UNION TO FRANKEN : WHITE SUGAR : 4 000 RAW
SUGAR : -

319 2 . WITH REGARD TO THE DELIVERIES BY THE FRENCH PRODUCERS
CONCERNED TO OTHER OPERATORS ESTABLISHED IN SOUTH GERMANY -
HEREINAFTER CALLED 'OTHER DELIVERIES' - THE CONDUCT OF BEGHIN AND
SUCRE-UNION MUST BE DISTINGUISHED .

320 A - IN THE CASE OF BEGHIN IT IS NOT DENIED THAT IT DID NOT SUPPLY
SUCH OPERATORS .

321 B - IN THE CASE OF SUCRE-UNION, ALTHOUGH THE PARTIES AGREE THAT
IT DID SUPPLY SUCH OPERATORS, THE FIGURES ON THE COURT'S FILE DO NOT
HOWEVER ENABLE THE VOLUME TO BE CALCULATED ACCURATELY AND IT IS
ALL THE MORE DIFFICULT TO DO SO BECAUSE THE INFORMATION SUPPLIED
BY THE COMMISSION IS CONTRADICTORY .

322 IN FACT, ON THE ONE HAND, THE COMMISSION STATES (STATEMENT OF
DEFENCE IN CASE 44/73, NO 43) THAT SUCRE-UNION SUPPLIED 'IN 1970/71
LARGER AMOUNTS' - THAT IS TO SAY LARGER AMOUNTS THAN IN THE
PREVIOUS MARKETING YEARS - 'TO INDEPENDENT MIDDLEMEN, BUT MUCH
LESS IN 1971/72', IN OTHER WORDS THAT IT MADE OTHER DELIVERIES DURING
EACH OF THE TWO MARKETING YEARS IN QUESTION .

323 ON THE OTHER HAND THE STATISTICS FOR FRENCH IMPORTS INTO
GERMANY IN ANNEX 4 OF THE REJOINDER IN CASE 44/73, IN SO FAR AS SUCRE-

UNION'S OTHER DELIVERIES ARE CONCERNED, ONLY EXPRESSLY RECORDS 4 000 METRIC TONS SUPPLIED IN 1970/71 'TO A GERMAN DEALER', WHICH SUGGESTS THAT THIS COMPANY DID NOT EFFECT ANY OTHER DELIVERIES IN 1971/72 .

324 FURTHER IN NOTE 14 TO TABLE V OF ANNEX I OF THE REJOINDER IN CASE 54/73 THE COMMISSION CLAIMS THAT IN THE 1970/71 AND 1971/72 MARKETING YEARS 'OTHER EXPORTS TO SOUTH GERMANY' - THAT IS TO SAY DELIVERIES OTHER THAN THOSE EFFECTED BY BEGHIN OR SUCRE-UNION TO SZAG OR TO FRANKEN - 'WERE EFFECTED BY FRENCH PRODUCERS WHO DID NOT PARTICIPATE IN DELIVERIES FROM PRODUCER TO PRODUCER', WHICH IS TANTAMOUNT TO SAYING THAT SUCRE-UNION DID NOT EFFECT ANY OTHER DELIVERIES IN 1970/71 OR IN 1971/72 .

325 FINALLY THE CONTESTED DECISION (P . 45, LAST BUT ONE PARAGRAPH OF SECTION IV (2)) STATES THAT THERE ARE NO GROUNDS FOR FINING SUCRE-UNION, SINCE IT 'ALWAYS PLAYED THE PART OF AN OUTSIDER AS FAR AS THIS WAS POSSIBLE' AND 'MADE, IN ADDITION TO DIRECT SALES TO FOREIGN COMPETITORS, QUITE LARGE SALES TO DEALERS AND TO PROCESSING UNDERTAKINGS IN THE MARKET OF DESTINATION '.

326 IN VIEW OF THESE FACTS IT IS ONLY RIGHT TO ACKNOWLEDGE, IN FAVOUR OF THE APPLICANTS, THAT THE PROPORTION WHICH OTHER DELIVERIES BORE TO THE AGGREGATE AMOUNT OF SUGAR EXPORTED BY SUCRE-UNION TO SOUTH GERMANY DURING THE TWO MARKETING YEARS IN QUESTION, WAS APPROXIMATELY THE SAME AS THE PROPORTION OF DELIVERIES TO GERMAN PRODUCERS .

II - THE QUESTION WHETHER THE BEFOREMENTIONED CONDUCT WAS CONCERTED

1 . THE EVIDENCE

327 A - (A) THE COMMISSION PRODUCES IN SUPPORT OF THIS COMPLAINT A SERIES OF DOCUMENTS, SOME OF WHICH HOWEVER MUST BE REJECTED STRAIGHT AWAY, BECAUSE THEY ARE NOT RELEVANT SO THAT ONLY THOSE DOCUMENTS HEREINAFTER REFERRED TO MAY BE CONSIDERED .

328 A GERMAN DEALER SENT SUCRE-UNION ON 23 AUGUST 1971 A TELEX MESSAGE (ANNEX I 156 TO THE STATEMENTS OF DEFENCE) IN WHICH HE SAID : 'NACH HEUTIGER TELEFONISCHER RUECKSPRACHE MIT OBIGER FIRMA' - THAT IS TO SAY WITH A GERMAN FIRM WHICH HAD BOUGHT OR CONTEMPLATED BUYING FROM SZV - 'STELLTE ICH FEST, DASS DIE VON MIR UNTERBREITETEN PREISE FUER MAINZ UND KEMPTEN/HEGGE VON ANDERER SEITE BILLIGER OFFERiert WURDEN . DIE PREISE SOLLEN IN JEDEM FALLE UNDER DEN BASISPREISEN LIEGEN, DIE DIE SUEZUCKER-VERKAUFS-GMBH AUFGEgeben HAT . ICH KONNTE NOCH NICHT IN ERFAHRUNG BRINGEN, OB DIE AUFGEgebenEN PREISE TATSAECHLICH VON DER SUEZUCKER-VERKAUFS-GMBH SIND ODER VON EINEM ANDEREN ANBIETER . VIELLEICHT ERFAHRE ICH IN DEN NAECHSTEN TAGEN WEITERE EINZELHEITEN, BEVOR DIE OBENGANANNTTE FIRMA FUER IHREN BEDARF VOM 1 . 10 . BIS 31 . 12 . 1971 EINDECKUNGEN VORNIMMT . IN JEDEM FALLE SOLL ICH UNTERRICHTET WERDEN . DIES ZUR KENNTNISNAHME UND ERWARTE IHRE STELLUNGNAHME HIERZU ' . (' AFTER MY TELEPHONE CONVERSATION TODAY WITH THE BEFOREMENTIONED UNDERTAKING' - THAT IS TO SAY WITH A GERMAN FIRM WHICH BOUGHT OR CONTEMPLATED BUYING FROM SZV - 'I DISCOVERED THAT SOMEONE ELSE HAD OFFERED PRICES BELOW THOSE WHICH I HAD OFFERED FOR MAINZ AND KEMPTEN/HEGGE . THESE PRICES WOULD IN ANY CASE BE BELOW THE BASIC PRICES NOTIFIED BY THE "SUEZUCKER-VERKAUFS-GMBH" . I HAVE NOT YET BEEN ABLE TO FIND OUT WHETHER THE QUOTED PRICES COME IN FACT FROM THE "SUEZUCKER-VERKAUFS-GMBH" OR FROM ANOTHER OFFERER . I SHALL PERHAPS OBTAIN FURTHER INFORMATION DURING THE NEXT FEW DAYS BEFORE THE FIRM REFERRED TO ABOVE BEGINS TO COVER ITS REQUIREMENTS FOR THE PERIOD 1 OCTOBER TO 31 DECEMBER 1971 . I HAVE IN ANY CASE ASKED TO BE INFORMED . THIS MESSAGE IS FOR INFORMATION : I AWAIT YOUR VIEWS IN THIS MATTER ').

329 THE COMMISSION THEN GOES ON TO SAY THAT 'A GERMAN DEALER' - WHOSE NAME WAS DISCLOSED BY THE PARTIES DURING THE PROCEEDINGS AND WHO AT THAT TIME WAS SUCRE-UNION'S REPRESENTATIVE IN SOUTH GERMANY HEREINAFTER REFERRED TO AS 'X' - WROTE TO SUCRE-UNION ON 29 SEPTEMBER 1971 (CF . ANNEX I 157 TO THE STATEMENTS OF DEFENCE) AND SAID 'AS YOU SEE THE NOTIFICATION TO SZV OF THE NAMES OF FIRMS WHICH UP TILL NOW HAVE BOUGHT FROM US HAS CONSIDERABLE DISADVANTAGES . SZV GETS TO KNOW IN THIS WAY WHICH OPERATORS HAVE ALREADY PURCHASED SUGAR IN FRANCE OR WHICH INTEND TO DO SO ... I DO NOT CONSIDER THAT IT IS ANY LONGER EXPEDIENT TO PASS ON TO SZV THE ADDRESSES (OF OUR) CUSTOMERS . IT WILL GET TO KNOW THEM IN ANY CASE IF THE CUSTOMERS BUY LESS FROM IT THAN BEFORE OR IF THEY DO NOT BUY ANYTHING FROM IT AT ALL .

330 THE COMMISSION INFERS FROM THIS LETTER THAT SUCRE-UNION, AT THE REQUEST OF SZAG OR OF SZV, REQUIRED ITS GERMAN REPRESENTATIVE TO SEND THE LIST OF ITS CUSTOMERS TO ONE OR OTHER OF THESE COMPANIES .

331 FINALLY, IN A LETTER OF 10 MARCH 1972 THE GERMAN FIRM GEDELFI INFORMED THE BELGIAN FIRM GEMAS (ANNEX II 9 TO THE STATEMENTS OF DEFENCE IN CASES 54 TO 56/73) THAT 'IN DEN LETZTEN 4 JAHREN IST VON DER GEDELFI KEIN ZUCKER AUS EWG-LAENDERN IMPORTIERT WORDEN . UNSERE VERGEBLICHEN VERSUCHE VOR EINIGEN JAHREN SIND IHNEN AUS UNSEREN GESPRAECHEN BEKANNT . DAMALS HABEL WIR AUF UNSERE ANFRAGEN OFFERTEN GENANNT, DIE SICH ABER AUS FRACHTGRUENDEN UND DESHALB PREISGRUENDEN NICHT REALISIEREN LASSEN ' . (' DURING THE LAST FOUR YEARS GEDELFI HAS NOT IMPORTED ANY SUGAR COMING FROM EEC COUNTRIES . OUR DISCUSSIONS HAVE MADE YOU FAMILIAR WITH THE UNSUCCESSFUL ATTEMPTS WE MADE SOME YEARS AGO . AT THAT TIME OUR REQUESTS WERE NOT FOLLOWED UP BY ANY OFFER . AT THE PRESENT OUR ENQUIRIES PRODUCE OFFERS, WHICH FOR REASONS CONNECTED WITH FREIGHT AND THEREFORE PRICES ARE NOT ACCEPTABLE ').

332 (B) THE APPLICANTS IN GENERAL DO NOT CONSIDER THAT ANY OF THE DOCUMENTS PRODUCED ARE CONCLUSIVE .

333 SO FAR IN PARTICULAR AS THE LETTER OF 29 SEPTEMBER 1971 IS CONCERNED BEGHIN STATES THAT THE FACTS SET OUT THEREIN DID NOT APPLY TO IT .

334 SZAG FORMALLY DENIES THAT X EVER SENT IT OR SZV A LIST OF CUSTOMERS OR GAVE EITHER OF THESE TWO COMPANIES THE NAMES OF SUCRE-UNION'S CUSTOMERS .

335 SZAG PRODUCES IN ANNEX 1 TO ITS REPLY A LETTER OF 20 JUNE 1973 FROM SUCRE-UNION IN REPLY TO A REQUEST FOR INFORMATION RELATING TO THE LETTER OF 29 SEPTEMBER IN WHICH THE COMPANY SAYS : 'BEILIEGEND SENDEN WIR IHNEN DIE KOPIE EINES VON (X) IN BRUESSEL VORGELEGTEN SCHREIBENS, DAS WIR ANGEBLICH ERHALTEN HABEN SOLLEN, WIEDER ZURUECK . IN UNSEREN AKTEN KONNTE NICHT DIE GERINGSTE SPUR EINES SOLCHEN SCHREIBENS AN UNS ENTDECKT WERDEN . DARUEBER HINAUS IST UNS DESSEN WORTLAUT ABSOLUT UNBEKANNT . ES MUSS NATUERLICH BERUECKSICHTIGT WERDEN, DASS DAS DATUM DES SCHREIBENS WEIT ZURUECK LIEGT . ES MACHT JEDOCH DEN ANSCHEIN, ALS SEI DIESER BRIEF IN EINER GEWISSEN ABSICHT GESCHRIEBEN WORDEN ... WIR MUSSTEN UNSER VERTRAGSVERHAELTNIS (MIT X) LOESEN, DA ER UNS EINEN SEHR BEDEUTENDEN BETRAG SCHULDETE UND SEINE FINANZIELLE LAGE UNS NOCH EIN GROESSERES DEFIZIT BEFUERCHTEN LIESS . SEINE SCHULD HAT ER UEBRIGENS NICHT BEGLICHEN . IN PUNCTO KUNDENLISTE GLAUBEN WIR NICHT, DASS WIR PERSOENLICH EINE AUFGESTELLT HABEN . WIR KOENNEN AUCH KEINE KOPIE FINDEN . WIR BEDAUERN JEDOCH, ES NICHT GETAN ZU HABEN . BEI UNS SIND DAMALS SEHR UNANGENEHME BESCHWERDEN EINGEGANGEN, DA (X), DER KEINE EXKLUSIVITAET FUER DEUTSCHLAND HATTE, OFFERTEN AN KUNDEN ABGEGEBEN HATTE, DIE BEREITS UEBER DREI ANDERE VERKAUFSKANAELE ZUCKER VON UNS BEZOGEN :

(1) SUCRE-UNION ALS DIREKTER VERKAEUFER,

(2) FIRMA SCHLUETER UND MAACK, HAMBURG (ALS HAENDLER),

(3) UNSER VERTRETER G . BAUS, HOMBURG/SAAR .

ES WAERE DESHALB VERSTAENDLICH GEWESEN, WENN WIR EINE GEWISSE EINTEILUNG DES ARBEITSBEREICHES DER EINZELNEN VERKAEUFER VORGENOMMEN HAETTEN '. (' HEREWITH WE ENCLOSE A COPY OF A LETTER WHICH (X) PRODUCED IN BRUSSELS AND WHICH WAS APPARENTLY ADDRESSED TO US . WE HAVE NOT BEEN ABLE TO FIND ANY TRACE AT ALL OF IT AMONG OUR PAPERS . WHAT IS MORE WE HAVE NO IDEA WHAT IT MEANS . ACCOUNT MUST OBVIOUSLY BE TAKEN OF THE FACT THAT IT IS DATED A LONG TIME AGO . IT APPEARS HOWEVER TO HAVE BEEN DRAFTED WITH A SPECIFIC OBJECT IN MIND ... WE HAD TO BREAK OFF CONTRACTUAL RELATIONS WITH (X) BECAUSE HE OWED US A VERY LARGE SUM OF MONEY AND OWING TO HIS FINANCIAL SITUATION WE WERE AFRAID THAT THE DEFICIT WOULD GET LARGER . MOREOVER HE HAS NOT PAID HIS DEBT . WITH REGARD TO THE LIST OF CUSTOMERS WE DO NOT THINK THAT WE OURSELVES MADE ONE . WE CANNOT FIND ANY COPY EITHER . WE NEVERTHELESS REGRET THAT WE DID NOT DO SO . WE RECEIVED AT THAT TIME SOME VERY UNPLEASANT COMPLAINTS, BECAUSE (X), WHO DID NOT HAVE THE EXCLUSIVE RIGHTS FOR GERMANY, MADE OFFERS TO CUSTOMERS WHO ALREADY BOUGHT SUGAR FROM US THROUGH THREE OTHER SALE CHANNELS :

(1) SUCRE-UNION AS A DIRECT VENDOR,

(2) THE SCHLUETER UND MAACK UNDERTAKING, HAMBURG (AS A DEALER),

(3) OUR REPRESENTATIVE G . BAUS, HOMBURG/SAAR .

IT WOULD THEREFORE HAVE BEEN UNDERSTANDABLE IF WE HAD PROCEEDED TO SOME PARTITIONING OF THE FIELD OF OPERATIONS OF INDIVIDUAL VENDORS ').

336 DURING THE HEARING SZAG STATED THAT THERE WERE OTHER FACTS WHICH IN ITS VIEW COULD SHOW THAT X CANNOT BE BELIEVED AND EVEN AROUSED THE SUSPICION THAT HE SENT THE COMMISSION A 'COPY' OF A NON-EXISTENT ORIGINAL, NAMELY OF HIS ALLEGED LETTER TO SUCRE-UNION OF 29 SEPTEMBER 1971 .

337 B - THE COMMISSION MENTIONS THE STRIKING FACT THAT BEGHIN AND SUCRE-UNION SUPPLIED GERMAN PRODUCERS WITH LARGE AMOUNTS, AND MOREOVER AT PRICES WHICH WERE PARTICULARLY ADVANTAGEOUS TO THESE UNDERTAKINGS, WHEREAS BEGHIN DID NOT EFFECT ANY OTHER DELIVERIES AND THE VOLUME OF SUCRE-UNION'S OTHER DELIVERIES WAS SMALL .

338 SINCE (A) THE MARKET PRICE IN SOUTH GERMANY WAS ABOUT 5 PER CENT ABOVE THE FRENCH INTERVENTION PRICE, (B) IN 1970/71 GERMAN PRODUCERS COULD NOT MEET THE TOTAL REQUIREMENTS OF THIS REGION AND (C) SEVERAL OPERATORS ESTABLISHED IN THIS REGION INDICATED THAT THEY WERE INTERESTED IN IMPORTING FRENCH SUGAR, IT WAS TO BE EXPECTED THAT SUCRE-UNION AND BEGHIN - PARTICULARLY THE LATTER WHICH HAD VERY LARGE SURPLUS STOCKS OF SUGAR - WOULD HAVE SOLD SUGAR ON A VERY LARGE SCALE TO SUCH OPERATORS .

339 WHEN BEGHIN SUPPLIED RAW SUGAR TO A COMPETITOR IT GAVE UP REFINING ITSELF THE AMOUNTS IN QUESTION AND SELLING THE WHITE SUGAR PRODUCED FROM THIS PROCESSING ON THE MARKET OF THE SOUTHERN PART OF GERMANY; THIS CONDUCT CAN ONLY BE EXPLAINED BY THE WISH OF THE UNDERTAKINGS CONCERNED NOT TO COMPETE WITH EACH OTHER ON THIS MARKET .

340 SALES OF RAW SUGAR CANNOT BE JUSTIFIED BY INSUFFICIENT REFINING CAPACITY, SINCE BEGHIN COULD HAVE REFINED IN ITS FACTORIES AT THUMERIES IN THE NORTH OF FRANCE ALL THE RAW SUGAR PRODUCED AT ITS

FACTORIES AT SILLERY NEAR REIMS, WHICH INDEED IS WHAT IT DID BEFORE THE TWO MARKETING YEARS IN QUESTION .

341 BEGHIN'S ARGUMENT THAT FREIGHT RATES MADE SUCH AN OPERATION UNECONOMIC COMES UP AGAINST THE FACT THAT, ON THE ONE HAND, SILLERY IS FURTHER AWAY FROM SZAG'S REFINERIES THAN FROM THUMERIES AND, ON THE OTHER HAND, THAT, THE COMPANY, INSTEAD OF TRANSPORTING THE RAW SUGAR TO THUMERIES AND THEN EXPORTING IT, COULD HAVE FOUND ANOTHER WAY OF SELLING SUGAR TO SOUTH GERMANY .

2 . THE EVALUATION OF THIS EVIDENCE

A - BEGHIN'S DELIVERIES

342 IT IS FIRST OF ALL HELD THAT THE LETTER OF 29 SEPTEMBER 1971 DEALS WITH EVENTS WITH WHICH BEGHIN WAS IN NO WAY CONNECTED .

343 (A) BEGHIN'S DELIVERIES OF WHITE SUGAR TO GERMAN PRODUCERS WERE RESTRICTED TO 286 METRIC TONS SUPPLIED TO SZAG AND THIS OPERATION IS SO SMALL THAT IT CANNOT CONSTITUTE EVIDENCE OF A CONCERTED ACTION DESIGNED TO PROTECT THE MARKET OF SOUTH GERMANY .

344 (B) THE COMMISSION HAS BEEN UNABLE TO MENTION A SINGLE INSTANCE OF A REFUSAL BY BEGHIN TO SUPPLY A NON-PRODUCER ESTABLISHED IN SOUTH GERMANY; MOREOVER NO SUCH COMPLAINT HAS BEEN MADE IN THE DECISION AND CANNOT BE UPHELD, AS THE COMMISSION HAS NOT REFUTED THIS COMPANY'S CONTENTION THAT IT NEVER RECEIVED AN OFFER TO PURCHASE FROM GERMAN DEALERS OR CONSUMERS .

345 AS THE COMMISSION ITSELF STATED (DECISION P . 20, FIRST PARAGRAPH OF RECITAL 9) 'IN GERMANY THE SUPPLY OF AND DEMAND FOR SUGAR ARE, ON THE WHOLE, IN BALANCE' AND, SINCE THE IMPORT REQUIREMENTS OF SOUTH GERMANY - WHICH ARE LIMITED AS A RESULT OF THIS STATE OF

EQUILIBRIUM - SEEM TO HAVE BEEN MET BY OTHER FOREIGN PRODUCERS, IT IS NOT NECESSARILY A MATTER FOR COMMENT THAT A PARTICULAR FRENCH PRODUCER KEPT OUT OF THE MARKET OF SOUTH GERMANY .

346 (C) WITH REGARD TO THE DELIVERIES OF RAW SUGAR BY BEGHIN TO SZAG AND FRANKEN THE COMMISSION WAS UNABLE TO REFUTE BEGHIN'S ARGUMENT THAT IT WOULD HAVE BEEN UNECONOMIC TO REFINER THE RAW SUGAR MANUFACTURED AT THE FACTORIES AT SILLERY, WHICH HAVE NO REFINING PLANT, AT THUMERIES AND THEN DISPATCH THE WHITE SUGAR PRODUCED BY THE REFINING PROCESS TO SOUTH GERMANY .

347 MOREOVER IT IS NOT DENIED THAT DURING THE TWO MARKETING YEARS IN QUESTION BEGHIN SUPPLIED 75 PER CENT AND 74 PER CENT RESPECTIVELY OF THE PRODUCTION OF ITS SILLERY FACTORY TO REFINERS IN FRANCE, ITALY OR THIRD COUNTRIES AND THAT IT HAS NOT BEEN ALLEGED THAT THESE DELIVERIES, WITH THE EXCEPTION OF THE 4 PER CENT OF THE 1971/72 PRODUCTION SOLD IN ITALY, ALSO STEMMED FROM A CONCERTED ACTION DESIGNED TO PROTECT THE BUYERS' MARKET .

348 ON THE OTHER HAND, SO FAR AS THE INTERESTS OF SZAG ARE CONCERNED, IT IS NOT DENIED THAT THE PURCHASES IN ISSUE FOLLOWED A WELL ESTABLISHED PRACTICE, AS THE PREVIOUS PURCHASES FROM OTHER PRODUCERS WERE EVEN LARGER THAN THOSE FROM FRENCH PRODUCERS .

349 NOR IS IT DENIED THAT SZAG FOUND THAT THE PRICE IT PAID TO BEGHIN WAS FAVOURABLE, WHEREAS THE OPPOSITE SHOULD HAVE BEEN EXPECTED IF THE OBJECT OF THE CONTESTED DELIVERIES HAD BEEN TO PROTECT THE MARKET IN SOUTH GERMANY .

350 MOREOVER IN THIS CASE THE STATEMENT IN THE DECISION THAT 'NORMALLY' IT IS NOT IN THE INTEREST OF A PRODUCER TO SELL TO A COMPETITOR, SINCE HE COULD OBTAIN A MORE FAVOURABLE PRICE IF HE SUPPLIED DEALERS AND CONSUMERS DIRECT, CAN BE PARTLY TURNED AGAINST THE AUTHOR, SINCE IT SUGGESTS, OR AT LEAST DOES NOT DENY,

THAT IN THE NATURE OF THINGS IT MAY VERY WELL BE IN THE INTEREST OF THE PRODUCER-PURCHASER HIMSELF TO MAKE ADDITIONAL PURCHASES .

351 IN FACT LARGE FLUCTUATIONS OF THE HARVEST YIELDS, WHICH MAY FORCE A PRODUCER TO HAVE RECOURSE TO THE PRODUCTION OF ONE OF HIS COUNTERPARTS IN ORDER TO BE ABLE TO PERFORM HIS OBLIGATIONS UNDER LONG TERM SUPPLY CONTRACTS WITH HIS CUSTOMERS, ARE PECULIAR TO THE SUGAR MARKET .

352 (D) IN ADDITION THE COMMISSION SUBMITS THAT IN CONSIDERATION FOR BEGHIN'S CONDUCT SZAG AND FRANKEN REFRAINED FROM SUPPLYING SUGAR TO THE SAAR WHICH TRADITIONALLY FORMED PART OF THE AREA IN WHICH FRENCH PRODUCERS OPERATED .

353 HOWEVER ATTENTION MUST BE DRAWN TO THE FACT THAT BEGHIN STATED THAT IT NEVER SUPPLIED SUGAR TO THIS REGION DURING THE PERIOD IN QUESTION WITHOUT BEING CONTRADICTED BY THE COMMISSION .

354 HAVING REGARD TO ALL THESE CIRCUMSTANCES IT CANNOT BE RULED OUT THAT BEGHIN'S DELIVERIES TO SZAG AND FRANKEN AND BEGHIN'S FAILURE TO EFFECT OTHER DELIVERIES TO SOUTH GERMANY ARE NOT THE CONSEQUENCE OF A CONCERTED ACTION AND MAY BE EXPLAINED IN A DIFFERENT WAY .

B - SUCRE-UNION'S DELIVERIES

355 (A) SINCE SUCRE-UNION DID NOT SUPPLY SZAG AND FRANKEN WITH RAW SUGAR, THE QUESTION ARISES WHETHER THE PATTERN OF ITS DELIVERIES OF WHITE SUGAR IN SOUTH GERMANY CONSTITUTES SUFFICIENTLY STRONG EVIDENCE TO ENABLE THE CONCLUSION TO BE DRAWN THAT THE ALLEGED CONCERTED ACTION EXISTED SO FAR AS THE THREE BEFOREMENTIONED UNDERTAKINGS ARE CONCERNED .

356 AS HAS BEEN EXPLAINED ABOVE THERE ARE GROUNDS FOR THE ASSUMPTION THAT THE AMOUNTS SUPPLIED BY THE FRENCH COMPANY TO GERMAN NON-PRODUCERS WERE OF APPROXIMATELY THE SAME VOLUME AS THOSE DELIVERED TO SZAG AND FRANKEN .

357 THIS FACT IS LIKELY TO RAISE DOUBTS AS TO THE EXISTENCE OF A CONCERTED ACTION BETWEEN THE UNDERTAKINGS CONCERNED AND IN ANY CASE OF A CONCERTED ACTION WHICH WAS IN FACT IMPLEMENTED .

358 FURTHER, CERTAIN CONSIDERATIONS MENTIONED IN CONNEXION WITH BEGHIN'S DELIVERIES ALSO APPLY IN THIS CONTEXT, IN PARTICULAR THE FACT THAT THE COMMISSION HAS BEEN UNABLE TO MENTION A SINGLE INSTANCE OF A REFUSAL BY SUCRE-UNION TO SELL TO A GERMAN NON-PRODUCER, THE FACT THAT IT COULD BE IN THE INTERESTS OF SZAG AND FRANKEN, EVEN IF THEY ACTED INDEPENDENTLY, TO MAKE ADDITIONAL PURCHASES AND FINALLY THE CONCLUSIONS TO BE DRAWN FROM THE FACT THAT AS A RULE THE MARKET OF SOUTH GERMANY WAS IN EQUILIBRIUM .

359 (B) THERE STILL REMAINS FOR CONSIDERATION THE QUESTION WHETHER, NOTWITHSTANDING THESE FACTS, THE LETTER OF 29 SEPTEMBER 1971, WHICH IS SAID TO HAVE BEEN SENT TO SUCRE-UNION BY ITS GERMAN REPRESENTATIVE X, HAVING REGARD TO THE PATTERN OF SUCRE-UNION'S EXPORTS TO SOUTH GERMANY, CAN PROVE THAT THE INFRINGEMENT IN QUESTION WAS IN FACT COMMITTED .

360 WITH REGARD TO THE QUESTION WHETHER THERE EVER WAS SUCH A LETTER AND, IF SO, WHETHER ITS CONTENTS ARE TRUE, X'S STATEMENTS CONFLICT WITH THOSE OF SUCRE-UNION AND SZAG .

361 EVEN IF IT MUST BE ACKNOWLEDGED THAT SUCRE-UNION AND SZAG WERE ACTUATED BY THE WISH TO COOPERATE IN A WAY WHICH IS INCOMPATIBLE WITH ARTICLE 85 OF THE TREATY, IT IS HARDLY LIKELY THAT THIS COOPERATION WOULD HAVE TAKEN THE FORM OF CONDUCT AS UNUSUAL AS THAT MENTIONED IN THE SAID LETTER, WHICH, IN THE CONTEXT

OF THIS CASE, COULD HAVE MEANT THAT A PRODUCER MIGHT GIVE AN ACTUAL OR POTENTIAL COMPETITOR THE OPPORTUNITY OF ENTICING AWAY HIS CUSTOMERS OR PUNISH THEM BY ABOLISHING A LOYALTY REBATE AND THEREBY DESTROY THE FRUITS OF HIS PREVIOUS ENDEAVOURS AND RUN THE RISK OF LOSING HIS CUSTOMERS' CONFIDENCE .

362 FINALLY IT MUST NOT BE OVERLOOKED IN THIS CONNEXION THAT THE COMMISSION, DEPARTING FROM THE POSITION IT ADOPTED WITH REGARD TO BEGHIN AND SZAG, ACKNOWLEDGED THAT SUCRE-UNION PLAYED THE PART OF AN 'OUTSIDER' AND DID NOT FINE IT; IT IS DIFFICULT TO MAINTAIN THIS VIEW IF IT HAS TO BE CONCEDED THAT SUCRE-UNION DID IN FACT TAKE THE KIND OF STEPS MENTIONED IN THE LETTER IN QUESTION .

363 IN THESE CIRCUMSTANCES IT IS QUITE POSSIBLE THAT SUCRE-UNION'S DELIVERIES TO SZAG AND FRANKEN AND THE LIMITED VOLUME OF OTHER DELIVERIES BY SUCRE-UNION TO SOUTH GERMANY ARE NOT THE CONSEQUENCE OF A CONCERTED ACTION BUT CAN BE EXPLAINED IN A DIFFERENT WAY .

364 THE EFFECT OF ALL THESE CONSIDERATIONS IS THAT SUBPARAGRAPH 4 OF ARTICLE 1 (1) OF THE DECISION MUST BE ANNULLED .

CHAPTER 5

THE COMPLAINT THAT RT BROUGHT ECONOMIC PRESSURE TO BEAR ON BELGIAN EXPORTERS

365 SUBPARAGRAPH 1 OF ARTICLE 1 (2) OF THE CONTESTED DECISION BLAMES RT FOR HAVING 'FROM THE 1968/69 MARKETING YEAR ONWARDS COMMITTED AN INFRINGEMENT OF ARTICLE 86 BY BRINGING ECONOMIC PRESSURE TO BEAR ON BELGIAN EXPORTERS WITH THE OBJECT OF COMPELLING THEM TO RESTRICT THEIR EXPORTS ' .

I - SUMMARY OF THE RELEVANT STATEMENTS OF THE DECISION

366 THE COMMISSION TAKES THE VIEW THAT RT BROUGHT ECONOMIC PRESSURE TO BEAR ON THE BELGIAN DEALERS EXPORT AND HOTTLET, HEREINAFTER CALLED 'THE DEALERS', WITH THE OBJECT OF COMPELLING THEM ONLY TO RESELL THE SUGAR SUPPLIED TO THEM TO SPECIFIC CUSTOMERS OR DESTINATIONS AND TO IMPOSE THESE RESTRICTIONS ON THEIR OWN CUSTOMERS .

367 THIS PRESSURE CONSISTED 'IN REFUSING TO SELL SUGAR TO THESE TWO DEALERS, IN PARTICULAR FOR EXPORTING TO THIRD COUNTRIES - AND SUCH SALES REPRESENT A LARGE PROPORTION OF THEIR TURNOVER - IF THIS SUGAR IS RESOLD FOR THE PURPOSES WHICH IT (RT) HAS NOT AUTHORIZED '.

368 RT OCCUPIES A DOMINANT POSITION ON THE BELGO-LUXEMBOURG SUGAR MARKET WHICH IS A SUBSTANTIAL PART OF THE COMMON MARKET .

II - EXAMINATION OF THE SUBMISSION

369 RT'S MAIN SUBMISSION IS THAT THE BELGO-LUXEMBOURG MARKET IS NOT A SUBSTANTIAL PART OF THE COMMON MARKET, THAT IT DOES NOT OCCUPY A DOMINANT POSITION ON THIS MARKET AND HAS NOT ABUSED ITS POSITION, SO THAT THE COMMISSION INFRINGED ARTICLE 86 OF THE TREATY WHEN IT APPLIED THIS PROVISION TO ITS CONDUCT .

1 . THE QUESTION WHETHER THE BELGO-LUXEMBOURG MARKET IS A SUBSTANTIAL PART OF THE COMMON MARKET .

370 RT CONSIDERS THAT IN VIEW OF THE RELATIVELY SMALL VOLUME OF BELGIAN PRODUCTION AND THE NUMBER OF CONSUMERS IN BELGIUM AND LUXEMBOURG THIS QUESTION MUST BE ANSWERED IN THE NEGATIVE .

371 FOR THE PURPOSE OF DETERMINING WHETHER A SPECIFIC TERRITORY IS LARGE ENOUGH TO AMOUNT TO 'A SUBSTANTIAL PART OF THE COMMON MARKET' WITHIN THE MEANING OF ARTICLE 86 OF THE TREATY THE PATTERN

AND VOLUME OF THE PRODUCTION AND CONSUMPTION OF THE SAID PRODUCT AS WELL AS THE HABITS AND ECONOMIC OPPORTUNITIES OF VENDORS AND PURCHASERS MUST BE CONSIDERED .

372 SO FAR AS SUGAR IN PARTICULAR IS CONCERNED IT IS ADVISABLE TO TAKE INTO CONSIDERATION IN ADDITION TO THE HIGH FREIGHT RATES IN RELATION TO THE PRICE OF THE PRODUCT AND THE HABITS OF THE PROCESSING INDUSTRIES AND CONSUMERS THE FACT THAT COMMUNITY RULES HAVE CONSOLIDATED MOST OF THE SPECIAL FEATURES OF THE FORMER NATIONAL MARKETS .

373 FROM 1968/69 TO 1971/72 BELGIAN PRODUCTION AND TOTAL COMMUNITY PRODUCTION INCREASED RESPECTIVELY FROM 530 000 TO 770 000 METRIC TONS AND FROM 6 800 000 TO 8 100 000 METRIC TONS (CF . CONTESTED DECISION, P . 18, PARAGRAPHS NOS 3 AND 5).

374 DURING THESE MARKETING YEARS BELGIAN CONSUMPTION WAS APPROXIMATELY 350 000 METRIC TONS WHEREAS COMMUNITY CONSUMPTION INCREASED FROM 5 900 000 TO 6 500 000 METRIC TONS (CF . LOC . CIT .).

375 IF THE OTHER CRITERIA MENTIONED ABOVE ARE TAKEN INTO ACCOUNT THESE MARKET SHARES ARE SUFFICIENTLY LARGE FOR THE AREA COVERED BY BELGIUM AND LUXEMBOURG TO BE CONSIDERED, SO FAR AS SUGAR IS CONCERNED, AS A SUBSTANTIAL PART OF THE COMMON MARKET IN THIS PRODUCT .

2 . THE QUESTION WHETHER RT OCCUPIES A DOMINANT POSITION ON THE BELGO-LUXEMBOURG SUGAR MARKET

376 ACCORDING TO ITS OWN STATEMENTS RT ACCOUNTS FOR 65 PER CENT OF BELGIAN PRODUCTION .

377 THE COMMISSION SUBMITS THAT IN FACT THE CORRECT FIGURE IS 85 PER CENT, SINCE THE PRODUCTION OF THE FIRMS SUIKERFABRIEKEN VAN

VLAANDEREN AT MOERBEKE-WAAS, AND RAFFINERIE NOTRE-DAME AT OREYE - HEREINAFTER CALLED RESPECTIVELY 'MOERBEKE-WAAS' AND 'OREYE' -, HAVING REGARD TO THE PERSONAL OR FINANCIAL LINKS BETWEEN RT AND EACH OF THEM AS WELL AS THE FACT THAT THEY ADOPTED THE SALES POLICY FIXED BY RT, MUST BE ATTRIBUTED TO RT .

378 RT OWNS AT LEAST 50 PER CENT OF THE CAPITAL OF MOERBEKE-WAAS AND OREYE, FIVE OF THE PERSONS WHO MANAGE RT ARE ON THE BOARD OF DIRECTORS OF MOERBEKE-WAAS, ONE OF THE DIRECTORS OF THE LATTER COMPANY IS ON RT'S BOARD OF DIRECTORS AND FINALLY, AND THIS IS OF SPECIAL IMPORTANCE, THE VARIOUS DOCUMENTS PRODUCED FOR THE COURT'S FILE SHOW THAT THESE TWO FIRMS ADOPTED, IF NOT REGULARLY AT LEAST FREQUENTLY, THE RESTRICTIVE SALES POLICY IMPLEMENTED BY RT ON THE MARKETS OF THE NETHERLANDS AND WEST GERMANY .

379 SINCE THEREFORE THE PRODUCTION OF MOERBEKE-WAAS AND OREYE CAN BE ATTRIBUTED TO RT, IT CAN BE ASSUMED IN THIS CONTEXT THAT RT ACCOUNTED IN PRACTICE FOR 85 PER CENT OF BELGIAN PRODUCTION .

380 THIS FIGURE, WHICH IS IN ITSELF HIGHLY SIGNIFICANT, MUST BE EVALUATED IN THE LIGHT OF THE NEGLIGIBLE VOLUME OF SUGAR IMPORTS INTO BELGIUM .

381 IN THESE CIRCUMSTANCES RT WAS ABLE TO IMPEDE EFFECTIVE COMPETITION ON THE MARKET IN QUESTION .

382 CONSEQUENTLY DURING THE PERIOD WHICH HAS TO BE CONSIDERED IT OCCUPIED A DOMINANT POSITION ON THIS MARKET .

3 . THE QUESTION WHETHER THERE WAS AN ABUSE OF THE DOMINANT POSITION

A - THE EVIDENCE

383 (A) IN ORDER TO SHOW THAT RT HAS IN FACT COMMITTED THE INFRINGEMENT FOR WHICH IT IS BLAMED THE COMMISSION RELIES FIRST OF ALL ON A SERIES OF DOCUMENTS WHICH IT PRODUCED AT THE SAME TIME TO PROVE THAT THERE WERE CONCERTED PRACTICES DESIGNED TO PROTECT THE NETHERLANDS OR THE WEST GERMAN MARKET AND WHICH HAVE BEEN MENTIONED ABOVE (CHAPTERS 2 AND 3).

384 IN ADDITION THE COMMISSION REFERS TO FIFTEEN PURCHASE CONTRACTS ENTERED INTO BETWEEN RT AND HOTTLET BETWEEN 8 OCTOBER 1968 AND 7 JANUARY 1972, TO A LETTER FROM RT TO HOTTLET OF 19 MARCH 1969 AND TO SEVERAL OF EXPORT'S INTERNAL MEMORANDA DRAWN UP BETWEEN FEBRUARY AND MAY 1970 (ANNEXES I 41, 78, 131 TO THE STATEMENTS OF DEFENCE; ANNEX II 17, 18 TO THE STATEMENT OF DEFENCE IN CASE 47/73; ANNEX 3 TO THE REJOINDER IN THE SAME CASE).

385 THE FINDINGS IN CHAPTERS 2 AND 3 SHOW THAT RT SUCCEEDED IN MAKING DEALERS ABIDE BY ITS SALES POLICY WHICH WAS TO CHANNEL TO SPECIFIC CONSIGNEES OR DESTINATIONS THE EXPORTS OF WHITE SUGAR TO THE NETHERLANDS AND THE WESTERN PART OF THE FEDERAL REPUBLIC OF GERMANY .

386 IN THE COMMISSION'S VIEW RT ALSO BROUGHT THE ECONOMIC PRESSURE REFERRED TO IN THE DECISION TO BEAR ON DEALERS TO PROCURE THEIR COMPLIANCE WITH THE PRACTICES ALLEGED TO HAVE BEEN CONCERTED BETWEEN THE BELGIAN COMPANY AND CERTAIN FRENCH PRODUCERS RELATING TO THE INVITATIONS TO TENDER FOR REFUNDS ON EXPORTS TO THIRD COUNTRIES WHICH ARE THE SUBJECT-MATTER OF THE COMPLAINT DEALT WITH IN CHAPTER 9 .

387 (B) IT EMERGES FROM LETTERS BETWEEN RT AND HOTTLET EXCHANGED BETWEEN 20 OCTOBER 1968 AND 16 DECEMBER 1969 (ANNEX 3 TO THE REJOINDER IN CASE 47/73) THAT :

- HOTTLET PURCHASED A SPECIFIC AMOUNT OF SUGAR FROM RT AND RESOLD IT TO A GERMAN CUSTOMER AND IT WAS A TERM OF THE RESPECTIVE PURCHASE CONTRACT AND CONTRACT FOR RESALE INSERTED AT RT'S REQUEST THAT THE SUGAR SHOULD ONLY BE USED FOR DENATURING;

- SUBSEQUENTLY HOTTLET ASKED RT TO RELEASE THE SAID CUSTOMER AND ITSELF FROM THIS OBLIGATION WHICH COULD NO LONGER BE COMPLIED WITH BECAUSE THE DENATURING PREMIUM HAD BEEN ABOLISHED;

RT NEVERTHELESS INSISTED ON ABSOLUTE PERFORMANCE OF THE CLAUSE IN QUESTION AND IN THE END REQUIRED HOTTLET TO PAY BFRS 1 250 000 BY WAY OF DAMAGES, BECAUSE HOTTLET, AS A RESULT OF THE EVENTS WHICH HAVE JUST BEEN DESCRIBED, DID NOT TAKE DELIVERY WITHIN THE PRESCRIBED TIME OF 2 500 METRIC TONS OF THE AMOUNT COVERED BY THE BEFORE MENTIONED CONTRACTS .

388 AN INTERNAL MEMORANDUM OF EXPORT 'ON THE OPPORTUNITIES FOR COOPERATING WITH RT' OF 23 APRIL 1970 (ANNEX I 75 TO THE STATEMENTS OF DEFENCE) AFTER COMPLAINING THAT 'THE REFINERS' POLICY' DOES NOT PERMIT EXPORT TO SUPPLY THE FRONTIER REGIONS OF THE NETHERLANDS, FRANCE AND GERMANY ENDS AS FOLLOWS : 'IT IS DOUBTFUL WHETHER WE CAN GET A QUOTA, BECAUSE RT WILL NOT WISH TO UNDERWRITE A POLICY RUNNING COUNTER TO THE AGREEMENTS WHICH IT HAS ENTERED INTO WITH OTHER REFINERS ' .

389 ANOTHER INTERNAL MEMORANDUM OF EXPORT RELATING TO A DISCUSSION WHICH ITS REPRESENTATIVES HAD ON 17 FEBRUARY 1970 WITH MR MAISIN OF RT (ANNEX I 78 TO THE STATEMENTS OF DEFENCE) READS AS FOLLOWS :

'RAFFINERIE TIRLEMONTTOISE PLANS TO EXPORT ABOUT 9 000 METRIC TONS OF RAW SUGAR WHICH WILL BE DELIVERED TO TATE . RT SUGGESTS THAT EXPORT ACTS IN THIS OPERATION AS BROKER . IF EXPORT DOES SO IT SHOULD ABIDE BY THE COMMON POLICY LAID DOWN FOR INVITATIONS TO TENDER .

WHEN INVITED TO CLARIFY THIS LAST POINT MR MAISIN ADMITS THAT THIS COMMITMENT ALSO COVERS INVITATIONS TO TENDER FOR THE EXPORT OF WHITE SUGAR . WE THEN REPLY THAT OUR ATTITUDE ON THIS POINT HAS NOT ALTERED SINCE LAST WEEK BUT FOR ALL THAT IS NEITHER FIXED NOR UNCHANGING .

MR MAISIN THEN REFERS TO THE LETTERS EXCHANGED BETWEEN BARON KRONACKER AND MR ROLIN AND DRAWS OUR ATTENTION TO THE FACT THAT IF A NEW "CLIMATE" HAS TO BE CREATED THIS CAN ONLY BE DONE BY PROGRESSIVE STAGES ...'.

CONCLUSION

'RAFFINERIE TIRLEMONTTOISE PROPOSES THAT WE SHOULD ACT AS BROKER IN ITS INTENDED (OR AGREED) SALE OF 9 000 METRIC TONS OF RAW SUGAR TO TATE AND LYLE .

AS CONSIDERATION IT REQUESTS US TO GIVE UP OUR FREEDOM TO ATTEND THE INVITATIONS TO TENDER FOR EXPORTS OF RAW AS WELL AS WHITE SUGAR .

IT IS IMPLIED THAT RAFFINERIE TIRLEMONTTOISE REFUSES TO OFFER US RAW SUGAR WHICH WE ARE FREE TO SELL WHEREVER WE LIKE ' .

390 ON THE SAME DATE EXPORT'S MANAGING BOARD MADE A DECISION CONCERNING THE SAME QUESTIONS (ANNEX II 17 TO THE STATEMENT OF DEFENCE IN CASE 47/73) WHICH INTER ALIA STATES 'WE AGREE IN A CONCILIATORY SPIRIT AND AS AN INDICATION THAT WE WISH TO BE COOPERATIVE NOT TO TENDER FOR A REFUND ON RAW SUGAR AT THE STANDING EEC INVITATIONS TO TENDER WHICH WILL TAKE PLACE ONCE A WEEK ON AND AFTER WEDNESDAY 18 FEBRUARY, SO THAT SUCH APPLICATIONS FOR REFUNDS DO NOT COMPETE WITH THE APPLICATIONS OF FRANCO-BELGIAN REFINERS AND IN PARTICULAR OF RAFFINERIE

TIRLEMONTISE . (IT MUST BE NOTED THAT THIS WAS A PURELY FORMAL GESTURE BECAUSE, UNLESS EXPORT'S SUPPLIES OF RAW SUGAR WERE GUARANTEED BY TIRLEMONT, THE ONLY POSSIBLE BELGIAN UNDERTAKING, IT COULD NOT REASONABLY BE EXPECTED TO TENDER AT THE INVITATION TO TENDER FOR RAW SUGAR : THE RISK BEING THAT IF IT WAS A SUCCESSFUL TENDERER IT WOULD BE UNABLE IN PRACTICE TO COVER ITS POSITION)'.

391 BARON KRONACKER, CHAIRMAN OF EXPORT, IN A MEMORANDUM OF 26 MARCH 1970 (ANNEX II 18 TO THE STATEMENT OF DEFENCE IN CASE 47/73) WROTE AS FOLLOWS : 'IT IS MY WISH THAT WE KEEP IN STEP WITH TIRLEMONT . IF WE DO SO, WE SACRIFICE OUR PRINCIPALS, WE AGREE TO REDUCE THE AMOUNTS IN RESPECT OF WHICH WE ATTEND THE INVITATION TO TENDER FOR EXPORT AND, ALTHOUGH WE HAVE NO SAY IN THE MATTER, WE AGREE TO ADOPT THE PRICES OF THE PARIS CONSORTIUM . THIS OF NECESSITY IMPLIES THAT TIRLEMONT ONLY TAKES PART IN THE INVITATIONS TO TENDER THROUGH US ... AS COMPENSATION FOR OUR SACRIFICES WE MUST BE GRANTED A COMMISSION OF THREE QUARTER PER CENT ON ALL TRANSACTIONS '.

392 A MEMORANDUM OF EXPORT 'ON MR ROLIN'S ORAL REPLY ON 21 MAY 1970 TO BARON KRONACKER'S WRITTEN PROPOSAL OF 20 MAY CONCERNING RELATIONS BETWEEN EXPORT AND RT FOR THE 1970/71 MARKETING YEAR' (ANNEX I 131 TO THE STATEMENTS OF DEFENCE) STATES THAT : 'IN ADDITION MR ROLIN STILL RESTRICTS OUR FREEDOM OF ACTION AND OUR OPPORTUNITIES FOR APPLYING FOR REFUNDS, SUCH APPLICATION, ACCORDING TO HIM, SHOULD BE MADE AFTER THEIR AMOUNT AND LEVEL HAVE BEEN COORDINATED WITH MR BERNARD, CHAIRMAN AND MANAGING DIRECTOR OF SAY WITHIN THE FRAMEWORK OF THE CONCERTED ACTION AGREED IN PARIS (SAY, BEGHIN, VARSANO, SUCRE-UNION ETC .)'.

393 TWO TELEX MESSAGES OF 19 AUGUST 1970 EXCHANGED BETWEEN EXPORT AND RT (ANNEXES I 81, 82 TO THE STATEMENTS OF DEFENCE) STATE :

EXPORT'S TELEX MESSAGE :

'1 . HOLLAND : ON THE BASIS OF THE NETHERLANDS' DEMAND FOR IMPORTS OF EEC SUGAR WE AGREE THE PRINCIPLE MENTIONED AT LUNCH THE DAY BEFORE YESTERDAY : TO CARRY ON BUSINESS IN ACCORDANCE WITH YOUR PLAN, THAT IS TO SAY DELIVERIES BETWEEN SUGAR PRODUCERS THROUGH THE LONG ESTABLISHED BELGO-NETHERLANDS TRADING ORGANIZATIONS ON TERMS SATISFACTORY FOR EXPORT . IN ORDER TO GIVE EFFECT TO YOUR PROPOSAL WE ARE GETTING IN TOUCH WITH NETHERLANDS BUSINESS HOUSES ABOUT THESE QUESTIONS AND TECHNICAL PROBLEMS ' .

RT'S TELEX MESSAGE IN REPLY :

'FOLLOWING YOUR TELEX MESSAGE 16.06 HOURS OF WHICH I WAS ABLE TO INFORM MR ROLIN BY TELEPHONE, THE LATTER ASKED ME TO LET YOU KNOW THAT HE IS VERY PLEASED INDEED TO TAKE NOTE OF YOUR AGREEMENT WITH THE PRINCIPLE UNDER POINT 1 .

CONSEQUENTLY WE ARE MAKING SUGAR AVAILABLE TO YOU FOR THE NETHERLANDS CONDENSED MILK INDUSTRY TO BE DEALT WITH THROUGH LONG ESTABLISHED TRADING ORGANIZATIONS ...

ON THE OTHER HAND, IF THE NETHERLANDS SUGAR INDUSTRY WERE TO ASK US TO SUPPLY ITS OWN REQUIREMENTS, ANY BELGIAN SUGAR WHICH MIGHT BE EXPORTED WOULD BE HANDLED WITH THE HELP OF OUR BUSINESS HOUSES

.

IT FOLLOWS FROM THE BEFOREMENTIONED STIPULATIONS THAT YOU WILL REFRAIN FROM TAKING ANY KIND OF INITIATIVE ON THE NETHERLANDS MARKET SO THAT ITS PATTERN IS NOT DISTURBED ' .

394 TWO TELEX MESSAGES OF 20 AUGUST 1970 EXCHANGED IN SIMILAR CIRCUMSTANCES (ANNEXES I 83, 84 TO THE STATEMENT OF DEFENCE) READ AS FOLLOWS :

EXPORT'S TELEX MESSAGE :

'EXPORT RECORDS ITS AGREEMENT TO JOIN RT AS A MANUFACTURER OF BELGIAN SUGAR IN WORKING OUT AN AGREEMENT WITH SUIKER UNIE AND CENTRALE SUIKER MAATSCHAPPIJ AS MANUFACTURERS OF NETHERLANDS SUGAR FOR THE 1970/71 SUGAR MARKETING YEARS UPON THE FOLLOWING TERMS :

1 . EXPORT GIVES UP DEALING IN BELGIAN SUGAR WITH NETHERLANDS PURCHASER-CONSUMERS IN CONNEXION WITH WHAT WE CALL THE PARTICULAR REQUIREMENTS IN THE NETHERLANDS, THAT IS TO SAY, ON THE ONE HAND, FOR SUGAR IN ITS ORIGINAL STATE FOR HUMAN CONSUMPTION, AND, ON THE OTHER HAND, FOR SUGAR FOR FACTORIES MANUFACTURING SWEETS TO BE CONSUMED IN THE NETHERLANDS, THE OTHER EEC COUNTRIES AND THIRD COUNTRIES . THIS SWEET MANUFACTURING INDUSTRY DOES NOT INCLUDE THE MILK PROCESSING INDUSTRY .

THE DENATURING TRADE AND THE CHEMICAL INDUSTRY ARE ALSO EXCLUDED FROM THE TRADE WHICH EXPORT HAS GIVEN UP .

GROUNDS CONTINUED UNDER DOC.NUM : 673J0040.3

2 . GIVING UP THIS TRADE BY EXPORT IS LINKED ... SO FAR AS THE NETHERLANDS' IMPORT REQUIREMENTS OF EEC SUGAR ARE CONCERNED ..., WITH THE CONDITION THAT THE DELIVERIES TO BE CARRIED OUT BETWEEN BELGIAN AND NETHERLANDS SUGAR MANUFACTURERS IN ORDER TO SUPPLY THIS NETHERLANDS MARKET SHALL BE EFFECTED THROUGH THE LONG ESTABLISHED BELGIAN AND NETHERLANDS TRADE UPON TERMS WHICH ARE SATISFACTORY FOR EXPORT . THESE LAST WORDS MEAN THAT EXPORT'S RETURN ON THESE OPERATIONS MUST GIVE IT SATISFACTION, ON THE ONE HAND WITH REGARD TO ITS REMUNERATION PER UNIT OF SUGAR IN THE FORM OF COMMISSION OR COMMERCIAL PARTICIPATION IN THE FORM OF A MARGIN, AND, ON THE OTHER HAND, WITH REGARD TO THE AMOUNT OF SUGAR SUPPLIED BY THE BELGIAN SUGAR MANUFACTURERS, WHICH WILL BE SOLD

TO THE NETHERLANDS SUGAR MANUFACTURERS ON THE BASIS OF THE NETHERLANDS' IMPORT REQUIREMENTS OF EEC SUGAR '.

RT'S REPLY :

'IT IS CLEAR FROM YOUR TELEX MESSAGE ... THAT WE ARE IN COMPLETE AGREEMENT ON THE METHOD TO ADOPT FOR DEALING IN BELGIAN SUGAR ON THE NETHERLANDS MARKET' ... 'WE DO NOT INTEND TO DO ANYTHING IN CONNEXION WITH CONSUMPTION IN THE NETHERLANDS WHICH IS NOT APPROVED BY OUR NETHERLANDS COLLEAGUES '.

395 EXPORT, IN A CONFIRMATION OF SALE OF 1 OCTOBER 1970 ADDRESSED TO THE NETHERLANDS DEALER JACOBSON (ANNEX I 88 TO THE STATEMENTS OF DEFENCE), FIRST STATED THAT RT 'HAS GIVEN THE EXCLUSIVE RIGHT, FOR THE 1970/71 MARKETING YEAR, TO SELL ITS GRANULATED SUGAR FOR EXPORT FROM BELGIUM TO THE LONG ESTABLISHED BELGIAN SUGAR TRADERS' - NAMELY EXPORT AND HOTTLET - THEN EMPHASIZED 'THE ESSENTIAL REQUIREMENTS OF RT'S GENERAL COMMERCIAL POLICY WHICH HAVE BEEN DEFINED FOR US, NAMELY THAT IT DOES NOT INTEND TO UNDERTAKE ANY BUSINESS FOR THE NETHERLANDS WHICH IS NOT APPROVED BY ... SU AND CSM' WENT ON AS FOLLOWS : 'WE CONSIDER ... THAT WE MUST DRAW YOUR ATTENTION EXPRESSLY TO THIS COMMERCIAL POLICY OF OUR PRINCIPAL SUPPLIERS, THE TIRLEMONT GROUP, SINCE IT CANNOT APPROVE ANY TRANSACTION IN BELGIAN SUGAR FALLING OUTSIDE THIS POLICY AND THE CONSEQUENCE OF ANY SUCH TRANSACTION IS THAT WE LOSE THE EXCLUSIVE RIGHTS IN QUESTION ... ABOVE '.

B - THE EVALUATION OF THE EVIDENCE

396 IT APPEARS TO BE QUITE CLEAR FROM THE DOCUMENTS MENTIONED, IF THEY ARE EVALUATED TOGETHER WITH THE FACTORS SET OUT IN CHAPTERS 2 AND 3, THAT RT EITHER EXPRESSLY OR IMPLIEDLY TOLD THE DEALERS, OR DELIBERATELY CREATED IN THEIR MINDS THE IMPRESSION, THAT IT WOULD NOT SUPPLY THEM WITH SUGAR OR WOULD NOT SUPPLY THEM WITH ALL THE

QUANTITIES FOR WHICH THEY APPLIED, UNLESS THEY COMPLIED WITH ITS RESTRICTIVE EXPORT POLICY AS APPLIED TO THE NETHERLANDS OR WEST GERMAN MARKETS OR DELIVERIES TO THIRD COUNTRIES .

397 THE WORDS USED IN SOME OF ITS STATEMENTS ARE INDEED SO PEREMPTORY THAT THEY CALL TO MIND INSTRUCTIONS TO A TRADE REPRESENTATIVE RATHER THAN NEGOTIATIONS ON A FOOTING OF EQUALITY BETWEEN A PRODUCER AND AN INDEPENDENT DEALER .

398 BY COMPELLING DEALERS TO CHANNEL THEIR EXPORTS TO SPECIFIC CONSIGNEES OR DESTINATIONS AND TO IMPOSE THESE RESTRICTIONS ON THEIR OWN CUSTOMERS RT HAS RESTRICTED THE OUTLETS OF THE DEALERS AND INDIRECTLY OF THEIR PURCHASERS, WHICH IS A PRACTICE EXPRESSLY MENTIONED BY ARTICLE 86 (B).

399 ALTHOUGH THE INCORPORATION OF A DENATURING CLAUSE IN A CONTRACT FOR THE SALE OF SUGAR DOES NOT NECESSARILY AMOUNT TO AN ABUSE, THE EXTREMELY HARD HEARTED WAY IN WHICH RT REFUSED TO MAKE ALLOWANCE FOR THE UNFORESEEABLE DIFFICULTIES ENCOUNTERED BY HOTTLET AND THE LATTER'S GERMAN CUSTOMER AT A LATER DATE IN DESPATCHING SUGAR TO THE DESTINATION LAID DOWN BY RT PROVES IN THE CONTEXT OF THIS CASE TO BE AN INTEGRAL PART OF THE POLICY CARRIED OUT BY RT OF BRINGING ECONOMIC PRESSURE TO BEAR ON DEALERS .

400 THERE ARE THEREFORE GROUNDS FOR FINDING THAT RT ABUSED ITS DOMINANT POSITION ON THE BELGO-LUXEMBOURG MARKET .

401 THIS ABUSE WAS CAPABLE OF AFFECTING TRADE BETWEEN MEMBER STATES TO THE EXTENT TO WHICH IT HAD AN EFFECT ON THE PATTERN OF THE DELIVERIES WHICH RT ALLOWED DEALERS TO UNDERTAKE OR PROHIBITED THEM FROM UNDERTAKING IN THE NETHERLANDS AND IN THE WESTERN PART OF THE FEDERAL REPUBLIC OF GERMANY .

402 IN THESE CIRCUMSTANCES RT'S APPLICATION MUST BE DISMISSED TO THE EXTENT TO WHICH IT ASKS FOR THE ANNULMENT OF SUBPARAGRAPH 1 OF ARTICLE 1 (2) OF THE CONTESTED DECISION .

CHAPTER 6

THE COMPLAINT THAT SU AND CSM BROUGHT ECONOMIC PRESSURE TO BEAR ON NETHERLANDS IMPORTERS

403 SUBPARAGRAPH 2 OF ARTICLE 1 (2) OF THE CONTESTED DECISION BLAMES SU AND CSM FOR HAVING 'DURING THE 1969/70 MARKETING YEAR COMMITTED INFRINGEMENTS OF ARTICLE 86 BY BRINGING ECONOMIC PRESSURE TO BEAR ON NETHERLANDS IMPORTERS WITH THE OBJECT OF COMPELLING THEM TO RESTRICT THEIR IMPORTS ' .

404 SU AND CSM JOINTLY THREATENED THE NETHERLANDS DEALERS JACOBSON, DUDOK DE WIT AND INTERNATIO THAT THEY WOULD PREVENT THEM FROM CONTINUING TO IMPORT SUGAR FOR THE PURPOSE OF SUPPLYING THE NETHERLANDS MILK PROCESSING INDUSTRY UNLESS THEY GAVE THREE UNDERTAKINGS :

- NOT TO APPLY TOO COMPETITIVE A PRICE WHEN RESELLING FRENCH SUGAR TO NETHERLANDS THIRD PARTIES;

- TO RESELL, UNDER SPECIFIC CONDITIONS, PART OF THIS SUGAR TO TWO NETHERLANDS PRODUCERS;

- NOT TO EFFECT 'SUCH IMPORTS' - WHICH EXPRESSION MUST BE UNDERSTOOD AS MEANING IMPORTS INTENDED FOR SUPPLYING LONG ESTABLISHED NETHERLANDS CUSTOMERS OF SU AND CSM - WITHOUT THE LATTERS' CONSENT .

405 IT IS APPROPRIATE TO CONSIDER FIRST OF ALL WHETHER THE COMMISSION HAS PROVED THE STATEMENT IN ITS DECISION THAT SU AND

CSM THREATENED 'TO MAKE IT IMPOSSIBLE FOR THE DEALERS TO CARRY ON THEIR TRADITIONAL BUSINESS OF IMPORTING SUGAR UNDER TEMPORARY IMPORT ARRANGEMENTS FOR THE MILK PROCESSING INDUSTRY BY THEMSELVES SUPPLYING THIS INDUSTRY ON THE TERMS PREVAILING ON THE WORLD MARKET '.

406 IN FACT, IN THE ABSENCE OF SUCH EVIDENCE, THIS COMPLAINT WOULD BE UNFOUNDED SO THAT THERE WOULD BE NO NEED TO ASCERTAIN WHETHER IN FACT THE NETHERLANDS PRODUCERS, USING METHODS WHICH DO NOT FALL WITHIN ARTICLE 86, INDUCED THE DEALERS TO ADOPT THE COURSE OF CONDUCT ALLEGED BY THE COMMISSION .

407 THE COMMISSION'S MAIN EVIDENCE FOR THIS STATEMENT IS AN INTERNAL MEMORANDUM OF 8 JUNE 1970 DRAWN UP BY MR LEMAIRE, A DIRECTOR OF EXPORT, REPORTING A CONVERSATION WHICH THE LATTER HAD WITH MR DUDOK DE WIT, AT THAT TIME DIRECTOR OF THE FIRM HAVING THE SAME NAME (ANNEX I 133 TO THE STATEMENTS OF DEFENCE), WHICH INCLUDED THE FOLLOWING PASSAGES : 'THE NETHERLANDS SUGAR INDUSTRY (SUIKER UNIE AND CSM) THROUGH MR LINDEBOOM, SALES MANAGER OF SUIKER UNIE, APPROACHED THE LONG ESTABLISHED NETHERLANDS SUGAR TRADE (DUDOK DE WIT AND INTERNATIO AND JACOBSON) WITH THE OBJECT OF MAKING REPRESENTATIONS IN CONNEXION WITH TRANSACTIONS FOR IMPORTING FRENCH GRANULATED SUGAR CONCLUDED BY THESE BUSINESS HOUSES WITH SUCRE-UNION PARIS (THE TRADING COMPANY OF THE FRENCH SUGAR BEET COOPERATIVES) FOR THE 1969/70 MARKETING YEAR ... IN VIEW OF THE IMPORTANCE OF THESE TRANSACTIONS A SPECIFIC AGREEMENT WAS ENTERED INTO BETWEEN THE NETHERLANDS TRADE AND THE SUGAR MANUFACTURERS OF THIS COUNTRY UNDER WHICH ... THIS AGREEMENT ALSO PROVIDES THAT ... WHEN MR LINDEBOOM OF SUIKER UNIE HAD THIS DISCUSSION WITH THE NETHERLANDS IMPORT TRADE HE REQUESTED THAT IN FUTURE, FOR THE 1970/71 MARKETING YEAR, IT SHOULD REFRAIN FROM EFFECTING SIMILAR IMPORT TRANSACTIONS : IF IT DID NOT DO SO, HE WOULD MAKE IT IMPOSSIBLE FOR THEM TO CARRY ON THEIR TRADITIONAL BUSINESS OF IMPORTING SUGAR UNDER TEMPORARY ARRANGEMENTS BY HIMSELF

MEETING THE REQUIREMENTS OF THE PROCESSING INDUSTRY (MILK, ETC .)
ON THE TERMS PREVAILING ON THE WORLD MARKET ' .

408 WITH A VIEW TO CHECKING, INTER ALIA, WHETHER THIS THREAT WAS IN
FACT UTTERED THE COURT HEARD THE EVIDENCE OF MESSRS . LEMAIRE,
DUDOK DE WIT, SANDERS (AT THAT TIME THE AUTHORIZED REPRESENTATIVE
AND NOW DEPUTY DIRECTOR OF JACOBSON) AND LINDEBOOM .

409 THE WITNESS, MR LEMAIRE, CONFIRMED THAT THE MEMORANDUM
RECORDED ACCURATELY AND IN FULL THE TENOR OF HIS DISCUSSIONS WITH
MR DUDOK DE WIT .

410 WHEN HE WAS ASKED WHETHER THE 'AGREEMENT' ENTERED INTO
BETWEEN NETHERLANDS PRODUCERS AND THE DEALERS 'HAD BEEN
CONCLUDED UNDER SOME PRESSURE OR ... IN COMPLETE FREEDOM' THE
WITNESS REPLIED 'THAT THE AGREEMENT RELATED TO COMMERCIAL
RELATIONS, WHICH WERE UNCONNECTED WITH OUR DIRECT CONTACTS' AND
THAT IT WAS 'IMPOSSIBLE FOR HIM TO GIVE A DEFINITE REPLY ' .

411 WITH REGARD TO THE EVENTS LEADING UP TO THE RESALE OF PART OF
THE FRENCH SUGAR TO NETHERLANDS PRODUCERS THE WITNESSES MR
DUDOK DE WIT AND MR SANDERS STATED THAT THE DEALERS AGREED TO
BUY A LARGE AMOUNT OF SUGAR FROM THEIR FRENCH SUPPLIERS AND THAT
TO BEGIN WITH, BECAUSE OF THE FALL OF THE FRENCH FRANC, THE DEALERS
VIEWED THIS OPERATION IN A FAVOURABLE LIGHT .

412 HOWEVER, AFTER THE OFFICIAL DEVALUATION OF THE FRENCH FRANC,
THE DEALERS HAD TO PAY AN IMPORT LEVY WHICH WAS A HEAVY ADDITION
TO THE COST PRICE OF A LARGE AMOUNT OF THE SUGAR IN QUESTION AND
MADE IT DIFFICULT FOR THEM TO SELL THIS AMOUNT IN THE NETHERLANDS
WITHOUT INCURRING A LOSS .

413 AS TIME PRESSED THE DEALERS APPLIED TO THE NETHERLANDS
PRODUCERS WHICH WERE ALONE ABLE TO PURCHASE RELATIVELY LARGE

AMOUNTS AT SHORT NOTICE AND - ACCORDING TO THE EVIDENCE OF MR SANDERS - 'WERE SUCCESSFUL', A RESULT WITH WHICH THEY WERE 'VERY PLEASED'.

414 THEIR RESALE DID NOT BRING THE PRODUCERS OR THE DEALERS ANY FINANCIAL ADVANTAGE .

415 WITH REGARD TO THE QUESTION WHETHER SU AND CSM UTTERED THE THREAT IN RELATION TO THE DEALERS WHICH IS MENTIONED IN THE DECISION THE WITNESS MR DUDOK DE WIT REPLIED :

- 'THE WAY IN WHICH MR LEMAIRE DESCRIBES THE MATTER IS INCORRECT . THE ALLEGED INTENTION OF THE NETHERLANDS SUGAR INDUSTRY TO IMPORT ITSELF WAS ALSO NOT NEW AND, PARTICULARLY IN THIS CASE, WAS IMPLEMENTED BY PROGRESSIVE STAGES ... THAT CONSTITUTED IN ITSELF A THREAT BUT IT WAS NOT UTTERED ONLY AT THAT TIME . THIS THREAT WAS IN EXISTENCE BEFORE ... THE BASIS OF MR LEMAIRE'S AND MY OWN REASONING IS APPROXIMATELY THE SAME; THE ONLY DIFFERENCE IS THAT MR LEMAIRE'S MEMORANDUM GIVES THE FACTS AS HE SAW AND INTERPRETED THEM . BASICALLY IT IS HIS INTERPRETATION WHICH IS FAULTY ... IN FACT THERE WAS TALK OF INDUSTRY INCREASING ITS IMPORTS ... IT IS THE WORD "THREAT" TO WHICH I TAKE EXCEPTION . THE SITUATION WAS A THREAT TO TRADE BUT MR LINDEBOOM DID NOT SPECIFICALLY DESCRIBE IT IN TERMS OF A THREAT BY SAYING FOR EXAMPLE : IF YOU CONTINUE TO IMPORT I WILL MAKE IMPORTING IMPOSSIBLE ' .

- IF MR LEMAIRE HAD THE MISTAKEN IMPRESSION THAT THERE WAS COERCION BY THE PRODUCERS, IT WOULD BE 'VERY POSSIBLE' THAT THIS MISUNDERSTANDING WAS DUE TO THE FACT THAT THE WITNESS MR DUDOK DE WIT, WITH THE AIM OF NOT OFFENDING MR LEMAIRE BY TELLING HIM OPENLY THAT IT WAS NOT IN THE INTEREST OF THE DEALERS TO BUY BELGIAN SUGAR, DELIBERATELY EXPRESSED HIMSELF IN RATHER VAGUE TERMS .

416 ON THIS POINT THE WITNESS MR SANDERS SAID :

- 'MUCH MORE IS REQUIRED TO MAKE US FEEL THAT WE ARE THREATENED ' .

- HE FINDS THE STATEMENT IN MR LEMAIRE'S MEMORANDUM 'VERY SURPRISING', BECAUSE, 'IF MR LINDEBOOM MADE SUCH A REMARK, HE WOULD OBVIOUSLY HAVE INTENDED TO MAKE THE SUGAR COMING FROM THIRD COUNTRIES COMPETE WITH THE SUGAR HE PRODUCES HIMSELF . SUCH AN INTENTION SEEMS TO ME HARDLY ACCEPTABLE IN THE CASE OF A COOPERATIVE IN WHICH THE FARMERS ARE OWNERS OF SUGAR FACTORIES . IN THE SECOND PLACE I BELIEVE SUCH A DECLARATION OF INTENT TO BE HIGHLY UNLIKELY . IF THE SUGAR INDUSTRY BEGAN TO IMPORT FROM THIRD COUNTRIES, IT WOULD BEGIN TO COMPETE WITH NETHERLANDS DEALERS AND WE CLAIM TO BE BETTER PLACED THAN THE NETHERLANDS INDUSTRIALISTS TO DO BUSINESS ON THE WORLD MARKETS AND WE THEREFORE BELIEVE THAT, IF WE ARE CONFRONTED WITH THIS KIND OF COMPETITION, WE SHOULD BE MORE SUCCESSFUL THAN OUR COMPETITORS IN SELLING MORE CHEAPLY . AND I BELIEVE THAT MR LINDEBOOM IS ALSO AWARE OF THIS ' .

- 'IN THE HEAT OF A CONVERSATION CONCERNING THE CONCLUSION OF AN AGREEMENT ALLOWING US TO SELL PART OF OUR FRENCH SUGAR ... IT MAY HAVE BEEN SAID : 'IF YOU DO NOT DISCONTINUE THESE IMPORTS THEN WE SHALL TAKE THIS OR THAT STEP ' . WHETHER SUCH STEPS CAN HAVE ANY EFFECT IS ANOTHER MATTER . WE CAN SAY : IF YOU DO NOT STOP THIS PRACTICE WE WILL TAKE SUCH AND SUCH A STEP, BUT OBVIOUSLY IT MUST BE POSSIBLE TO DO SO . THE FOLLOWING YEAR WE IMPORTED BELGIAN SUGAR . IT IS RATHER DIFFICULT TO SAY 'WE SHALL IMPORT SUGAR FROM THIRD COUNTRIES' WHEN THE FOLLOWING YEAR NEW REGULATIONS ARE ADOPTED WHICH MAKE IT IMPOSSIBLE TO IMPORT SUGAR FROM THIRD COUNTRIES ' .

- 'THERE MAY HAVE BEEN SUCH A STATEMENT . I MUST SAY TO YOU THAT I AM NOT CERTAIN . IN ANY CASE SUCH A STATEMENT CARRIES LITTLE WEIGHT, BECAUSE, IF IT IS SAID THAT THE REQUIREMENTS OF THE PROCESSING INDUSTRY WILL BE MET ON THE TERMS PREVAILING ON THE WORLD MARKET,

THAT MEANS THAT BOTH PARTIES WILL MAKE PURCHASES ON WORLD MARKETS AND, AS THE DEALERS CAN BUY ON THESE MARKETS, THE LATTER IN ANY CASE CLAIM, PERHAPS WRONGLY, THAT THEY CAN DO THIS BETTER THAN THE INDUSTRY WHICH IS MORE GEARED TO MARKETING ITS SUGAR '.

417 IN CONNEXION WITH THE SAME POINT THE WITNESS MR LINDEBOOM STATED THAT :

- DURING A PERIOD WHICH BEGAN BEFORE 1961 AND ENDED IN 1967 HE WAS EMPLOYED BY INTERNATIO AND BECAME FRIENDLY WITH MR KOPMELS WHO WAS ATTACHED TO THE JACOBSON FIRM AND DIED SOME YEARS AGO .

- FOLLOWING THE IMPORT OF FRENCH SUGAR WHICH IS THE SUBJECT-MATTER OF THESE PROCEEDINGS HE HAD ONE DISCUSSION, WHICH MOREOVER WAS FRIENDLY, WITH MR KOPMELS ON THE IMPACT WHICH SUCH IMPORTS WOULD HAVE ON THE NETHERLANDS MARKET BUT HE NEVER HAD ANY DISCUSSION WITH MR DUDOK DE WIT AND MR SANDERS;

- DURING THE SAID DISCUSSION HE SAID TO MR KOPMELS THAT, OWING IN PARTICULAR TO THE CURRENCY SITUATION WHICH HAS LED TO DISTORTION OF COMPETITION, 'THE SITUATION IN THE SUGAR SECTOR IS BECOMING SO DIFFICULT THAT IT COULD VERY WELL ONE DAY BRING ABOUT A COLLAPSE OF DOMESTIC PRICES', WHICH WOULD CALL FOR 'SELF DISCIPLINE' ON THE PART OF BOTH PRODUCERS AND DEALERS OF THE NETHERLANDS;

- THESE PREOCCUPATIONS DID NOT HAVE A COMMERCIAL ORIGIN BUT WERE DUE TO THE FACT THAT SU, AS A COOPERATIVE FOR BEET GROWERS, CONSIDERED THAT IT WAS UNDER A DUTY TO ENSURE THAT THE MINIMUM PRICE TO BE PAID TO THEM, LAID DOWN BY COMMUNITY RULES, WAS NOT ENDANGERED;

- THE BELGIAN TRADE AND A GERMAN UNDERTAKING LAID NETHERLANDS OPERATORS OPEN TO HARSH COMPETITION BY SELLING AT VERY LOW PRICES TO LARGE NETHERLANDS UNDERTAKINGS;

- 'WE HAVE NOT IMPEDED TRADE' WHICH THE WITNESS COULD PROVE WITH THE HELP OF CONTRACTS WHICH WERE ENTERED INTO AFTER 1970 .

418 ALTHOUGH IT CANNOT BE RULED OUT THAT THE THREAT ALLEGED BY THE COMMISSION WAS IN FACT UTTERED, IT DOES NOT HOWEVER APPEAR, ACCORDING TO THE WITNESSES' STATEMENTS, TO HAVE BEEN ADEQUATELY PROVED .

419 THE STATEMENT MADE BY THE COMMISSION AT THE HEARING HAS NOT PROVIDED ANY FACTS OR CONSIDERATIONS WHICH ALTER THIS EVALUATION .

420 SINCE THEREFORE THE FACTS ALLEGED BY THE COMMISSION UPON WHICH IT BASED THIS COMPLAINT HAVE NOT BEEN SUFFICIENTLY PROVED, SUBPARAGRAPH 2 OF ARTICLE 2 (2) OF THE CONTESTED DECISION MUST BE ANNULLED .

CHAPTER 7

COMPLAINT THAT SZV PREVENTED ITS AGENTS FROM RESELLING SUGAR FROM OTHER SOURCES AND TIED ITS CUSTOMERS BY THE GRANT OF LOYALTY REBATES

421 SUBPARAGRAPH 3 OF ARTICLE 1 (2) OF THE CONTESTED DECISION BLAMES SZV FOR HAVING 'FROM THE BEGINNING OF THE 1968/69 MARKETING YEAR ONWARDS COMMITTED INFRINGEMENTS OF ARTICLE 86 BY PREVENTING ITS AGENTS FROM RESELLING SUGAR FROM OTHER SOURCES AND BY TYING ITS CUSTOMERS BY GRANTING LOYALTY REBATES ' .

SECTION 1 : PROCEDURAL AND FORMAL SUBMISSIONS

I - SUBMISSIONS ALREADY DEALT WITH IN CHAPTER 2

422 THE SUBMISSIONS PUT FORWARD BY SZV THAT PREMATURE PUBLICATION IS A BREACH OF THE PRINCIPLE THAT EVERYONE IS ENTITLED TO A FAIR TRIAL AND THAT THERE WERE UNDULY SHORT TIME-LIMITS FOR SUBMISSION OF OBSERVATIONS ON THE NOTIFICATION OF OBJECTIONS ARE IN SUBSTANCE SIMILAR TO THE CORRESPONDING SUBMISSIONS MADE BY SU, CSM AND PFEIFER UND LANGEN IN CONNEXION WITH THE SECOND COMPLAINT AND MUST BE REJECTED FOR THE REASONS GIVEN IN CONNEXION THEREWITH .

II - SUBMISSIONS BASED ON DEFECTS IN THE NOTIFICATION OF OBJECTIONS

423 1 . SZV TAKES THE VIEW THAT THE NOTIFICATION OF OBJECTIONS WHICH WAS SENT IN IDENTICAL WORDING TO FORTY-EIGHT UNDERTAKINGS, ALTHOUGH EACH OF THE LATTER WAS ONLY AFFECTED BY SOME OF THE FACTS ALLEGED, DID NOT SET OUT WITH SUFFICIENT ACCURACY THE COMPLAINTS SPECIFICALLY MADE AGAINST THE APPLICANT OR THE EVIDENCE USED AGAINST IT .

424 NONE OF THE DOCUMENTS MENTIONED IN THE NOTIFICATION OF OBJECTIONS TO JUSTIFY THE COMPLAINT THAT IT ENGAGED IN A GENERAL CONCERTED ACTION BASED ON THE PRINCIPLE 'CHACUN CHEZ SOI' (' EACH IN HIS OWN HOME ') WHICH WAS ALSO MADE AGAINST THE APPLICANT, EMANATED FROM SZV OR WAS SENT TO IT .

425 SINCE IT CONSEQUENTLY FEARED THAT THE REPLIES GIVEN BY THE OTHER UNDERTAKINGS WOULD BE CONSTRUED AGAINST IT, SZV REQUESTED THE COMMISSION TO SEND IT COPIES OF THEM, WHICH THE COMMISSION REFUSED TO DO ON THE GROUND THAT IT WAS UNDER A DUTY TO RESPECT THE PRINCIPLE OF PROFESSIONAL SECRECY .

426 THIS COMPLAINT, WHICH IS THE ONLY ONE MADE AGAINST THE APPLICANT BY THE CONTESTED DECISION, IS NOT THAT SZV ENGAGED IN A CONCERTED PRACTICE BUT THAT IT ABUSED A DOMINANT POSITION .

427 THIS COMPLAINT HAS BEEN CLEARLY AND ACCURATELY FORMULATED ON PAGES 91 TO 93, 107 TO 108 AND 121 TO 123 OF THE NOTIFICATION OF OBJECTIONS AND SUPPORTED BY DOCUMENTS EMANATING FROM SZV OR WHICH EXPLICITLY MENTION SZV .

428 THE SUBMISSION MUST THEREFORE BE REJECTED .

429 2 . SZV SUBMITS THAT, CONTRARY TO ARTICLE 3 OF REGULATION NO 1 OF THE COUNCIL, THE WORDING OF THE NOTIFICATION OF OBJECTIONS WHICH WAS SENT TO IT WAS NOT ENTIRELY WRITTEN IN GERMAN BUT INCLUDED COPIES OF A LARGE NUMBER OF DOCUMENTS IN OTHER LANGUAGES, OF WHICH THE COMMISSION DID NOT AT THE SAME TIME PRODUCE A GERMAN TRANSLATION .

430 THIS SUBMISSION CANNOT BE UPHELD BECAUSE THE COPIES OF THE ONLY DOCUMENTS RELATING TO THIS CASE, NAMELY THOSE REFERRED TO AT PAGES 91 TO 93 OF THE GERMAN VERSION OF THE NOTIFICATION OF OBJECTIONS, ARE IN GERMAN .

431 3 . FINALLY SZV BLAMES THE COMMISSION FOR HAVING QUOTED IN THE NOTIFICATION OF OBJECTIONS AS EVIDENCE OF THE ALLEGED INFRINGEMENT EXTRACTS OF LETTERS OF WHICH NEITHER THE NAME OF THE SENDER NOR OF THE ADDRESSEE WAS INDICATED .

432 IN THE ORIGINALS OF THESE LETTERS WHICH SZV'S AUTHORIZED REPRESENTATIVE WAS ABLE TO EXAMINE THE NAMES HAD ALSO BEEN EFFACED .

433 THIS SUBMISSION RELATING TO THE EVALUATION OF THE EVIDENCE FORMS PART OF THE SUBSTANCE OF THE CASE .

III - SUBMISSION THAT ARTICLE 4 OF REGULATION NO 99/63 HAS BEEN INFRINGED

434 SZV SUBMITS THAT THE DECISION IS DEFECTIVE BECAUSE THERE HAS BEEN AN INFRINGEMENT OF ARTICLE 4 OF REGULATION NO 99/63 UNDER WHICH THE COMMISSION 'SHALL IN ITS DECISIONS DEAL ONLY WITH THOSE OBJECTIONS RAISED AGAINST UNDERTAKINGS AND ASSOCIATIONS OF UNDERTAKINGS IN RESPECT OF WHICH THEY HAVE BEEN AFFORDED THE OPPORTUNITY OF MAKING KNOWN THEIR VIEWS', SINCE THE NOTIFICATION OF OBJECTIONS ONLY ATTRIBUTED A DOMINANT POSITION TO SZAG, WHEREAS THE DECISION FOUND THAT SZV OCCUPIED SUCH A POSITION .

435 IT EMERGES FROM PAGES 122 AND 123 OF THE NOTIFICATION OF OBJECTIONS THAT THE COMMISSION BLAMED SZV FOR HAVING ABUSED THE DOMINANT POSITION OF SZAG, WHEREAS ACCORDING TO THE DECISION SZV ABUSED ITS OWN DOMINANT POSITION .

436 HOWEVER SZV HAS NOT DENIED THAT IT DEFINED ITS POSITION DURING THE ADMINISTRATIVE PROCEEDINGS ON THE COMPLAINT MADE AGAINST IT UNDER ARTICLE 86 .

437 THE COMMISSION STATED, WITHOUT THE APPLICANT RAISING ANY OBJECTION, THAT IT CHANGED ITS MIND SIMPLY BECAUSE IT LEARNT FROM THE OBSERVATIONS OF THE UNDERTAKINGS CONCERNED THAT SZAG ONLY HAS LIMITED VOTING RIGHTS IN SZV .

438 SINCE THE APPLICANT THEREFORE HAD THE OPPORTUNITY OF MAKING KNOWN ITS POINT OF VIEW ON THE QUESTION WHETHER IT OCCUPIES A DOMINANT POSITION AND COULD EXPECT THAT ITS OWN AND SZAG'S EXPLANATIONS WOULD LEAD THE COMMISSION TO MODIFY ITS OPINION, THIS SUBMISSION IS UNFOUNDED .

IV - SUBMISSION BASED ON DEFECTS IN THE TAKING OF EVIDENCE BY THE COMMISSION AND ON THE INADEQUACY OF THE STATEMENT OF THE REASONS UPON WHICH THE DECISION IS BASED

439 SZV SUBMITS THAT SOME OF THE STATEMENTS IN THE DECISION ARE NOT SUPPORTED BY EVIDENCE OR THAT THE REASONS UPON WHICH THEY ARE BASED ARE NOT SUCH AS TO ENABLE THEIR ACCURACY TO BE VERIFIED .

440 THE EXAMINATION OF THE QUESTION WHETHER THE COMMISSION HAS OR HAS NOT PRODUCED EVIDENCE OF THE ALLEGED INFRINGEMENT FORMS PART OF THE SUBSTANCE OF THE CASE .

SECTION 2 : SUBSTANTIVE SUBMISSION BASED ON INFRINGEMENT OF ARTICLE 86 OF THE TREATY

I - THE QUESTION WHETHER THE 'SOUTHERN PART OF GERMANY' IS A SUBSTANTIAL PART OF THE COMMON MARKET

441 1 . IT IS CLEAR FROM THE STATEMENT OF THE REASONS UPON WHICH THE DECISION IS BASED (P . 20 TO 21, PARAGRAPH 9, P . 28 UNDER PARAGRAPH 16) THAT WHEN THE COMMISSION REFERS TO 'THE SOUTHERN PART OF GERMANY' IT MEANS THE AREA WHICH IT REGARDS AS SZV'S SALES TERRITORY AS OPPOSED, ON THE ONE HAND, TO THE SALES TERRITORIES WHICH IT CONSIDERS BELONG TO NZV AND WZV, TWO COMPANIES, OF WHICH THE SUGAR PRODUCERS OF THE SOUTHERN AND WESTERN REGIONS OF THE FEDERAL REPUBLIC OF GERMANY ARE MEMBERS AND, ON THE OTHER HAND, TO THE LAENDER OF BERLIN AND THE SAAR, WHICH IT STATES ARE FOR THE MOST PART SUPPLIED BY SUGAR COMING RESPECTIVELY FROM THE FEDERAL REPUBLIC OF GERMANY AND THE FRENCH REPUBLIC .

442 THE COMMISSION PRODUCED FOR THE COURT'S FILE A MAP (ANNEX II 10 TO THE STATEMENTS OF DEFENCE IN CASES 54 TO 56/73) 'BASED ON' THE MAPS ANNEXED TO THE CONTRACTS OF WZV'S COMMISSION AGENTS, WHICH MARKS THE BOUNDARIES OF THE LATTER'S SALES TERRITORY AND BEARS THE LETTERS 'NZV' (IN THE NORTH) AND 'SZV' (IN THE SOUTH), BUT DOES NOT HOWEVER INDICATE WITH ANY ACCURACY THE BOUNDARY BETWEEN THE RESPECTIVE SALES TERRITORIES OF THESE TWO MARKETING ORGANIZATIONS

.

443 IF THIS MAP IS EXAMINED IN THE LIGHT OF THE PARTIES' STATEMENTS, TO THE EXTENT TO WHICH THEY AGREE, IT SHOWS CLEARLY THAT THE TERRITORY WITHIN WHICH SZV CARRIES ON BUSINESS, THAT IS THE 'SOUTHERN PART OF GERMANY', WITHIN THE MEANING THIS EXPRESSION IS GIVEN IN THE DECISION, INCLUDES THE WHOLE OF BAVARIA AND BADEN-WUERTTEMBERG, PART OF THE LAND HESSEN BORDERING ON THESE TWO LAENDER, WHICH TAKES IN MORE THAN HALF OF HESSE AS WELL AS CERTAIN PARTS ADJOINING THE RHINE-PALATINATE, THE SAAR, NORTH RHINE-WESTPHALIA AND LOWER SAXONY WHICH ARE REGIONS OF INSIGNIFICANT SIZE COMPARED WITH THE OTHER SECTORS OF SZV'S SALES TERRITORY .

444 2 . IN ORDER TO ASCERTAIN THE CRITERIA WHICH DETERMINE WHETHER A SPECIFIC TERRITORY IS 'A SUBSTANTIAL PART OF THE COMMON MARKET' REFERENCE MUST BE MADE TO CHAPTER 5 .

445 THE AGGREGATE ANNUAL PRODUCTION OF THE COMPANIES WHICH WERE MEMBERS OF SZV WAS AT THAT TIME ON AVERAGE ABOUT 800 000 METRIC TONS, A FIGURE WHICH MUST BE EVALUATED BEARING IN MIND THAT, ON THE ONE HAND, SZAG, THE PRINCIPAL MEMBER OF SZV HAVING ITS PLACE OF BUSINESS IN BADEN-WUERTTEMBERG ITSELF SUPPLIED ABOUT 70 PER CENT OF THIS PRODUCTION AND, ON THE OTHER HAND, THAT FRANKEN, HAVING ITS PLACE OF BUSINESS IN BAVARIA, IS AFTER SZAG THE LARGEST PRODUCER MEMBER OF SZV (CF . DECISION P . 20, PARAGRAPH 9).

446 ACCORDING TO THE COMMISSION'S STATISTICS (CF . ANNEX I TO THE REJOINER IN CASE 55/73, TABLE V, COLUMN 29) CONSUMPTION 'IN SZAG'S SALES TERRITORY LESS THE SAAR' INCREASED DURING EACH OF THE FOUR MARKETING YEARS UNDER CONSIDERATION TO 790 000, 792 000, 872 000 AND 826 000 METRIC TONS RESPECTIVELY, AND THESE FIGURES COULD EVEN INCREASE TO THE EXTENT TO WHICH IT WOULD HAVE TO BE CONCEDED THAT SZV'S SALES TERRITORY EXCEEDS THAT OF SZAG .

447 ACCORDING TO THE AVAILABLE STATISTICS THE AVERAGE NUMBER OF CONSUMERS IN THE REGION IN QUESTION FOR THE YEARS WHICH HAVE TO BE TAKEN INTO ACCOUNT CAN BE ESTIMATED AT 22 MILLION AT LEAST .

448 IF THESE FIGURES ARE COMPARED WITH THE CORRESPONDING FIGURES RELATING TO THE WHOLE OF THE COMMUNITY SET OUT IN CHAPTER 5, THE 'SOUTHERN PART OF GERMANY', WITHIN THE MEANING WHICH THIS EXPRESSION IS GIVEN IN THE DECISION, IS FOUND TO BE SUFFICIENTLY LARGE, SO FAR AS SUGAR IS CONCERNED, TO BE CONSIDERED HAVING REGARD TO THE OTHER CRITERIA MENTIONED IN CHAPTER 5 AS A SUBSTANTIAL PART OF THE COMMON MARKET IN THIS PRODUCT .

449 3 . SZV SUBMITS THAT FOR THE PURPOSE OF DETERMINING WHETHER THE AREA IN QUESTION IS A SUBSTANTIAL PART OF THE COMMON MARKET THE STATISTICAL DATA RELATING TO THIS AREA SHOULD NOT ONLY BE COMPARED WITH THE CORRESPONDING DATA RELATING TO THE COMMON MARKET AS IT WAS WHEN THE FACTS GIVING RISE TO THESE PROCEEDINGS EXISTED BUT ALSO WITH THE DATA RELATING TO THE COMMUNITY OF 'NINE' IN ITS PRESENT FORM .

450 ARTICLE 86 OF THE EEC TREATY CLEARLY REFERS IN EACH CASE TO THE POSITION OCCUPIED BY THE UNDERTAKING CONCERNED ON THE COMMON MARKET AT THE TIME WHEN THE LATTER ACTED IN A WAY WHICH IS ALLEGED TO AMOUNT TO AN ABUSE .

451 FOR THIS REASON ALONE SZV'S ARGUMENT CANNOT BE UPHELD .

II - THE QUESTION WHETHER SZV OCCUPIES A DOMINANT POSITION ON THE SUGAR MARKET OF THE SOUTHERN PART OF GERMANY

452 SZV DOES NOT DENY THAT IN THE TWO PRINCIPAL REGIONS OF THE AREA IN QUESTION, NAMELY THE LAENDER OF BAVARIA AND OF BADEN-WUERTTEMBERG, ITS SHARE OF THE MARKET IS APPROXIMATELY THE 90 PER

CENT TO 95 PER CENT SHARE MENTIONED IN THE CONTESTED DECISION (P . 39, PARAGRAPH NO 3) FOR THE WHOLE OF ITS SALES TERRITORY .

453 SIMILARLY IT CONCEDES THAT IN THE LAND HESSE ITS SHARE OF THE MARKET EXCEEDS 50 PER CENT AND, HAVING REGARD TO THE FACT THAT PART OF THIS LAND DOES NOT FORM PART OF THE APPLICANT'S SALES TERRITORY, THIS STATEMENT RAISES THE PRESUMPTION THAT, TO THE EXTENT TO WHICH THE LAND HESSE IS CO-EXTENSIVE WITH THIS TERRITORY, SZV'S SHARE OF THE MARKET IS APPRECIABLY HIGHER THAN 50 PER CENT .

454 THESE FIGURES ARE CONFIRMED BY THE COMMISSION'S STATISTICS (ANNEX I TO THE REJOINER IN CASE 55/73, TABLE V, COLUMNS 28 TO 30) ACCORDING TO WHICH IMPORTS, OTHER THAN DELIVERIES FROM PRODUCER TO PRODUCER, EFFECTED DURING THE FOUR MARKETING YEARS IN QUESTION IN THE SALES TERRITORY OF SZAG, THE LARGEST MEMBER OF SZV, ONLY AMOUNTED TO 0.19 PER CENT; 0.73 PER CENT; 1.62 PER CENT AND 2.93 PER CENT RESPECTIVELY OF THE TOTAL CONSUMPTION IN SZAG'S SALES TERRITORY .

455 WITH REGARD TO THE DELIVERIES EFFECTED IN THE SALES TERRITORY OF SZV OR ITS MEMBERS BY NZV AND WZV OR BY THE MEMBERS OF THESE MARKETING ORGANIZATIONS THERE IS NO EVIDENCE AT ALL ON THE COURT'S FILE THAT THE VOLUME OF THESE DELIVERIES WAS VERY LARGE .

456 THEREFORE SZV SOLELY OR JOINTLY WITH ITS MEMBERS HAD THE OPPORTUNITY OF PREVENTING EFFECTIVE COMPETITION ON THE MARKET IN QUESTION .

457 CONSEQUENTLY IT HAD DURING THE PERIOD TO BE TAKEN INTO CONSIDERATION A DOMINANT POSITION ON THIS MARKET .

III - THE EXISTENCE OF AN ABUSE

458 THE COMPLAINT MADE BY THE COMMISSION AGAINST SZV CONSISTS OF TWO DISTINCT PARTS . THE FIRST RELATES TO THE APPLICANT'S SALES

ORGANIZATION AND IN PARTICULAR TO THE OBLIGATION IMPOSED ON AGENTS NOT TO RESELL SUGAR FROM OTHER SOURCES WITHOUT ITS CONSENT AND THE SECOND TO THE FACT THAT THE APPLICANT TIED ITS CUSTOMERS BY LOYALTY REBATES .

1 . THE OBLIGATION IMPOSED ON AGENTS

A - THE COMMISSION'S VIEW

(A) IN ITS DECISION THE COMMISSION STATES THAT, IN ORDER TO DISTRIBUTE WITHIN ITS SALES TERRITORY THE SUGAR PRODUCED BY ITS MEMBERS, SZV USED PRIMARILY SEVENTEEN REGIONAL REPRESENTATIVES WHO, IN ADDITION TO THEIR OPERATIONS IN THE SUGAR SECTOR, SOLD OTHER PRODUCTS FOR THEIR OWN ACCOUNT .

460 THESE REPRESENTATIVES UNDER THE TRADE REPRESENTATIVES CONTRACTS ENTERED INTO BY SZV WITH THEM WERE SUBJECT TO THE OBLIGATION, INTER ALIA, ONLY TO SELL IN THE NAME AND FOR THE ACCOUNT OF SZV AND, EXCEPT WITH THE LATTER'S PRIOR CONSENT, NOT TO ACT AS AGENT FOR OTHER PRODUCERS OF OR DEALERS IN SUGAR OR COMPETING PRODUCTS AND NOT TO ENGAGE IN THE SUGAR TRADE ON THEIR OWN ACCOUNT .

461 HOWEVER THE SAID CONSENT WAS PRESUMED TO BE GRANTED IF SZV'S MEMBERS WISHED TO MARKET THE SUGAR THEY THEMSELVES PRODUCED DIRECT BY USING THE APPLICANT'S REPRESENTATIVES .

462 TO THE EXTENT TO WHICH THE REPRESENTATIVES WISHED TO SELL SUGAR FROM EITHER GERMAN OR FOREIGN SOURCES, THEY WERE GRANTED CONSENT IF THE SUGAR WAS TO BE PROCESSED OR WAS A SPECIAL KIND INTENDED FOR OTHER UNDERTAKINGS .

463 BY THESE ARRANGEMENTS SZV MADE IT VIRTUALLY IMPOSSIBLE FOR FOREIGN PRODUCERS TO SELL SUGAR THROUGH DEALERS WHO OBTAINED THEIR SUPPLIES FROM IT .

464 IF IT IS TRUE THAT THERE ARE OTHER DEALERS IN SOUTH GERMANY WHO CAN IMPORT FREELY AND THAT A NUMBER OF PROCESSING UNDERTAKINGS ALSO OBTAIN THEIR SUPPLIES FROM ABROAD, IT WOULD BE NO LESS TRUE THAT THE ARRANGEMENTS AT ISSUE APPRECIABLY REDUCED FOREIGN PRODUCERS' OPPORTUNITIES OF SELLING AT A TIME WHEN THE HIGH PRICE LEVEL IN SOUTH GERMANY MADE IMPORTING INTO THIS TERRITORY AN ATTRACTIVE PROPOSITION .

465 THE FACT THAT AN UNDERTAKING OCCUPYING A DOMINANT POSITION IMPOSES ON ITS AGENTS AN OBLIGATION SUCH AS THE ONE IN QUESTION AMOUNTS TO AN ABUSE OF THIS POSITION WITHIN THE MEANING OF ARTICLE 86 OF THE TREATY .

466 (B) DURING THE PROCEEDINGS THE COMMISSION MADE THE FOLLOWING COMPLAINT .

467 THE SYSTEM, WHICH IT CRITICIZES, IMPLIES THAT THE 1 270 WHOLESALERS, WHO HAVE THEIR PLACES OF BUSINESS IN SZV'S SALES TERRITORY AND SUPPLIED SMALL INDUSTRIAL CONSUMERS AND RETAILERS, DO NOT HAVE THE OPPORTUNITY OF OBTAINING SUGAR DIRECT FROM THE APPLICANT BUT MUST APPLY TO ONE OF SZV'S SEVENTEEN REGIONAL REPRESENTATIVES .

468 SUCH A SYSTEM DOES NOT GUARANTEE THE DEVELOPMENT OF COMPETITION AT THE COMMERCIAL LEVEL SO THAT SZV MUST EITHER REPLACE ITS REGIONAL REPRESENTATIVES BY INDEPENDENT WHOLESALERS OR AT LEAST GIVE NOT ONLY THE SAID REPRESENTATIVES BUT ALSO INDEPENDENT DEALERS DIRECT ACCESS TO THE PRODUCTION WHICH IT SELLS .

469 FURTHER THE COMMISSION BLAMES SZV FOR SUPPLYING ITSELF, THROUGH ITS REGIONAL REPRESENTATIVES, ABOUT 730 LARGE INDUSTRIAL CONSUMERS, THEREBY PREVENTING THE 1 270 BEFOREMENTIONED WHOLESALERS FROM SUPPLYING A SECTOR HAVING APPROXIMATELY A 55 PER CENT SHARE OF SUGAR SALES IN THE TERRITORY IN QUESTION .

470 THEREFORE, SINCE THESE DEALERS WERE NOT IN COMMERCIAL CONTACT WITH THE LARGE PROCESSING INDUSTRY IN SOUTH GERMANY, THEY HAD LITTLE OPPORTUNITY OF SELLING FOREIGN SUGAR TO THIS INDUSTRY WHICH, TO THE EXTENT TO WHICH IT BOUGHT FRENCH SUGAR, APPLIED DIRECT TO FRENCH PRODUCERS .

471 THIS SITUATION, TOGETHER WITH THE CONSEQUENCES OF THE PROHIBITION OF COMPETITION IMPOSED ON REGIONAL REPRESENTATIVES AND OF DENYING WHOLESALERS DIRECT ACCESS TO SZV, REDUCES TO A CONSIDERABLE EXTENT THE OPPORTUNITIES OF SELLING IN SOUTH GERMANY SUGAR COMING FROM OTHER MEMBER STATES .

472 AN UNDERTAKING HAVING A DOMINANT POSITION IS NOT ALLOWED TO ORGANIZE THE SALE OF ITS PRODUCTION IN SUCH A WAY AS TO ELIMINATE COMPETITION .

B - THE EVALUATION OF THE COMMISSION'S VIEW

473 SZV SUBMITS THAT, SINCE THE RELATIONSHIP TO ITSELF OF THE INTERMEDIARIES WITH WHOM IT ENTERED INTO THE DISPUTED AGREEMENTS WAS THAT OF COMMERCIAL REPRESENTATIVES, ARTICLE 86 DOES NOT APPLY TO THESE CONTRACTS .

474 (A) 1 . WITH REGARD TO THE PROHIBITION OF COMPETITION STIPULATED IN THESE CONTRACTS IT MUST BE NOTED THAT AN UNDERTAKING OR ASSOCIATION, IN ORDER TO ENSURE THAT THE GOODS WHICH IT OR ITS MEMBERS MANUFACTURE ARE DISTRIBUTED, CAN CHOOSE EITHER TO USE COMMERCIAL EMPLOYEES - THAT IS TO SAY PERSONS BOUND TO IT BY A

CONTRACT OF EMPLOYMENT - OR TRADERS WITH WHOM IT ENTERS INTO CONTRACTS OF A DIFFERENT KIND .

475 SO FAR AS THE LEGAL POSITION OF THESE TRADERS AND THE TERMS OF THESE CONTRACTS ARE CONCERNED, THE LAWS OF THE MEMBER STATES AND ECONOMIC PRACTICE HAVE DEVELOPED A GREAT VARIETY OF FORMS OF AGREEMENT WHICH DISTINGUISH IN PARTICULAR BETWEEN THOSE WHERE THE INTERMEDIATE TRADER NEGOTIATES WITH CUSTOMERS OR COMES TO AN AGREEMENT WITH THEM IN HIS OWN NAME AND FOR HIS OWN ACCOUNT, OR IN HIS OWN NAME BUT FOR THE ACCOUNT OF THE PRINCIPAL, OR AGAIN IN THE NAME AND FOR THE ACCOUNT OF THE LATTER .

476 IF THE CONTRACTS ON THE COURT'S FILE, WHICH ARE AT ISSUE, ARE EXAMINED THEY ARE FOUND TO BE IN LAW TRADE REPRESENTATIVES CONTRACTS, IN PARTICULAR BECAUSE THEY EXPRESSLY CONFER UPON THE INTERMEDIARIES THE ATTRIBUTES OF A TRADE REPRESENTATIVE WITHIN THE MEANING OF GERMAN LAW AND BECAUSE UNDER THEIR TERMS THE REPRESENTATIVE IS UNDER A DUTY TO NEGOTIATE OR CONCLUDE SALES OF SUGAR IN THE NAME AND FOR THE ACCOUNT OF THE PRINCIPAL, TO CARRY OUT THE LATTER'S INSTRUCTIONS AND LOOK AFTER HIS INTERESTS AND FINALLY BECAUSE THEY ALLOT THEM SPECIFIC TERRITORIES WHERE THEY ARE TO ACT AS REPRESENTATIVES .

477 IT IS AGREED THAT, WITHOUT PREJUDICE TO CERTAIN SMALL DIFFERENCES, GERMAN LAW, WHICH GOVERNS THE CONTRACTS IN DISPUTE, PROCEEDS ON THE BASIS OF THE PRINCIPLE THAT SUCH TRADE REPRESENTATIVES ARE PROHIBITED, EVEN IF THERE IS NO STIPULATION IN THE CONTRACT TO THAT EFFECT, FROM COMPETING WITH THEIR PRINCIPAL WITHOUT THE LATTER'S CONSENT AND THAT ANY INFRINGEMENT OF THIS PROHIBITION OF COMPETITION MAY EVEN RENDER THE REPRESENTATIVE LIABLE TO AN ACTION AGAINST HIM FOR DAMAGES .

478 HOWEVER FOR THE PURPOSE OF APPLYING ARTICLES 85 AND 86 OF THE TREATY THE RELATIONSHIP BETWEEN AN ECONOMIC OPERATOR AND HIS

INTERMEDIARIES MUST ONLY BE DETERMINED IN THE LIGHT OF COMMUNITY LAW, SO THAT THE FACT THAT A TRADE REPRESENTATIVES CONTRACT, WHICH IMPOSES UPON THE REPRESENTATIVE A PROHIBITION OF COMPETITION, COMPLIES WITH THE NATIONAL LAW GOVERNING THIS CONTRACT OR THAT THIS LAW EVEN IMPOSES A SIMILAR PROHIBITION IS NOT DETERMINATIVE WHEN CONSIDERING WHETHER SUCH A CONTRACT IS NOT CAUGHT BY ARTICLE 86 .

479 HOWEVER IT MUST BE ADMITTED, INDEPENDENTLY OF THE CONTENT OF THE APPLICABLE LAWS OF THE MEMBER STATES, THAT, IN GENERAL, THE FACT THAT A PRODUCER OR AN ASSOCIATION OF PRODUCERS FORBIDS ITS AGENTS, WHO SELL IN ITS NAME AND FOR ITS ACCOUNT, TO ACT AT THE SAME TIME FOR COMPETING PRODUCERS WITHOUT ITS CONSENT, CORRESPONDS TO THE NATURE AND SPIRIT OF A LEGAL AND ECONOMIC RELATIONSHIP OF THE KIND IN QUESTION .

480 IN FACT, IF SUCH AN AGENT WORKS FOR THE BENEFIT OF HIS PRINCIPAL HE MAY IN PRINCIPLE BE TREATED AS AN AUXILIARY ORGAN FORMING AN INTEGRAL PART OF THE LATTER'S UNDERTAKING, WHO MUST CARRY OUT HIS PRINCIPAL'S INSTRUCTIONS AND THUS, LIKE A COMMERCIAL EMPLOYEE, FORMS AN ECONOMIC UNIT WITH THIS UNDERTAKING .

481 IN THESE CIRCUMSTANCES THE ABUSE IS NOT DUE TO THE FACT THAT THE PRINCIPAL FORBIDS SUCH AN AUXILIARY ORGAN, WITHOUT HIS CONSENT, TO TRADE IN PRODUCTS WHICH COULD COMPETE WITH HIS OWN .

482 THE POSITION IS DIFFERENT IF THE AGREEMENTS ENTERED INTO BETWEEN THE PRINCIPAL AND HIS AGENTS, WHOM THE CONTRACTING PARTIES CALL 'TRADE REPRESENTATIVES', CONFER UPON THESE AGENTS OR ALLOW THEM TO PERFORM DUTIES WHICH FROM AN ECONOMIC POINT OF VIEW ARE APPROXIMATELY THE SAME AS THOSE CARRIED OUT BY AN INDEPENDENT DEALER, BECAUSE THEY PROVIDE FOR THE SAID AGENTS ACCEPTING THE FINANCIAL RISKS OF THE SALES OR OF THE PERFORMANCE OF CONTRACTS ENTERED INTO WITH THIRD PARTIES .

483 IN FACT IN SUCH A CASE THE AGENTS CANNOT BE REGARDED AS AUXILIARY ORGANS FORMING AN INTEGRAL PART OF THE PRINCIPAL'S UNDERTAKING WITH THE RESULT THAT, IF A CLAUSE PROHIBITING COMPETITION IS AGREED BETWEEN PRINCIPAL AND AGENT AND THE PRINCIPAL IS AN UNDERTAKING OCCUPYING A DOMINANT POSITION, THAT CLAUSE MAY CONSTITUTE AN ABUSE WITHIN THE MEANING OF ARTICLE 86 AS IT IS LIKELY TO CONSOLIDATE THAT DOMINANT POSITION .

484 HOWEVER THE COMMISSION HAS NOT ALLEGED AND THE AGREEMENTS PRODUCED FOR THE COURT'S FILE DO NOT DISCLOSE THAT THE RELATIONS BETWEEN SZV AND ITS AGENTS INCLUDED THE CONDITIONS WHICH HAVE JUST BEEN MENTIONED, THAT IS TO SAY STIPULATIONS WHICH ENABLE THE CONCLUSION TO BE DRAWN THAT THE AGENTS HAVE IN RELATION TO THE APPLICANT A POSITION VERY SIMILAR TO THAT OF AN INDEPENDENT DEALER .

485 IN PARTICULAR THE COMMISSION HAS NOT DENIED THAT THE TRADE REPRESENTATIVES IN QUESTION WERE MAINLY CONCERNED WITH DISTRIBUTION FOR THE ACCOUNT OF THE APPLICANT WITHOUT ACTING AT THE SAME TIME AS INDEPENDENT DEALERS TO ANY GREAT EXTENT .

486 2 . HOWEVER EVEN CLAUSES PROHIBITING COMPETITION IMPOSED BY AN UNDERTAKING OCCUPYING A DOMINANT POSITION ON TRADE REPRESENTATIVES MAY CONSTITUTE AN ABUSE, IF FOREIGN COMPETITORS FIND THAT THERE ARE NO INDEPENDENT OPERATORS WHO CAN MARKET THE PRODUCT IN QUESTION ON A SUFFICIENTLY LARGE SCALE, AND ARE IN PRACTICE FORCED TO APPLY TO THE SAID UNDERTAKING'S TRADE REPRESENTATIVES IF THEY WISH TO SELL THIS PRODUCT IN THE LATTER'S SALES TERRITORY, OR IF THE SAID UNDERTAKING ENLARGES THE SCOPE OF THE PROHIBITION OF COMPETITION TO SUCH AN EXTENT THAT IT NO LONGER CORRESPONDS TO THE NATURE OF THE LEGAL AND ECONOMIC RELATIONSHIP IN QUESTION .

487 WITH REGARD TO THE FIRST OF THESE EXCEPTIONS THE COMMISSION HAS NOT DENIED THAT THERE ARE TWO GROUPS OF ECONOMIC OPERATORS IN SOUTH GERMANY TRADING IN SUGAR, WHICH, SINCE THEY ARE UNDER NO OBLIGATION TO SZV, ARE NOT BOUND BY THE PROHIBITION OF COMPETITION IMPOSED BY THE LATTER ON ITS TRADE REPRESENTATIVES . THEY ARE THE 1 270 WHOLESALERS REFERRED TO ABOVE, AND, IN PARTICULAR A NOT INCONSIDERABLE NUMBER OF DEALERS, WHOSE BUSINESS CONSISTS MAINLY OR TO A GREAT EXTENT OF IMPORTING AND EXPORTING SUGAR .

488 IT DOES NOT APPEAR THAT THIS CASE IS CONCERNED WITH DEALERS IN THE SECOND GROUP .

489 THE RESULT OF ALL THESE CONSIDERATIONS IS THAT THE CLAUSES PROHIBITING COMPETITION IN THE DISPUTED CONTRACTS ARE NOT IN THEMSELVES AN ABUSE WITHIN THE MEANING OF ARTICLE 86 .

490 (B) THE COMMISSION THEN BLAMED SZV, ON THE ONE HAND, FOR HAVING FORCED THE WHOLESALERS WHOSE PLACES OF BUSINESS WERE IN ITS SALES TERRITORY TO APPLY TO ITS TRADE REPRESENTATIVES AND NOT TO ITSELF, AND, ON THE OTHER HAND, FOR HAVING SUPPLID ABOUT 730 LARGE INDUSTRIAL CONSUMERS OF THIS TERRITORY INSTEAD OF ARRANGING FOR THE SAID WHOLESALERS TO PLAY THEIR PART IN DELIVERING SUGAR TO THEM .

491 THESE ASPECTS OF SZV'S SALES ORGANIZATION HAVE NOTHING TO DO WITH THE OBLIGATIONS IMPOSED ON TRADE REPRESENTATIVES BUT STEM FROM DECISIONS TAKEN UNILATERALLY BY SZV, NAMELY TO ENABLE THEM TO PLAY THEIR PART IN DELIVERING SUGAR TO THE TRADE AND TO PREVENT DEALERS FROM DELIVERING SUGAR TO LARGE CONSUMERS .

492 IF THE PRODUCER AVAILS HIMSELF OF AN AGENT WHO IS AN AUXILIARY ORGAN FORMING AN INTEGRAL PART OF HIS UNDERTAKING, PURCHASES FROM THIS 'REPRESENTATIVE' ARE IN FACT DIRECT PURCHASES FROM HIS PRINCIPAL .

493 THEREFORE SUCH CONDUCT CAN NEITHER BE AN ABUSE NOR EVIDENCE THEREOF .

494 WITH REGARD TO THE FACT THAT SZV SUPPLIED CERTAIN LARGE CONSUMERS DIRECT THROUGH ITS TRADE REPRESENTATIVES WITHOUT MAKING USE OF DEALERS THERE WAS NOTHING TO PREVENT THESE CONSUMERS FROM BUYING FROM INDEPENDENT DEALERS INSTEAD OF APPLYING TO THE APPLICANT'S REPRESENTATIVES OR THESE DEALERS FROM SELLING TO THE SAID INDUSTRIAL CONSUMERS .

495 THE VIEW CAN THEREFORE BE TAKEN THAT SUGAR WAS NOT SUPPLIED IN THIS WAS BECAUSE OF ANY PRESSURE BROUGHT TO BEAR BY SZV BUT AS A RESULT OF DECISIONS TAKEN FREELY BY THE CONSUMERS IN QUESTION WHO COULD SEE THAT THIS SYSTEM OF SUPPLYING DIRECT OFFERED ADVANTAGES

496 MOREOVER THE COMMISSION HAS NOT BLAMED SZV FOR HAVING ACTED IN A DISCRIMINATORY MANNER IN CHOOSING WHICH LARGE INDUSTRIAL CONSUMERS TO SUPPLY DIRECT .

497 ALL THESE CONSIDERATIONS SHOW THAT AN ABUSE WITHIN THE MEANING OF ARTICLE 86 OF THE TREATY HAS NOT BEEN PROVED .

498 SUBPARAGRAPH 3 OF ARTICLE 1 (2) OF THE DECISION MUST THEREFORE BE ANNULLED TO THE EXTENT TO WHICH IT BLAMES SZV FOR HAVING PREVENTED ITS AGENTS FROM RESELLING SUGAR FROM OTHER SOURCES .

2 . THE LOYALTY REBATE

A - THE COMMISSION'S VIEW

499 (A) THE DECISION STATES THAT SINCE SZV WAS FORMED IT HAS APPLIED A SYSTEM OF SO-CALLED ANNUAL 'QUANTITY' REBATES WHICH ARE IN FACT

LOYALTY REBATES AND WERE GRANTED AT A RATE OF DM 0.30 PER 100 KG TO CUSTOMERS WHO MET THEIR ANNUAL REQUIREMENTS EXCLUSIVELY FROM MEMBERS OF SZV .

500 IN THE CASE OF SOME OF THE CUSTOMERS THE REBATE WAS DEDUCTED IMMEDIATELY ON THE INVOICE .

501 IN SOME CASES AT LEAST THE REBATE WAS DISCONTINUED OR ITS DISCONTINUANCE NOTIFIED IF THE BUYER WENT ON IMPORTING SUGAR AND THESE STEPS INDUCED THE BUYERS IN QUESTION TO STOP IMPORTING, EVEN THOUGH OFFERS FROM ABROAD WERE DM 10 TO 20 PER METRIC TON BELOW SZV'S OFFERS .

502 THE GRANT OF SUCH A REBATE PLACED CUSTOMERS WHO ALSO BUY SUGAR FROM OTHER SOURCES AT AN UNJUSTIFIABLE DISADVANTAGE AND ENABLED SZV TO 'CONTROL' THE VOLUME OF SUPPLIES TO ITS CUSTOMERS BY FOREIGN PRODUCERS .

503 AS SZV'S PURCHASERS DEPEND AT LEAST IN PART ON SZV'S DELIVERIES BECAUSE THEIR STORAGE FACILITIES WERE INADEQUATE AND THEY NEEDED REGULAR SUPPLIES, THE DISADVANTAGE OF LOSING THE REBATE, ALTHOUGH IT APPEARS TO BE RELATIVELY SMALL, WOULD VERY SOON OUTWEIGH THE ADVANTAGE OF BUYING SUGAR FROM THIRD PARTIES, EVEN IF THE LATTER WERE TO MAKE OFFERS AT MORE FAVOURABLE PRICES .

504 THE FACT THAT IN CERTAIN CASES THE REBATE WAS GRANTED EVEN THOUGH SUGAR WAS PURCHASED FROM FOREIGN PRODUCERS DOES NOT ALTER THE FACT THAT THE NOTIFICATION ALONE OF ITS DISCONTINUANCE OR THE MERE RISK OF IT BEING DISCONTINUED PREVENTED CUSTOMERS FROM IMPORTING SUGAR IN LARGE QUANTITIES SYSTEMATICALLY .

505 IF SUCH A REBATE IS GRANTED BY AN UNDERTAKING OCCUPYING A DOMINANT POSITION WITH A VIEW TO RESTRICTING FURTHER OPPORTUNITIES FOR IMPORTING AND TO CONSOLIDATING THIS POSITION, THIS REBATE

AMOUNTS TO AN ABUSE OF THIS POSITION WITHIN THE MEANING OF ARTICLE 86 OF THE TREATY .

506 (B) DURING THE PROCEEDINGS THE COMMISSION PRODUCED EIGHT SALES CONTRACTS ENTERED INTO BY SZV (ANNEX I 145 TO 148, 150, 151, 153, 154 TO THE STATEMENTS OF DEFENCE), FOUR OF WHICH INCLUDE THE DISPUTED CLAUSE, WHEREAS A FIFTH CONTRACT MAKES THE GRANT OF A REBATE SUBJECT TO THE CONDITION THAT THE ANNUAL PURCHASES MADE DURING THE LAST YEAR AND IN THE PRECEDING YEAR ARE APPROXIMATELY THE SAME, AND LASTLY IN THE THREE REMAINING CONTRACTS THE REBATE HAS ALREADY BEEN DEDUCTED FROM THE SALE PRICE WITHOUT HAVING BEEN EXPRESSLY CONNECTED WITH A CLAUSE THAT SUPPLIES MUST BE OBTAINED EXCLUSIVELY FROM SZV .

507 THE PARTIES DISAGREE OVER THE CONSTRUCTION OF THE FOUR CONTRACTS MENTIONED IN THE PREVIOUS PARAGRAPH . THE COMMISSION IS OF THE OPINION THAT IN THESE CONTRACTS AS WELL THE REBATE AT ISSUE WAS GRANTED, WHEREAS THE APPLICANT TAKES THE OPPOSITE VIEW AND GOES ON TO SAY THAT, ON THE ONE HAND, THE SAID CONTRACTS SHOW THAT THE CLAUSE, WHICH MAKES THE GRANT OF THE REBATE DEPENDANT UPON THE AGENT OBTAINING HIS SUPPLIES EXCLUSIVELY FROM SZV, WAS NOT SYSTEMATICALLY INCORPORATED IN ALL THE SALES CONTRACTS CONCLUDED BY THE COMPANY AND, ON THE OTHER HAND, THAT IT DEDUCTED THE REBATE IMMEDIATELY EACH TIME A CUSTOMER WISHED THIS TO BE DONE .

508 FURTHER THE COMMISSION PRODUCED FOR THE COURT'S FILE CERTAIN DOCUMENTS INTENDED TO SHOW THAT, AT LEAST IN CERTAIN CASES, THE REBATE AT ISSUE WAS DISCONTINUED OR ITS DISCONTINUANCE NOTIFIED IF THE PURCHASER IN QUESTION CONTINUED TO IMPORT SUGAR (ANNEX I 155 TO 158 TO THE STATEMENTS OF DEFENCE).

509 THE APPLICANT, WITHOUT SERIOUSLY CALLING IN QUESTION THE TRUTH OF THE STATEMENTS IN THESE DOCUMENTS, OBJECTS HOWEVER TO THEIR

USE AS EVIDENCE ON THE GROUND THAT THEY HAVE BEEN MADE PARTLY ANONYMOUS, AND CLAIMS THAT THEY ARE NOT A SUITABLE BASIS FOR ANY GENERALISATION, SINCE THE COMPANY'S CUSTOMERS NUMBERED APPROXIMATELY 2 000 .

B - THE EVALUATION OF THE FACTS

510 (A) IT IS AGREED THAT THE CLAUSE IN ISSUE AS DESCRIBED IN THE CONTESTED DECISION WAS INCORPORATED IN A LARGE NUMBER OF SALES CONTRACTS CONCLUDED BY SZV WITHOUT HOWEVER HAVING BEEN INSERTED IN ALL OF THEM .

511 THERE IS NO NEED TO ASCERTAIN THE NUMBER OF CONTRACTS WHICH HAVE THIS CLAUSE AND THE NUMBER WHICH DO NOT .

512 IN FACT THE COURT'S FILE SHOWS THAT IN ANY CASE THE EFFECT OF THE CLAUSE WAS IN PRACTICE BY NO MEANS NEGLIGIBLE SINCE IT WAS INCORPORATED IN CONTRACTS FOR LARGE QUANTITIES (CF . THE CONTRACT OF 9 DECEMBER 1970 BEING ANNEX I 146 OF THE STATEMENTS OF DEFENCE AND HAVING AS ITS OBJECT THE SALE OF 30 000 METRIC TONS) .

513 MOREOVER, AS THE COMMISSION HAS ARGUED, WHEN EXAMINING THIS COMPLAINT THE CASES WHERE THE REBATE WAS IMMEDIATELY DEDUCTED FROM THE INVOICE PRICE MUST BE TAKEN INTO ACCOUNT AS WELL, SINCE THIS METHOD OF GRANTING A REBATE ALSO DISSUADES THE CUSTOMERS CONCERNED FROM OBTAINING THEIR SUPPLIES FROM OTHER PRODUCERS, AS THEY HAD TO FEAR THAT, IF THEY DID SO, THEY WOULD EITHER BE REQUIRED TO REPAY THE AMOUNT ORIGINALLY DEDUCTED OR THAT THE REBATE WOULD BE DISCONTINUED IN FUTURE .

514 (B) THE SYSTEM APPLIED BY SZV WAS LIKELY TO AFFECT TRADE BETWEEN MEMBER STATES, SINCE THE DISSUASIVE EFFECT MENTIONED ABOVE RELATED NOT ONLY TO THE SUGAR WHICH THE COMPANY'S CUSTOMERS COULD PURCHASE FROM OTHER GERMAN PRODUCERS BUT ALSO

TO THE SUGAR WHICH THESE CUSTOMERS MIGHT HAVE BEEN PREPARED TO IMPORT FROM OTHER MEMBER STATES .

515 IN THE CASE OF THE LATTER IMPORTS THE DISSUASIVE EFFECT WAS VERY MARKED, SINCE THE FOREIGN SUGAR IMPORTED INTO SOUTH GERMANY, EVEN IF IT IS OFFERED AT AN EX-WORKS PRICE BELOW THAT OF GERMAN SUGAR, IS BURDENED WITH HEAVY FREIGHT RATES .

516 THEREFORE THE LOSS OF THE REBATE WAS LIKELY EITHER TO MAKE IT MORE EXPENSIVE TO IMPORT THAN TO OBTAIN SUPPLIES FROM SZV OR AT LEAST TO CANCEL THE FINANCIAL ADVANTAGE WHICH IMPORTING COULD HAVE OFFERED COMPARED WITH THIS METHOD OF OBTAINING SUPPLIES .

517 (C) 1 . WITH REGARD TO THE QUESTION WHETHER THE SYSTEM AT ISSUE AMOUNTS TO AN ABUSE OF ITS DOMINANT POSITION SZV SUBMITS THAT A REBATE SUCH AS THE ONE IN QUESTION IS A NORMAL PRICE REDUCTION, WHICH IS LAWFUL HAVING REGARD TO THE IMPORTANCE OF RATIONALIZING SALES IN A COMPETITIVE ECONOMY .

518 THIS WAY OF CONCEIVING A REBATE DISREGARDS THE FACT THAT THE REBATE AT ISSUE IS NOT TO BE TREATED AS A QUANTITY REBATE EXCLUSIVELY LINKED WITH THE VOLUME OF PURCHASES FROM THE PRODUCER CONCERNED BUT HAS RIGHTLY BEEN CLASSIFIED BY THE COMMISSION AS A 'LOYALTY' REBATE DESIGNED, THROUGH THE GRANT OF A FINANCIAL ADVANTAGE, TO PREVENT CUSTOMERS OBTAINING THEIR SUPPLIES FROM COMPETING PRODUCERS .

519 2 . THE PARTIES CANNOT AGREE WHETHER THE COMMISSION IS CORRECT WHEN IT STATES THAT THE SYSTEM TO WHICH EXCEPTION IS TAKEN ENABLED SZV TO 'CONTROL' THE VOLUME OF SUGAR SUPPLID TO ITS CUSTOMERS BY FOREIGN PRODUCERS .

520 IN PARTICULAR SZV DENIES THAT IT WAS ABLE TO FIND OUT THE ENTIRE REQUIREMENTS OF ALL ITS CUSTOMERS .

521 THIS ARGUMENT IS NOT RELEVANT, SINCE IT IS UNNECESSARY TO KNOW TO WHAT EXTENT THE APPLICATION OF THE SAID SYSTEM WAS CAPABLE OF PROVIDING SZV WITH COMPLETE PARTICULARS OF THE VOLUME OF IMPORTS IN ITS SALES TERRITORY BUT NECESSARY TO FIND OUT WHETHER THIS SYSTEM WAS LIKELY TO DISSUADE THE COMPANY'S CUSTOMERS FROM OBTAINING THEIR SUPPLIES ALSO FROM PRODUCERS ESTABLISHED IN THE OTHER MEMBER STATES AND THIS QUESTION HAS ALREADY BEEN ANSWERED IN THE AFFIRMATIVE .

522 3 . AS THE COMMISSION HAS EMPHASIZED THE EFFECT OF THE SYSTEM COMPLAINED OF WAS THAT DIFFERENT NET PRICES WERE CHARGED TO TWO ECONOMIC OPERATORS WHO BOUGHT THE SAME AMOUNT OF SUGAR FROM SZV IF ONE OF THEM PURCHASED FROM ANOTHER PRODUCER AS WELL .

523 BY ACTING IN THIS WAY SZV 'APPLIED DISSIMILAR CONDITIONS TO EQUIVALENT TRANSACTIONS WITH OTHER TRADING PARTIES' WITHIN THE MEANING OF ARTICLE 86 (C) OF THE TREATY .

524 SZV HOWEVER, CALLS ATTENTION TO THE FACT THAT THE COMMISSION HAS NOT PROVED THAT THE APPLICATION OF THE SYSTEM COMPLAINED OF PLACED THE VARIOUS BUYERS FROM THE COMPANY 'AT A COMPETITIVE DISADVANTAGE '.

525 PURCHASERS FROM SZV, AND IN PARTICULAR LARGE INDUSTRIAL CONSUMERS, COMPETE WITH OTHER BUYERS FROM THE COMPANY .

526 FURTHER THE SYSTEM COMPLAINED OF WAS LIKELY TO LIMIT MARKETS TO THE PREJUDICE OF CONSUMERS WITHIN THE MEANING OF ARTICLE 86 (B), BECAUSE IT GAVE OTHER PRODUCERS AND ESPECIALLY THOSE HAVING THEIR PLACES OF BUSINESS IN OTHER MEMBER STATES NO CHANCE OR RESTRICTED THEIR OPPORTUNITIES OF COMPETING WITH SUGAR SOLD BY SZV .

527 THE LOYALTY REBATE IN QUESTION WHICH MAY FURTHER CONSOLIDATE SZV'S DOMINANT POSITION IS INCOMPATIBLE WITH THIS PROVISION .

528 HAVING REGARD TO ALL THESE CIRCUMSTANCES THIS SUBMISSION MUST BE REJECTED TO THE EXTENT TO WHICH IT IS DESIGNED TO ANNUL THE FINDING THAT SZV HAS ABUSED ITS DOMINANT POSITION BY TYING ITS CUSTOMERS BY GRANTING LOYALTY REBATES .

CHAPTER 8

THE COMPLAINT DIRECTED AGAINST PFEIFER UND LANGEN, THAT IT ENTERED INTO AGREEMENTS WITH ITS AGENTS WHICH RESTRICT THEIR OPPORTUNITIES FOR IMPORTING AND EXPORTING WITHIN THE COMMUNITY

529 SUBPARAGRAPH 4 OF ARTICLE 1 (2) OF THE CONTESTED DECISION BLAMES PFEIFER UND LANGEN FOR HAVING 'FROM THE 1968/69 MARKETING YEAR ONWARDS COMMITTED INFRINGEMENTS OF ARTICLE 85 (1) BY ENTERING INTO AGREEMENTS WITH THEIR AGENTS WHICH RESTRICT THEIR OPPORTUNITIES FOR IMPORTING AND EXPORTING WITHIN THE COMMUNITY ' .

I - SUMMARY OF THE RELEVANT STATEMENTS IN THE DECISION AND OF CERTAIN ADDITIONAL INFORMATION SUPPLIED BY THE APPLICANT

530 THE COMMISSION SUBMITS THAT THE SALES TERRITORY OF WZV, OF WHICH PFEIFER UND LANGEN IS THE PRINCIPAL MEMBER, IS SUBDIVIDED INTO SEVERAL AREAS AND IN SOME OF THEM WZV ONLY SELLS THROUGH REGIONAL COMMISSION AGENTS WITH WHOM PFEIFER UND LANGEN ENTERED INTO 'TRADE REPRESENTATIVES AGREEMENTS' WHICH INCLUDED, ON THE ONE HAND, A PROHIBITION ON THE SALE OF SUGAR FROM OTHER SOURCES WITHOUT PFEIFER UND LANGEN'S CONSENT WHICH WAS ONLY GRANTED FOR THE SALE OF SPECIAL QUALITIES OF SUGAR OR OF SUGAR FOR DENATURING AND, ON THE OTHER HAND, THE OBLIGATION ONLY TO RESELL THE SUGAR SUPPLIED BY PFEIFER UND LANGEN IN A SPECIFIC TERRITORY AND TO SPECIFIC CUSTOMERS .

531 PFEIFER UND LANGEN ONLY SUPPLIED OTHER DEALERS DIRECT IF THE LATTER SIGNED SUCH AGREEMENTS OR STATED THAT THEY ACCEPTED THE PRINCIPLES GOVERNING THEM .

532 THE EFFECT OF THIS SYSTEM OF SELLING WAS TO MAKE THE SALE OF SUGAR COMING FROM OTHER MEMBER STATES IN THE WESTERN PART OF THE FEDERAL REPUBLIC OF GERMANY VERY MUCH MORE DIFFICULT, TO PREVENT ANY INCREASE IN THE NUMBER OF SUGAR SUPPLIERS IN THAT AREA, TO ENABLE PFEIFER UND LANGEN TO CONTROL THE OPERATIONS FOR WHICH IT GRANTED ITS CONSENT AND TO STOP THE COMPANY'S AGENTS EXPORTING THE SUGAR PRODUCED BY THE LATTER TO OTHER MEMBER STATES .

533 AT THE REQUEST OF THE COURT PFEIFER UND LANGEN PRODUCED FOR THE COURT'S FILE A COPY OF TWO STANDARD FORM CONTRACTS WHICH IN TURN GOVERNED ITS RELATIONS WITH ITS AGENTS, THE FIRST - HEREINAFTER CALLED 'THE 1948 CONTRACT' - FROM 1948 TO 30 JUNE 1970 AND THE SECOND - HEREINAFTER CALLED 'THE 1970 CONTRACT' - FROM 1 JULY 1970 TO 31 DECEMBER 1972 .

534 THE 1948 CONTRACT AND THE 1970 CONTRACT BOTH

FOUNDATIONS CONTINUED UNDER DOC.NUM : 673J0040.4

- STIPULATE THAT THE AGENT SHALL SELL 'IN THE NAME AND FOR THE ACCOUNT OF PFEIFER UND LANGEN', THE 1970 CONTRACT ALSO STATING THAT THE AGENT HAS THE ATTRIBUTES OF A TRADE REPRESENTATIVE WITHIN THE MEANING GIVEN TO SUCH A REPRESENTATIVE UNDER GERMAN LAW, AND 'SHALL PROMOTE IN ALL RESPECTS AND TO THE MAXIMUM POSSIBLE EXTENT THE INTERESTS OF PFEIFER UND LANGEN' AND 'SHALL DEVOTE THE WHOLE OF HIS TIME AND ATTENTION TO THE SALE OF SUGAR IN ACCORDANCE WITH PFEIFER UND LANGEN'S INSTRUCTIONS '.

- ASSIGN EACH AGENT A SPECIFIC TERRITORY IN WHICH HE IS TO ACT AS REPRESENTATIVE AND GRANT HIM, AS THE 1970 CONTRACT EXPRESSLY STATES, 'THE EXCLUSIVE RIGHT TO SELL IN THE TERRITORY ASSIGNED TO HIM AND, CONSEQUENTLY, TERRITORIAL PROTECTION FOR ITS ENTIRE RANGE OF SUGAR FOR CONSUMPTION' AND IT IS NOT DENIED THAT THESE CLAUSES IMPLY A PROHIBITION ON SALES OUTSIDE THIS AREA .

535 THESE CONTRACTS CONTAIN CLAUSES WHICH PROHIBIT ANY TRADING IN SUGAR FROM OTHER SOURCES WITHOUT THE CONSENT OF PFEIFER UND LANGEN . THEY ARE EXPRESSED IN THE FOLLOWING TERMS IN THE 1948 CONTRACT AND 1970 CONTRACT RESPECTIVELY .

THE 1948 CONTRACT

'THE REPRESENTATIVE SHALL NOT REPRESENT OTHER SUGAR FACTORIES EXCEPT WITH THE EXPRESS WRITTEN CONSENT OF PFEIFER UND LANGEN, NOR DEAL IN SUGAR FROM THE PFEIFER UND LANGEN UNDERTAKING OR ELSEWHERE FOR HIS OWN ACCOUNT ' .

THE 1970 CONTRACT

'THE REPRESENTATIVE UNDERTAKES ... NOT TO SELL IN THE SPECIFIC TERRITORY IN WHICH PFEIFER UND LANGEN IS INTERESTED ANY OTHER SUGAR FOR CONSUMPTION COMING FROM A DOMESTIC OR FOREIGN SOURCE . EVERY DEROGATION FROM THIS UNDERTAKING MUST BE LIMITED IN TIME AND CONFIRMED IN WRITING BY PFEIFER UND LANGEN . THIS EXCLUSIVITY AGREEMENT DOES NOT APPLY, UNLESS AND UNTIL THIS CLAUSE SHALL BE CANCELLED, TO THE TRANSACTIONS CARRIED OUT BY THE REPRESENTATIVE FOR THE BENEFIT OF THE "NORDWESTDEUTSCHE MARKENZUCKER-VERTRIEBS-GMBH UND CO . KG", AT BIELEFELD/COLOGNE AND (WZV) AT COLOGNE ' .

536 IN REPLY TO A QUESTION PUT TO IT BY THE COURT THE APPLICANT STATED THAT IT COOPERATED WITH OTHER AGENTS ON THE BASIS OF ORAL

AGREEMENTS WHICH IN THE MAIN CORRESPOND TO THE BEFOREMENTIONED CONTRACTS .

II - THE SUBSTANCE (OF THE COMPLAINT)

537 PFEIFER UND LANGEN SUBMITS THAT, SINCE THE RELATIONSHIP TO IT OF THE AGENTS WITH WHOM IT ENTERED INTO THE AGREEMENTS, WHICH ARE THE SUBJECT-MATTER OF THIS COMPLAINT, WAS THAT OF TRADE REPRESENTATIVES, ARTICLE 85 DOES NOT APPLY TO THESE AGREEMENTS .

538 AN ANALYSIS OF THE AGREEMENTS ON THE COURT'S FILE SHOWS THAT IN LAW THEY ARE TRADE REPRESENTATIVES CONTRACTS, ESPECIALLY AS THEY EXPRESSLY GRANT THE AGENTS THE ATTRIBUTES OF A TRADE REPRESENTATIVE WITHIN THE MEANING GIVEN TO SUCH A REPRESENTATIVE UNDER GERMAN LAW, IMPOSE ON THEM THE OBLIGATION TO SELL THE SUGAR IN THE NAME AND FOR THE ACCOUNT OF THE PRINCIPAL, TO CARRY OUT THE LATTER'S INSTRUCTIONS, TO PROMOTE HIS INTERESTS AND, FINALLY, BECAUSE THEY ASSIGN THEM SPECIFIC TERRITORIES WHERE THEY ARE TO ACT AS REPRESENTATIVES .

539 IF SUCH AN AGENT WORKS FOR HIS PRINCIPAL HE CAN IN PRINCIPLE BE REGARDED AS AN AUXILIARY ORGAN FORMING AN INTEGRAL PART OF THE LATTER'S UNDERTAKING BOUND TO CARRY OUT THE PRINCIPAL'S INSTRUCTIONS AND THUS, LIKE A COMMERCIAL EMPLOYEE, FORMS AN ECONOMIC UNIT WITH THIS UNDERTAKING .

540 IN THESE CIRCUMSTANCES INCOMPATIBILITY WITH ARTICLE 85 IS NOT SIMPLY DUE TO THE FACT THAT THE PRINCIPAL FORBIDS SUCH AN AUXILIARY TO TRADE WITHOUT HIS CONSENT IN PRODUCTS WHICH MIGHT COMPETE WITH HIS OWN PRODUCTS .

541 THE POSITION IS DIFFERENT IF THE AGREEMENTS ENTERED INTO BETWEEN THE PRINCIPAL AND HIS AGENTS, WHOM THE CONTRACTING PARTIES CALL 'TRADE REPRESENTATIVES', CONFER UPON THESE AGENTS OR ALLOW THEM

TO PERFORM DUTIES WHICH FROM AN ECONOMIC POINT OF VIEW ARE APPROXIMATELY THE SAME AS THOSE CARRIED OUT BY AN INDEPENDENT DEALER, BECAUSE THEY PROVIDE FOR THE SAID AGENTS ACCEPTING THE FINANCIAL RISKS OF THE SALES OR OF THE PERFORMANCE OF CONTRACTS ENTERED INTO WITH THIRD PARTIES .

542 FOR IN SUCH CASES THE AGENTS CANNOT BE REGARDED AS AUXILIARY ORGANS FORMING AN INTEGRAL PART OF THE PRINCIPAL'S UNDERTAKING, SO THAT A CLAUSE PROHIBITING COMPETITION WHICH THEY ENTERED INTO MAY BE AN AGREEMENT BETWEEN UNDERTAKINGS WHICH IS PROHIBITED UNDER ARTICLE 85 .

543 THE COMMISSION SUBMITS THAT IN THIS CASE THE ASSUMPTION THAT THE AGENTS WERE MERELY AUXILIARIES, FORMING AN INTEGRAL PART OF THE UNDERTAKING CANNOT BE MADE GOOD .

544 IN FACT IT IS NOT DISPUTED THAT THE AGENTS IN QUESTION ARE LARGE BUSINESS HOUSES, WHICH AT THE SAME TIME AS THEY DISTRIBUTE SUGAR FOR THE ACCOUNT OF THE APPLICANT, WZV AND OTHERS, UNDERTAKE A VERY CONSIDERABLE AMOUNT OF BUSINESS FOR THEIR OWN ACCOUNT ON THE SUGAR MARKET, IN PARTICULAR IN THE FIELD OF EXPORTS TO THIRD COUNTRIES OR OF SUPPLIES FOR DENATURING .

545 THUS THESE REPRESENTATIVES ARE AUTHORIZED TO ACT AS INDEPENDENT DEALERS IN THOSE TRANSACTIONS WHERE THERE IS NO RISK OF COMPETITION IN THE COMMON MARKET BUT THEY ARE, ON THE OTHER HAND, EFFECTIVELY FETTERED BY THEIR TRADE REPRESENTATIVES CONTRACTS IN THOSE TRANSACTIONS WHERE SUCH COMPETITION MAY BE GENERATED AT THE COMMERCIAL LEVEL .

546 THAT THESE COMMERCIAL UNDERTAKINGS SOMETIMES FORMED AN INTEGRAL PART OF THE APPLICANT UNDERTAKING AND SOMETIMES ACTED AS INDEPENDENT TRADERS, IS MOREOVER CONFIRMED BY THE APPLICANT'S OWN OBSERVATION (REPLY PAGE 44) THAT THE INTEGRATION OF

REPRESENTATIVES IN ITS SALES ORGANIZATION 'DID NOT RULE OUT THE POSSIBILITY THAT AGENTS MAY ALSO COMPETE WITH INDEPENDENT DEALERS, IN PARTICULAR WHEN THEY SELL FOR THEIR OWN ACCOUNT', AND THAT 'WHEN THEY DO SO THEY DO NOT ACT AS MEMBERS OF THE APPLICANT'S SALES ORGANIZATION '.

547 IN FACT THE CREATION OF SUCH AN AMBIVALENT RELATIONSHIP, WHICH IN RESPECT OF THE SAME COMMODITY ONLY GIVES THE TRADER THE OPPORTUNITY OF CONTINUING TO OPERATE INDEPENDENTLY TO THE EXTENT TO WHICH IT IS IN THE INTEREST OF HIS SUPPLIER FOR HIM TO DO SO, CANNOT ESCAPE THE PROHIBITIONS OF ARTICLE 85 NO MATTER HOW SUCH A RELATIONSHIP IS REGARDED UNDER NATIONAL LAW .

548 WHEN ARTICLE 85 (1) NOT ONLY PROHIBITS AGREEMENTS, DECISIONS OR PRACTICES HAVING REGARD TO THEIR OBJECT BUT ALSO TO THEIR ACTUAL EFFECTS IN THE FIELD OF COMPETITION, IT IMPLIES THAT THESE EFFECTS MUST BE CONSIDERED IN THE CONTEXT IN WHICH THEY TAKE PLACE, THAT IS TO SAY IN THEIR SURROUNDING ECONOMIC AND LEGAL CIRCUMSTANCES WITHIN WHICH THEY MAY, TOGETHER WITH OTHER FACTORS, HAVE A CUMULATIVE EFFECT ON COMPETITION .

549 IN ORDER TO DETERMINE WHETHER AN AGREEMENT IS CAUGHT BY ARTICLE 85 (1) IT CANNOT THEREFORE BE SEVERED FROM THIS CONTEXT AND, IN PARTICULAR, THE EXISTENCE OF SIMILAR CONTRACTS MAY BE TAKEN INTO CONSIDERATION TO THE EXTENT TO WHICH THESE KINDS OF CONTRACTS ARE IN GENERAL LIKELY TO RESTRICT FREE TRADE .

550 WHEN THE APPLICANT ADOPTED THE POLICY ONLY TO SELL THE SUGAR IT PRODUCES FOR HUMAN CONSUMPTION IN A PARTICULAR SECTOR OF THE COMMON MARKET THROUGH UNDERTAKINGS SUCH AS THOSE APPEARING IN THIS CASE, WHICH HAD ENTERED INTO TRADE REPRESENTATIVES CONTRACTS GRANTING THEM THE EXCLUSIVE RIGHT TO SELL IN A SPECIFIC TERRITORY IN CONSIDERATION OF THE OBLIGATION NOT TO SELL IN THIS TERRITORY ANY

OTHER DOMESTIC OR FOREIGN SUGAR FOR CONSUMPTION, IT IN FACT RESTRICTED COMPETITION, PARTICULARLY IN THE FIELD OF PRICES .

551 BY SETTING UP THIS MARKETING NETWORK WHICH MOREOVER OVERLAPPED IN SOME PLACES THAT OF OTHER PRODUCERS, TO WHOM THE PROHIBITION ON SALES BY THE REPRESENTATIVE OF SUGAR COMING FROM OTHER SOURCES DID NOT APPLY, THE APPLICANT HAS IN FACT, SO FAR AS THE SUGAR WHICH IT PRODUCED IN ACCORDANCE WITH THE QUOTA IT WAS AWARDED BY THE COMMON ORGANIZATION OF THE MARKET IN SUGAR IS CONCERNED, RESTRICTED FREE TRADE .

552 BY DOING SO IT MADE THE INTERPENETRATION OF MARKETS MUCH MORE DIFFICULT .

553 IN THIS CONNEXION ITS OBJECTION THAT THIS SYSTEM UNDER WHICH THE MARKETING IS CARRIED OUT EXCLUSIVELY BY REPRESENTATIVES HAD BEEN ADOPTED EVER SINCE 1948 AND CANNOT THEREFORE BE REGARDED AS BEING DESIGNED TO MAINTAIN A PARTITIONING OF THE MARKETS, WHICH WERE NOT MADE FREE MARKETS UNTIL 1968, IS IRRELEVANT, SINCE A LEGAL INSTRUMENT ADOPTED UNDER A NATIONAL SYSTEM GOVERNED BY A LARGE NUMBER OF REGULATIONS WHICH WERE IN FORCE BEFORE 1968 IS PERFECTLY ADAPTED TO MAINTAIN THE FRAMEWORK OF THE SUGAR MARKETS .

554 THEREFORE THIS SUBMISSION MUST BE REJECTED .

555 SO FAR AS THE FINE IS CONCERNED THIS APPLICANT REAFFIRMS THAT THE INFRINGEMENT OF ARTICLE 85 CANNOT JUSTIFY THE IMPOSITION OF A FINE, SINCE THE COMMISSION'S COMMUNICATION OF 1962 MISLED IT BY GIVING THE IMPRESSION THAT THE TRADE REPRESENTATIVES CONTRACTS WERE IN ANY CASE COMPATIBLE WITH THE PROVISIONS OF THIS ARTICLE .

556 ALTHOUGH THE APPLICANT MUST HAVE KNOWN THAT THE ORGANIZATION OF ITS MARKETING NETWORK ON THE BASIS OF AGENCY AGREEMENTS ENTERED INTO BY IT WITH COMMERCIAL UNDERTAKINGS

WHICH WERE NOT SIMPLY ORDINARY AUXILIARIES WAS LIKELY TO RESTRICT COMPETITION, THE POSSIBILITY THAT THE WORDING OF THE SAID COMMUNICATION COULD INDUCE THE BELIEF THAT SUCH A PRACTICE WAS ACCEPTED AS BEING COMPATIBLE WITH THE TREATY CANNOT NEVERTHELESS BE RULED OUT .

557 THEREFORE THIS INFRINGEMENT CANNOT BE TAKEN INTO CONSIDERATION FOR THE PURPOSE OF FIXING THE AMOUNT OF THE FINE .

CHAPTER 9

THE COMPLAINT OF A CONCERTED ACTION IN CONNEXION WITH THE INVITATIONS TO TENDER FOR REFUNDS ON EXPORTS TO THIRD COUNTRIES

558 ARTICLE 1 (3) OF THE CONTESTED DECISION BLAMES RT, SAY, BEGHIN, GENERALE SUCRIERE ET SUCRES ET DENREES - AS WELL AS LEBAUDY-SUC AND SUCRE-UNION WHICH HAVE NOT LODGED ANY APPLICATION WITH THE COURT - FOR HAVING 'COMMITTED IN 1970 INFRINGEMENTS OF ARTICLE 85 (1) BY ENGAGING IN CONCERTED ACTIONS, AT THE TIME OF THE INVITATIONS TO TENDER FOR REFUNDS ON EXPORTS TO THIRD COUNTRIES, IN CONNEXION WITH THE AMOUNT OF THE REFUNDS FOR WHICH APPLICATIONS WERE MADE AND ALSO THE QUANTITIES WHICH WERE OFFERED '.

559 THE COMMISSION'S MAIN SUBMISSION IS THAT A SYSTEM OF INVITATIONS TO TENDER MUST BE REGARDED AS AN IDEAL WAY OF GENERATING COMPETITION AND THAT COMPETITION WITHIN THE COMMON MARKET IS IMPEDED IF THE TENDERS SUBMITTED BY THE PARTICIPANTS AT AN INVITATION TO TENDER ARE THE RESULT OF PRIOR KNOWLEDGE OF THE TENDERS OF THE OTHER PARTICIPANTS AND OF CONCERTED ACTION BETWEEN THEM .

SECTION 1 : FORMAL SUBMISSION BASED ON INFRINGEMENT OF ARTICLE 190 OF THE TREATY

560 SUCRES ET DENREES REGARDS AS INADEQUATE THE STATEMENT OF THE REASONS GIVEN BY THE COMMISSION IN SUPPORT OF ITS ASSERTION THAT 'ALTHOUGH THESE INVITATIONS TO TENDER DEAL WITH THE EXPORT OF SUGAR TO THIRD COUNTRIES, ACCOUNT MUST BE TAKEN OF THE FACT THAT THEY PERMIT THE EXPORT OF SUGAR PRODUCED WITHIN THE COMMUNITY '.

561 FURTHER, GENERALE SUCRIERE AND SUCRES ET DENREES CONSIDER THAT THE STATEMENT THAT 'THIS CONCERTED ACTION HAS ALSO SUPPLEMENTED THE OTHER MEASURES TAKEN BY THE PERSONS CONCERNED TO ACHIEVE PROTECTION OF CERTAIN NATIONAL MARKETS' LACKS PRECISION .

562 THE DECISION (PAGE 30, THE FIRST PARAGRAPH OF SECTION II) INCLUDES A GENERAL OUTLINE OF THE PRACTICES FOR WHICH IT BLAMES THE UNDERTAKINGS CONCERNED . THIS OUTLINE ALSO MENTIONS THE PRACTICES ALLEGED IN THIS COMPLAINT AND STATES THAT IT WAS THE GENERAL AIM OF THESE UNDERTAKINGS 'TO ENSURE THE PROTECTION OF THEIR RESPECTIVE MARKETS '.

563 THE DECISION (PAGE 42, THIRD PARAGRAPH UNDER LETTER F) GOES ON TO STATE 'THAT ACCORDING TO THE RESULTS OF THE INVITATIONS TO TENDER SOME PRODUCERS RATHER THAN OTHERS WOULD HAVE TO SELL SURPLUS QUANTITIES IN THE OTHER MEMBER STATES OF THE COMMUNITY' AND 'THAT THE CONCERTED ACTION WAS LIKELY TO BRING ABOUT A CHANGE IN THE QUANTITIES MARKETED WITHIN THE COMMUNITY BY THE PRINCIPAL PRODUCERS IN FRANCE AND BELGIUM '.

564 ALL THESE FACTORS SHOW THAT IN THE COMMISSION'S VIEW, ON THE ONE HAND, ALL THE MEASURES TO WHICH EXCEPTION IS TAKEN WERE DESIGNED TO ACHIEVE THE COMMON PURPOSE OF PROTECTING THE RESPECTIVE MARKETS OF THE PRODUCERS CONCERNED AND, ON THE OTHER HAND, THE CONCERTED ACTION RELATING TO THE INVITATIONS TO TENDER IN QUESTION AFFECTED TRADE - AND CONSEQUENTLY COMPETITION - WITHIN THE COMMON MARKET .

565 AS THE STATEMENT OF THE REASONS UPON WHICH THE DECISION WAS BASED IS ADEQUATE THIS SUBMISSION IS UNFOUNDED .

SECTION 2 : SUBSTANTIVE SUBMISSIONS

I - INFRINGEMENT OF ARTICLE 85 OF THE TREATY

566 THE APPLICANTS TAKE THE VIEW THAT THE COMMISSION HAS INFRINGED ARTICLE 85 OF THE TREATY EITHER BECAUSE IT BASED ITS DECISION ON STATEMENTS OF FACTS WHICH ARE INCORRECT OR, IN PARTICULAR, BECAUSE IT WRONGLY THOUGHT THAT THE APPLICANTS' CONDUCT MIGHT AFFECT TRADE BETWEEN MEMBER STATES AND THAT ITS OBJECT AND EFFECT WAS TO IMPEDE COMPETITION NOT ONLY IN THE CASE OF EXPORTS TO THIRD COUNTRIES BUT ALSO WITHIN THE COMMON MARKET .

1 . THE TRUTH OF THE FACTS ALLEGED

567 A - A MEMORANDUM DRAWN UP BY EMPLOYEES OF EXPORT FOR BARON KRONACKER, THE CHAIRMAN OF THIS COMPANY, AND RECORDING A TELEPHONE CONVERSATION WITH MR MAISIN (OF RT) OF 17 FEBRUARY 1970 (ANNEX I 78 TO THE STATEMENTS OF DEFENCE) STATES :

'MR MAISIN TELEPHONED US BECAUSE WE ASKED HIM LAST WEEK TO SUPPLY US WITH RAW SUGAR FOR THE PURPOSE OF THE INVITATION TO TENDER FOR REFUNDS ON THE EXPORT OF RAW SUGAR ON 18 FEBRUARY .

HE CONFIRMED THAT ON 16 FEBRUARY HE WAS IN PARIS FOR A MEETING OF REFINERS AT WHICH TATE AND LYLE WERE REPRESENTED .

DURING THIS MEETING THE AMOUNTS OF THE REFUNDS FOR WHICH TENDERS WILL BE SUBMITTED WAS THE SUBJECT OF AN AGREEMENT . TATE WILL BE THE PRINCIPAL ULTIMATE PURCHASER OF THESE LOTS .

RAFFINERIE TIRLEMONTTOISE PLANS TO EXPORT ABOUT 9 000 METRIC TONS OF RAW SUGAR WHICH WILL BE DELIVERED TO TATE . RT SUGGESTS THAT EXPORT ACTS IN THIS OPERATION AS BROKER . IF EXPORT DOES SO IT SHOULD ABIDE BY THE COMMON POLICY LAID DOWN FOR INVITATIONS TO TENDER .

WHEN INVITED TO CLARIFY THIS LAST POINT MR MAISIN ADMITS THAT THIS COMMITMENT ALSO COVERS INVITATIONS TO TENDER FOR THE EXPORT OF WHITE SUGAR ...

DURING THE EXCHANGE OF VIEWS WHICH FOLLOWED WE ASKED MR MAISIN HOW THIS CONCERTED ACTION WORKED IN PRACTICE . WE LEARNT THAT :

- THE PARTICIPATORS WERE SAY, BEGHIN, LEBAUDY, COMMERCIALE SUCRIERE (BOUCHON-ST-LOUIS) (AN EXPRESSION REFERRING TO GENERALE SUCRIERE), SUCRE-UNION, RAFFINERIE TIRLEMONTTOISE AND SUCRES ET DENREES .

IT MUST BE NOTED THAT SUCRES ET DENREES ATTENDS THE MEETINGS . BECAUSE IT IS SO FAR AWAY RAFFINERIE TIRLEMONTTOISE RARELY ATTENDS BUT KEEPS IN TOUCH BY TELEPHONE ... THESE MEETINGS ARE HELD ON TUESDAY EVENINGS AT ABOUT 17.00 HRS . THE DISCUSSIONS AT THESE MEETINGS ARE ABOUT

(1) THE GENERAL LEVEL OF REFUNDS

(2) THE AMOUNT FOR WHICH EACH OF THE MEMBERS WILL TENDER, ANY NECESSARY RECONCILIATION OF THE TENDERS TAKING PLACE DURING MULTILATERAL DISCUSSIONS .

CONCLUSION

RAFFINERIE TIRLEMONTTOISE PROPOSES THAT WE SHOULD ACT AS BROKERS IN ITS INTENDED (OR AGREED) SALE OF 9 000 METRIC TONS TO TATE AND LYLE

.

AS CONSIDERATION IT REQUESTS US TO GIVE UP OUR FREEDOM TO ATTEND THE INVITATIONS TO TENDER FOR EXPORTS OF RAW AS WELL AS WHITE SUGAR .

IT IS IMPLIED THAT RAFFINERIE TIRLEMONTTOISE REFUSES TO OFFER US RAW SUGAR WHICH WE ARE FREE TO SELL WHEREVER WE LIKE ' .

568 ANOTHER OF EXPORT'S INTERNAL MEMORANDA (ANNEX II 17 TO THE STATEMENT OF DEFENCE IN CASE 47/73) SHOWS THAT THIS FIRM'S MANAGING BOARD ON 17 FEBRUARY TOOK THE FOLLOWING DECISIONS, 'AFTER CONSIDERING THE PROPOSAL (MR MAISIN OF RT) ON THE QUESTION OF EXPORT SHARING IN THE PROFITS ARISING OUT OF THE SALE OF TIRLEMONT RAW SUGAR, (PROPOSAL) SUBJECT TO COMMUNICATION BY EXPORT OF ITS TENDERS IN ANSWER TO THE EEC INVITATIONS TO TENDER FOR WHITE SUGAR ':

'A - WE AGREE ... NOT TO TENDER FOR A REFUND ON RAW SUGAR AT THE STANDING EEC INVITATIONS TO TENDER WHICH WILL TAKE PLACE ONCE A WEEK ON AND AFTER WEDNESDAY 18 FEBRUARY, SO THAT SUCH APPLICATIONS FOR REFUNDS DO NOT COMPETE WITH THE APPLICATIONS OF FRANCO-BELGIAN REFINERS AND IN PARTICULAR OF RAFFINERIE TIRLEMONTTOISE . (IT MUST BE NOTED THAT THIS WAS A PURELY FORMAL GESTURE, BECAUSE, UNLESS EXPORT'S SUPPLIES OF RAW SUGAR WERE GUARANTEED BY TIRLEMONT, THE ONLY POSSIBLE BELGIAN SUPPLIER, IT COULD NOT REASONABLY BE EXPECTED TO TENDER AT THE INVITATION TO TENDER FOR RAW SUGAR : THE RISK BEING THAT IF IT WAS A SUCCESSFUL TENDERER IT WOULD BE UNABLE IN PRACTICE TO COVER ITS POSITION) .

B -

C - SO FAR AS THE TENDERS FOR REFUNDS AT THE INVITATION TO TENDER FOR WHITE SUGAR ARE CONCERNED THE BASIC IDEAS OF A GENERAL PROPOSAL MADE BY EXPORT TO RAFFINERIE TIRLEMONTTOISE ARE AS FOLLOWS . THEY

WERE COMMUNICATED ... BY MR KRONACKER TO MR ROLIN AND THEN TO MR MAISIN .

(1)

(2) EXPORT WISHES TO ATTEND THE MEETING IN PARIS ON TUESDAY EVENINGS AND EVEN TO REPRESENT TIRLEMONT (SINCE THE LATTER CANNOT ATTEND) WHEN DECISIONS WILL BE TAKEN AS TO THE REFUNDS FOR WHICH APPLICATION IS TO BE MADE AT THE INVITATION TO TENDER TO BE HELD ON THE FOLLOWING DAY, WEDNESDAY MORNING . THESE MEETINGS ... ARE ATTENDED BY FRANCO-BELGIAN REFINERS, SUCRE-UNION (SUCRES ET DENREES) AND BAUCHE .

(3) EXPORT WILL NOTIFY THE AMOUNTS IN RESPECT OF WHICH IT WILL ATTEND THE INVITATION TO TENDER FOR WHITE SUGAR FOR ITSELF AND FOR THE ACCOUNT OF THIRD PARTIES (PRINCIPALS) AND INDICATE THE LEVEL OF ITS TENDERS : NOT THEIR AMOUNT BUT WHETHER THEY ARE HIGHER OR LOWER THAN THOSE DECIDED UPON AT THE MEETING IN PARIS OR BY RT ...

(4)

(5) CONCURRENTLY WITH THE MEETINGS IN PARIS RELATING TO THE CONCERTED ACTION AT WHICH THE FRENCH DISCUSS THEIR APPLICATIONS FOR REFUNDS MR KRONACKER ASKS THAT A SMALL JOINT RT - EXPORT COMMITTEE BE SET UP TO DETERMINE THE POSITION IN BELGIUM

.....

569 BARON KRONACKER STATES IN AN INTERNAL MEMORANDUM 'ON THE QUESTION OF RT'S NEGOTIATIONS ON 26 MARCH 1970' (ANNEX II 18 TO THE STATEMENT OF DEFENCE IN CASE 47/73)

IT IS MY WISH THAT WE KEEP IN STEP WITH TIRLEMONT . IF WE DO SO WE SACRIFICE OUR PRINCIPALS, WE AGREE TO REDUCE THE AMOUNTS IN RESPECT

OF WHICH WE ATTEND THE INVITATION TO TENDER FOR EXPORT AND, ALTHOUGH WE HAVE NO SAY IN THE MATTER, WE AGREE TO ADOPT THE PRICES OF THE PARIS CONSORTIUM . THIS OF NECESSITY IMPLIES THAT TIRLEMONT ONLY TAKES PART IN THE INVITATIONS TO TENDER THROUGH US . THIS SHOULD ALSO IMPLY THAT WE ATTEND THE MONDAY MEETINGS IN PARIS ...'

570 EXPORT STATES IN AN INTERNAL MEMORANDUM HEADED 'OBSERVATIONS ON THE ORAL ANSWER BY MR ROLIN ON 20 MAY TO BARON KRONACKER'S WRITTEN PROPOSAL OF 20 MAY RELATING TO RELATIONS BETWEEN EXPORT AND RT FOR THE 1970/71 MARKETING YEAR' (ANNEX I 131 TO THE STATEMENT OF DEFENCE)'. IN ADDITION MR ROLIN OF RT STILL RESTRICTS OUR FREEDOM OF ACTION AND OUR OPPORTUNITIES FOR APPLYING FOR REFUNDS .

SUCH APPLICATIONS ACCORDING TO HIM SHOULD BE MADE AFTER THEIR AMOUNT AND LEVEL HAVE BEEN COORDINATED WITH MR BERNARD, CHAIRMAN AND MANAGING DIRECTOR OF SAY WITHIN THE FRAMEWORK OF THE CONCERTED ACTION AGREED IN PARIS, (SAY, BEGHIN, VARSANO (DE SUCRES ET DENREES), SUCRE-UNION ETC ...)';

571 THE MINUTES OF A MEETING HELD ON 17 JULY 1970 BY RT'S BOARD OF DIRECTORS (ANNEX II 19 TO THE STATEMENT OF DEFENCE IN CASE 47/73 STATE : 'FOR NEXT YEAR WE WOULD LIKE TO TRY TO AVOID CUT PRICE REFUNDS . FOR THIS PURPOSE THE MANAGING DIRECTOR HAS SUBMITTED A PRELIMINARY DRAFT OF A PLAN FOR POOLING EXPORTS .

MOREOVER ONE ADVANTAGE OF THIS PLAN IS THAT IT WILL ALSO REDUCE THE TENDENCY IN FRANCE TO APPLY CUT PRICE INTERNAL PRICES . FINALLY IT WOULD ENABLE LARGE REDUCTIONS OF TRANSPORT COSTS TO BE EFFECTED '.

572 RT STATES IN A TELEX MESSAGE TO EXPORT OF 23 JULY 1970 (ANNEX I 77 TO THE STATEMENTS OF DEFENCE)

1 . I HAVE NOT LAID THE BLAME ON EXPORT FOR ANY BREAK-DOWN IN THE NEGOTIATIONS FOR FORMING A FRANCO-BELGIAN POOL . I HAVE EXPLAINED THE EFFORTS WHICH WE HAVE MADE AND THE REASONS FOR THEM WHICH I WILL SUMMARIZE IN A FEW WORDS :

(A) ELIMINATION OF COMPETITION FOR REFUNDS SO THAT EACH PRODUCER IS AT LEAST GUARANTEED THE INTERVENTION PRICE .

(B) CONSEQUENTLY ENDING OF THE STRUGGLE TO SELL AMOUNTS ON THE DOMESTIC MARKET WHERE THE PRICE IS MORE CERTAIN RATHER THAN HAVING TO EXPORT (THIS APPLIES PRIMARILY TO FRANCE) .

.....

2 . TO COME TO THE CRUX OF THE PROBLEM I WANT TO SELL THROUGH EXPORT BUT I WOULD LIKE TO ARRANGE FOR APPLICATIONS FOR REFUNDS TO BE HARMONIZED . HAVING REGARD TO THE IMPORTANCE OF OUR FRENCH INTERESTS IT SEEMS TO ME TO BE NECESSARY TO PREVENT TIRLEMONT FROM APPEARING TO SUPPORT AN AGREEMENT BETWEEN THE FRENCH WHEN IT WORKS AT RUE VENEAU AND TO UNDERMINE THE SAME AGREEMENT WHEN IT SUPPLIES EXPORT . THE OBSERVATIONS WHICH I MADE ON YOUR OBSERVATIONS OF 20 MAY ARE BASED ON THIS WISH TO FIND A FORMULA FOR THE CONCERTED ACTION IN CONNEXION WITH APPLICATIONS FOR REFUNDS . AS SOON AS A SOLUTION HAS BEEN FOUND WE CAN COMPLETE THE TERMS OF THE OPTION WHICH I MENTIONED TO YOU ' .

.....

573 EXPORT IN A TELEX MESSAGE TO RT OF 19 AUGUST 1970 (ANNEX I 81 TO THE STATEMENTS OF DEFENCE), HAVING RECORDED ITS ACCEPTANCE OF THE 'PLAN' PROPOSED BY RT FOR ARRANGING DELIVERIES TO THE NETHERLANDS AND SUGGESTED THAT A 'SIMILAR PLAN' BE WORKED OUT FOR DELIVERIES TO ITALY, DEALS WITH THE QUESTION OF REFUNDS AS FOLLOWS :

'TAKING INTO ACCOUNT OUR PARTICIPATION IN THE POINTS ABOVE, AND IN PRINCIPLE, WHATEVER FORMULA IS ADOPTED IN PARIS, WE ADVOCATE THAT EXPORT AND RT ACTUALLY WORK TOGETHER IN THIRD COUNTRIES AND THIS COOPERATION MUST NORMALLY RESULT IN A CONCERTED ACTION ON THE LEVEL OF REFUNDS, ACCOUNT BEING TAKEN OF THE MANUFACTURERS' POLICY '.

574 B - IT HAS ALREADY BEEN STATED THAT THE EVIDENTIAL VALUE OF THESE DOCUMENTS, TO THE EXTENT TO WHICH THEY EMANATE FROM EXPORT OR ARE ADDRESSED TO THIS FIRM BY RT, CANNOT BE CALLED IN QUESTION AND THAT THESE DOCUMENTS MAY ALSO BE USED AS EVIDENCE AGAINST APPLICANTS OTHER THAN RT .

575 THESE DOCUMENTS, READ TOGETHER, PROVE THAT THE APPLICANTS IN FACT IMPLEMENTED A CONCERTED ACTION RELATING TO THE QUANTITIES TO BE OFFERED AND THE AMOUNTS TO BE APPLIED FOR AT INVITATIONS TO TENDER FOR REFUNDS ON EXPORTS TO THIRD COUNTRIES .

576 MOREOVER, ALTHOUGH SOME OF THE APPLICANTS ASSERT THAT THE UNDERTAKINGS CONCERNED CONFINED THEIR JOINT ACTIVITIES TO AN EXCHANGE OF INFORMATION, NONE OF THEM HOWEVER SERIOUSLY CALLS IN QUESTION THE FACTS ALLEGED, AND GENERALE SUCRIERE AND SUCRES ET DENREES EVEN EXPRESSLY ACKNOWLEDGE THE EXISTENCE OF A CONCERTED ACTION ADDING HOWEVER THAT THE APPLICANTS DID NOT CONFER TOGETHER ONCE AND FOR ALL BUT ON THE OCCASION OF EACH INVITATION TO TENDER .

577 THESE FACTS AND CONSIDERATIONS SHOW THAT THE APPLICANTS AS WELL AS LEBAUDY-SUC AND SUCRE-UNION HAVE KNOWINGLY SUBSTITUTED FOR THE RISKS OF COMPETITION PRACTICAL COOPERATION BETWEEN THEM LEADING IN THE END TO CONDITIONS OF COMPETITION WHICH DID NOT CORRESPOND TO NORMAL MARKET CONDITIONS . IN THIS CASE THOSE MARKET CONDITIONS WERE THE RESULTS WHICH THE INVITATIONS TO TENDER IN QUESTION COULD HAVE PRODUCED, IF EACH OF THE

UNDERTAKINGS CONCERNED HAD DETERMINED INDEPENDENTLY THE QUANTITIES TO BE OFFERED AND THE AMOUNTS FOR WHICH APPLICATION WAS TO BE MADE .

578 THEREFORE THE ONLY POSSIBLE FINDING IS THAT THE APPLICANTS AND THE OTHER UNDERTAKINGS CONCERNED IN FACT ENGAGED IN THE CONCERTED PRACTICES DISCLOSED IN THE DECISION .

2 . THE QUESTION WHETHER THESE PRACTICES FULFIL THE CONDITIONS LAID DOWN IN ARTICLE 85 OF THE TREATY

A - THE QUESTION WHETHER THESE PRACTICES MIGHT AFFECT TRADE BETWEEN MEMBER STATES AND WHETHER THEIR OBJECT OR EFFECT WAS TO IMPEDE COMPETITION WITHIN THE COMMON MARKET .

579 (A) THE TELEX MESSAGE OF 23 JULY 1970 QUOTED BY RT STATING INTER ALIA THAT 'ELIMINATION OF COMPETITION FOR REFUNDS' COULD AND WAS INTENDED TO 'RESULT' IN 'ENDING THE STRUGGLE TO SELL AMOUNTS ON THE DOMESTIC MARKET' PROVES THAT THE UNDERTAKINGS CONCERNED HAVE THEMSELVES ESTABLISHED A LINK BETWEEN THE PRACTICES IN QUESTION, ON THE ONE HAND, AND THE COMPETITIVE SITUATION OF THESE UNDERTAKINGS ON THE COMMON MARKET, ON THE OTHER HAND .

580 FURTHER, AS THE UNDERTAKINGS CONCERNED HAD THEIR PLACE OF BUSINESS IN FRANCE AND BELGIUM, WHICH ARE COUNTRIES HAVING A LARGE SUGAR SURPLUS, THERE IS NO DOUBT THAT, HAD IT NOT BEEN FOR THE CONCERTED ACTION AT ISSUE, SOME AT LEAST OF THESE UNDERTAKINGS WOULD HAVE BEEN AWARDED SMALLER QUANTITIES THAN THEY WERE IN FACT AWARDED AND WOULD THUS HAVE BEEN INDUCED TO SELL MORE SUGAR IN THE OTHER MEMBER STATES, AND THESE SALES COULD NOT ONLY MODIFY THE PATTERN OF INTRA-COMMUNITY TRADE BUT ALSO INTENSIFY COMPETITION WITHIN THE COMMON MARKET, THE VERY RESULT WHICH THE UNDERTAKINGS WISHED TO PREVENT AS IS SHOWN BY THE TELEX MESSAGE WHICH HAS BEEN QUOTED .

581 (B) THE APPLICANTS SUBMIT THAT COMMUNITY REGULATIONS RELATING TO THE INVITATIONS TO TENDER FOR REFUNDS ON EXPORTS TO THIRD COUNTRIES GAVE THE COMMISSION SUCH WIDE POWERS THAT IT COULD PREVENT THE CONDUCT COMPLAINED OF FROM PRODUCING THE EFFECTS REFERRED TO IN ARTICLE 85 .

582 IT IS TRUE THAT THESE REGULATIONS GAVE THE COMMISSION CONSIDERABLE POWERS AND IN PARTICULAR THE POWER TO DECIDE HOW FREQUENTLY THE INVITATIONS TO TENDER SHOULD BE HELD, TO DETERMINE THE MAXIMUM AMOUNT OF SUGAR TO BE EXPORTED AT EACH INVITATION TO TENDER AND TO DISCONTINUE A SPECIFIC INVITATION TO TENDER .

583 HOWEVER THESE POWERS WERE LIMITED BY THE FACT THAT EACH TENDERER WHOSE OFFER DID NOT EXCEED THE MAXIMUM AMOUNT OF THE REFUND COULD REQUIRE AS A RULE THAT THE AWARD BE MADE TO HIM AND THAT HE BE ISSUED WITH AN EXPORT LICENCE .

584 SO FAR AS THE POSSIBILITY OF DISCONTINUING AN INVITATION TO TENDER IS CONCERNED IT IS APPROPRIATE TO POINT OUT THAT SUCH A DRASTIC STEP WOULD HAVE STOPPED THE FLOW OF EXPORTS IF IT HAD BEEN TAKEN REGULARLY .

585 FURTHERMORE THE APPLICANTS FAIL TO APPRECIATE THAT, IN ORDER TO BE ABLE TO UNCOVER A CONCERTED ACTION SUCH AS THE ONE IN QUESTION, THE COMMISSION HAD IN THE FIRST PLACE TO EXAMINE AND COMPARE THE RESULTS OF A RELATIVELY LARGE NUMBER OF INVITATIONS TO TENDER SO THAT, FROM THIS POINT OF VIEW AS WELL, IT WAS UNABLE TO PUT A STOP TO EVERY CONCERTED ACTION .

586 THE APPLICANTS' ARGUMENT CANNOT THEREFORE BE ACCEPTED .

587 (C) RT SUBMITS THAT WITH REFERENCE TO ARTICLE 184 OF THE TREATY, THE COMMUNITY REGULATIONS WHICH ESTABLISHED THE SYSTEM OF

INVITATIONS TO TENDER ARE INAPPLICABLE, SINCE THEY ARE CONTRARY TO ONE OF THE FUNDAMENTAL OBJECTIVES OF REGULATION NO 1009/67, NAMELY TO ENSURE THAT WHEN SUGAR PRODUCERS SELL THEY WILL AT LEAST OBTAIN THE INTERVENTION PRICE .

588 IN FACT THE EFFECT OF THIS SYSTEM WAS TO FORCE PRODUCERS TO BE SATISFIED WITH A RETURN LESS THAN THE SAID PRICE .

589 ALTHOUGH UNDER ARTICLE 9 OF REGULATION NO 1009/67 THE INTERVENTION AGENCIES OF MEMBER STATES SHALL BUY IN THE SUGAR OFFERED TO THEM AT THE INTERVENTION PRICE, THERE IS NOTHING IN THIS REGULATION TO JUSTIFY THE ASSERTION THAT THIS PRICE IS ALSO 'GUARANTEED' TO PRODUCERS FOR SUGAR WHICH THEY SUPPLY TO OTHER PRODUCERS .

590 SO FAR IN PARTICULAR AS EXPORTS TO THIRD COUNTRIES ARE CONCERNED ARTICLE 17 (1) OF THE REGULATION PROVIDES THAT THE DIFFERENCE BETWEEN THE QUOTATIONS AND PRICES ON THE WORLD MARKET AND PRICES WITHIN THE COMMUNITY 'MAY' BE COVERED BY AN EXPORT REFUND 'TO THE EXTENT NECESSARY TO ENABLE THE PRODUCTS TO BE EXPORTED '.

591 THIS WORDING SHOWS THAT COMMUNITY INSTITUTIONS WERE NOT REQUIRED TO INTRODUCE A SYSTEM OF EXPORT REFUNDS AND STILL LESS TO FIX THE AMOUNT THEREOF IN SUCH A WAY THAT IF SUGAR PRODUCERS EXPORT THEY OBTAIN THE INTERVENTION PRICE .

592 RT'S SUBMISSION CANNOT THEREFORE BE UPHELD .

593 (D) RT TAKES THE VIEW THAT ARTICLE 85 DOES NOT APPLY TO THE PRACTICES COMPLAINED OF, SINCE THE LATTER DID NOT RELATE TO THE MARKET FOR A PRODUCT BUT THE 'MARKET' FOR EXPORT LICENCES .

594 THIS ARGUMENT IS IRRELEVANT, SINCE THE ONLY QUESTION WHICH HAS TO BE ANSWERED IS WHETHER THE SAID PRACTICES, WHATEVER THEIR IMMEDIATE PURPOSE MAY HAVE BEEN, AIMED AT AND LED TO COMPETITION BEING IMPEDED WITHIN THE COMMON MARKET AND THIS QUESTION MUST BE ANSWERED IN THE AFFIRMATIVE .

595 THESE CONSIDERATIONS LEAD TO THE CONCLUSION THAT THE OBJECT AND EFFECT OF THE DISPUTED PRACTICES WERE, INTER ALIA, TO IMPEDE COMPETITION WITHIN THE COMMON MARKET AND, FOR THIS REASON, MIGHT AFFECT TRADE BETWEEN MEMBER STATES .

B - THE QUESTION WHETHER THE CONCERTED PRACTICES HAD AN APPRECIABLE EFFECT ON INTRA-COMMUNITY TRADE AND COMPETITION WITHIN THE COMMON MARKET

596 IN REPLY TO THE QUESTIONS PUT BY THE COURT THE APPLICANTS CALCULATED THAT THE SUGAR WHICH THEY EXPORTED IN 1970 AS A RESULT OF THE INVITATIONS TO TENDER AMOUNTED ALTOGETHER TO 89 821 METRIC TONS OF RAW SUGAR AND 248 833 METRIC TONS OF WHITE SUGAR, WHEREAS THE COMMISSION ESTIMATED THESE AMOUNTS TO BE 60 627 AND 207 239 METRIC TONS RESPECTIVELY AND WENT ON TO SAY THAT SUCRE-UNION AND LEBAUDY-SUC HAD EXPORTED 28 332 AND 17 125 METRIC TONS OF WHITE SUGAR RESPECTIVELY .

597 ACCORDING TO THE COMMISSION'S STATISTICS (TABLES III AND IV OF ANNEX I TO THE REJOINDER IN CASE 47/73), TO THE EXTENT TO WHICH THEY ARE BASED ON THE DATA SUPPLIED BY FRANCE AND BELGIUM, THE FOLLOWING AMOUNTS WERE EXPORTED BY THESE TWO MEMBER STATES WITHIN THE COMMON MARKET :

1969/70 : RAW SUGAR : FRANCE : 1 800 BELGIUM : 13 900 TOTAL : 15 700

1969/70 : WHITE SUGAR : FRANCE : 298 600 BELGIUM : 87 100 TOTAL : 385 700

1970/71 : RAW SUGAR : FRANCE : 74 700 BELGIUM : 21 100 TOTAL : 95 800

1970/71 : WHITE SUGAR : FRANCE : 524 300 BELGIUM : 91 100 TOTAL : 615 400

598 ALL THIS STATISTICAL INFORMATION SHOWS THAT THE UNDERTAKINGS CONCERNED WERE ABLE TO EXPORT LARGE QUANTITIES TO THIRD COUNTRIES AS A RESULT OF THE CONCERTED ACTION TO WHICH EXCEPTION IS TAKEN, NOT ONLY IN ABSOLUTE TERMS, BUT ALSO IN COMPARISON WITH FRENCH AND BELGIAN EXPORTS WITHIN THE COMMON MARKET .

599 THE ONLY INFERENCE TO DRAW FROM THIS IS THAT, HAD IT NOT BEEN FOR THE CONCERTED ACTION, SOME OF THE UNDERTAKINGS CONCERNED WOULD HAVE BEEN FORCED TO SELL MORE SUGAR WITHIN THE COMMON MARKET AND THAT CONSEQUENTLY THE PATTERN OF INTRA-COMMUNITY TRADE AND THE DEGREE OF COMPETITION WITHIN THE COMMON MARKET WOULD HAVE BEEN MODIFIED .

600 FURTHERMORE THE UNDERTAKINGS CONCERNED WERE FROM THE ECONOMIC POINT OF VIEW VERY IMPORTANT, AS THE FRENCH PRODUCERS AFFECTED BY THIS COMPLAINT ACCOUNTED AT THE TIME FOR 75 PER CENT OF FRENCH PRODUCTION, WHICH INCREASED FROM 2 620 000 METRIC TONS IN 1968/69 TO 3 230 000 METRIC TONS IN 1971/72, WHEREAS RT ACCOUNTED FOR 65 PER CENT OF BELGIAN PRODUCTION WHICH WENT UP FROM 530 000 METRIC TONS IN 1968/69 TO 770 000 METRIC TONS IN 1971/72 .

601 IN THESE CIRCUMSTANCES IT IS APPROPRIATE TO FIND THAT THE CONCERTED PRACTICES IN QUESTION MIGHT AFFECT TRADE BETWEEN MEMBER STATES AND IMPEDE COMPETITION WITHIN THE COMMON MARKET TO AN APPRECIABLE EXTENT .

602 ALL THESE CONSIDERATIONS LEAD TO THE CONCLUSION THAT THE SUBMISSION BASED ON INFRINGEMENT OF ARTICLE 85 OF THE TREATY MUST BE REJECTED .

II - INFRINGEMENT OF REGULATION NO 26

603 IF THE COURT FINDS THAT THE DISPUTED PRACTICES 'HELPS TO BRING ABOUT THE PROTECTION, INTER ALIA, OF THE ITALIAN MARKET' GENERALE SUCRIERE AND SAY SUBMIT THAT THEY OUGHT TO BENEFIT FROM THE EXCEPTIONS SPECIFIED IN ARTICLE 2 OF REGULATION NO 26 .

604 THIS SUBMISSION IS WITHOUT PURPOSE, SINCE THE COURT DOES NOT TAKE THE VIEW THAT THE IMMEDIATE RESULT OF THESE PRACTICES WAS THE PROTECTION OF THE ITALIAN MARKET .

605 RT'S SUBMISSION BASED ON THE FACT THAT THE COMMISSION WAS WRONG NOT TO APPLY THE SECOND EXCEPTION SPECIFIED IN ARTICLE 2 OF REGULATION NO 26 TO THE APPLICANTS' CASE, WHICH IS ALSO PUT FORWARD IN CONNEXION WITH THE SECOND COMPLAINT, MUST BE REJECTED FOR THE REASONS GIVEN WHEN THE COMPLAINT WAS EXAMINED .

CHAPTER 10

THE REQUIREMENT THAT THE APPLICANTS PUT AN END IMMEDIATELY TO THE INFRINGEMENTS FOUND TO HAVE BEEN COMMITTED (ARTICLE 2 OF THE DECISION). THE FINES (ARTICLE 3)

I - ARTICLE 2 OF THE DECISION

606 ARTICLE 2 OF THE DECISION REQUIRES THE UNDERTAKINGS REFERRED TO IN THIS DECISION 'TO PUT AN END IMMEDIATELY TO THE INFRINGEMENTS FOUND TO HAVE BEEN COMMITTED' BY ARTICLE 1 OF THE DECISION .

607 ARTICLE 2 MUST BE ANNULLED TO THE EXTENT TO WHICH IT REFERS TO INFRINGEMENTS WHICH HAVE NOT BEEN UPHOLD IN WHOLE OR IN PART BY THE COURT .

II - THE FINES IMPOSED BY ARTICLE 3 OF THE DECISION

608 ARTICLE 3 OF THE DECISION MUST BE ANNULLED TO THE EXTENT TO WHICH IT IMPOSES FINES ON VOLANO, EMILIANA, SADAM, SZAG, CAVARZERE, INDUSTRIA DEGLI ZUCCHERI AND ERIDANIA (CASES 45/73, 46/73, 50/73, 54/73, 111/73, 113/73 AND 114/73), SINCE THE COURT HAS NOT FOUND THAT THESE APPLICANTS COMMITTED ANY INFRINGEMENT .

609 WITH REGARD TO THE FINES IMPOSED ON THE APPLICANTS SU, GENERALE SUCRIERE, CSM, SAY, BEGHIN, RT, SUCRES ET DENREES, SZV AND PFEIFER UND LANGEN (CASES 40 TO 44/73, 47/73, 48/73, 55/73 AND 56/73), AGAINST WHICH THE COURT HAS ONLY UPHELD PART OF THE INFRINGEMENTS ALLEGED BY THE COMMISSION, IT MUST FIRST OF ALL BE NOTED THAT THE COMMISSION HAS STATED THAT IT DID NOT PUNISH THE INFRINGEMENTS SET OUT IN ARTICLE 1 (2) AND (3) OF THE DECISION DIRECTLY WITH A FINE BUT TOOK THESE INFRINGEMENTS AND THE INFRINGEMENTS SET OUT IN PARAGRAPH 1 OF THE SAID ARTICLE INTO ACCOUNT WHEN FIXING THE AMOUNT OF THE FINES WHICH IT IMPOSED .

610 THIS METHOD LEADS TO THE CONCLUSION THAT IN APPROPRIATE CASES THE FINES MUST BE CONSIDERED AS HAVING ALSO BEEN IMPOSED BY REASON OF THE INFRINGEMENTS FOUND IN ARTICLE 1 (2) AND (3) OF THE DECISION .

611 IT APPEARS FROM THE CONSIDERATIONS SET OUT IN THE PRECEDING CHAPTERS THAT ALL THE INFRINGEMENTS UPHELD BY THE COURT HAVE BEEN COMMITTED INTENTIONALLY OR AT LEAST NEGLIGENTLY, SO THAT THE UNDERTAKINGS CONCERNED ARE LIABLE TO PAY A FINE AS PROVIDED FOR IN ARTICLE 15 (2) OF REGULATION NO 17 IN RESPECT THEREOF EXCEPT IN THE CASE OF THE INFRINGEMENT REFERRED TO IN CHAPTER 8 .

612 IN FIXING THE AMOUNT OF THE FINES UNDER ARTICLE 15 (2) REGARD SHALL BE HAD BOTH TO THE GRAVITY AND TO THE DURATION OF THE INFRINGEMENT SO THAT THE COURT HAS TO TAKE PARTICULAR ACCOUNT OF THE LEGISLATIVE BACKGROUND AND ECONOMIC CONTEXT OF THE CONDUCT TO WHICH EXCEPTION IS TAKEN, THE NATURE OF THE RESTRICTIONS OF

COMPETITION AS WELL AS THE NUMBER AND SIZE OF THE UNDERTAKINGS CONCERNED .

613 SO FAR MORE PARTICULARLY AS THE LEGISLATIVE BACKGROUND AND ECONOMIC CONTEXT OF THE CONDUCT COMPLAINED OF IS CONCERNED, NO DECISION AS TO THE AMOUNT OF THE FINES CAN BE MADE WITHOUT TAKING ACCOUNT OF THE FACT THAT THE SUGAR MARKET IS NOT ORGANIZED ON THE BASIS OF THE COMMUNITY TREATED AS A GEOGRAPHICAL UNIT BUT AS A SYSTEM DESIGNED TO MAINTAIN ANY PARTITIONING OF NATIONAL MARKETS, IN PARTICULAR BY MEANS OF NATIONAL QUOTAS WITHIN THE LIMITS OF WHICH MANUFACTURERS PRODUCING SUGAR AND AT THE SAME TIME FARMERS GROWING BEET ARE IN GENERAL PROTECTED .

614 THE COMMISSION HAS FAILED TO TAKE SUFFICIENT ACCOUNT OF THE EXTENT TO WHICH THIS SYSTEM WAS CAPABLE OF AFFECTING CONDITIONS ON THE SUGAR MARKET .

615 INDEED THE FACT THAT, ON THE ONE HAND, THE SUGAR PRODUCED IN THE COMMUNITY WHICH CAN BE SOLD ON THE DOMESTIC MARKET WAS LIMITED TO A FIXED AMOUNT AND, ON THE OTHER HAND, THAT THE PRINCIPAL PRODUCERS KNOW THE AMOUNTS TO WHICH THE PRODUCTION OF EACH OF THEIR COMPETITORS IS RESTRICTED, MEANT THAT THE VALUE OF THE MARKET IN QUESTION WAS UNUSUALLY EASY TO CALCULATE AND THE MARKET ITSELF ABNORMALLY STABLE .

616 IN THESE CIRCUMSTANCES EACH PRODUCER WAS OF NECESSITY INCLINED TO SEEK A PROFIT NOT BY INCREASING HIS PRODUCTION AND, THEREFORE, HIS SHARE OF THE MARKET, BUT BY SELLING HIS PRODUCTION AT THE HIGHEST POSSIBLE PRICES .

617 HOWEVER, THERE WERE LIMITS TO THE HIGHER PRICES WHICH PRODUCERS COULD HOPE TO GET CAUSED BY THE SURPLUS PRODUCTION OF SUGAR IN THE COMMUNITY AND IN SOME MEMBER STATES BY MAXIMUM

CONSUMER PRICES WHICH WERE FIXED OR AT LEAST STRONGLY RECOMMENDED BY THE NATIONAL AUTHORITIES .

618 IT WAS THEREFORE IN THE INTEREST OF PRODUCERS NOT TO DISTURB EXISTING PRICE LEVELS IN THE VARIOUS MEMBER STATES AND THEY MUST HAVE KNOWN THAT BY INTERVENING IN ANY WAY ON THEIR COMPETITORS' TRADITIONAL MARKETS THEY RAN THE RISK OF BRINGING DOWN THE PRICE LEVEL ON THESE MARKETS AND THEREFORE OF REDUCING THE PROFIT ON THEIR OWN PRODUCTION .

619 THE COMMON ORGANIZATION OF THE MARKET IN SUGAR, WHICH MOREOVER IS TENDING TO EMERGE FROM ITS INITIAL TRANSITIONAL PHASE AND FOR THE REASONS WHICH HAVE JUST BEEN GIVEN ONLY LEFT A RESIDUAL FIELD AVAILABLE FOR COMPETITION, HAS THEREFORE HELPED TO ENSURE THAT SUGAR PRODUCERS CONTINUE TO BEHAVE IN AN UNCOMPETITIVE MANNER .

620 ALTHOUGH THIS SITUATION CANNOT LEAD TO ACCEPTANCE OF PRACTICES WHICH ARE LIKELY TO MAKE STILL WORSE WHAT ARE, FROM THE POINT OF VIEW OF THE TREATY, THE DISADVANTAGES OF SUCH A SYSTEM, IT NEVERTHELESS MEANS THAT THE BEHAVIOUR OF THE PARTIES CONCERNED CANNOT BE REGARDED WITH THE USUAL SEVERITY .

621 FURTHERMORE THE DAMAGE WHICH THE USERS AND CONSUMERS SUFFERED AS A RESULT OF THE CONDUCT TO WHICH EXCEPTION IS TAKEN WAS LIMITED, BECAUSE THE COMMISSION ITSELF HAS NOT BLAMED THE PARTIES CONCERNED FOR ANY CONCERTED OR IMPROPER INCREASE IN THE PRICES APPLIED AND BECAUSE, EVEN THOUGH THE RESTRICTIONS ON THE FREEDOM TO CHOOSE SUPPLIERS CAUSED BY THE PARTITIONING OF THE MARKET DESERVE CENSURE, THEY ARE NOT SO OPPRESSIVE IN THE CASE OF A PRODUCT LIKE SUGAR WHICH IS MAINLY HOMOGENOUS .

622 FINALLY IN THE CASE OF EACH OF THE UNDERTAKINGS IN QUESTION THE IMPORTANCE OF THE INFRINGEMENT OR INFRINGEMENTS UPHELD BY THE

COURT MUST BE COMPARED WITH THE IMPORTANCE OF ALL THE INFRINGEMENTS FOR WHICH THE COMMISSION HAS BLAMED THE APPLICANTS

623 IN ADDITION, IN SO FAR AS AN INFRINGEMENT UPHeld BY THE COURT HAS BEEN COMMITTED BY SEVERAL APPLICANTS, IT IS APPROPRIATE TO CONSIDER HOW SERIOUSLY EACH OF THEM PARTICIPATED IN IT .

624 HAVING REGARD TO THESE FACTORS THE FINES IMPOSED ON SU, GENERALE SUCRIERE, CSM, SAY, BEGHIN, RT, SUCRES ET DENREES, SZV AND PFEIFER UND LANGEN (CASES 40 TO 44/73, 47/73, 48/73, 55/73 AND 56/73) MUST BE REDUCED AS SET OUT IN THE OPERATIVE PART OF THIS JUDGMENT .

Decision on costs

625 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, WHEREAS, WHERE THERE ARE SEVERAL UNSUCCESSFUL PARTIES THE COURT SHALL DECIDE HOW THE COSTS ARE TO BE SHARED .

626 UNDER PARAGRAPH 3 OF THIS ARTICLE, WHERE 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 .

(A) THE COSTS IN THE MAIN ACTION

627 IN THESE PROCEEDINGS, AS THE COMMISSION WAS UNSUCCESSFUL IN CASES 45/73, 46/73, 50/73, 54/73, 111/73, 113/73 AND 114/73 (VOLANO, EMILIANA, SADAM, SZAG, CAVARZERE, INDUSTRIA DEGLI ZUCCHERI AND ERIDANIA) IT MUST BE ORDERED TO PAY THE WHOLE OF THE COSTS IN THESE CASES ACCOUNT BEING TAKEN OF THE FACT THAT THESE APPLICANTS HAVE EITHER EXPRESSLY OR BY IMPLICATION ASKED FOR THEM IN THEIR PLEADINGS .

628 AS THE APPLICANTS AND THE COMMISSION HAVE SUCCEEDED ON SOME AND FAILED ON OTHER HEADS IN CASES 40 TO 44/73, 47/73, 48/73, 55/73 AND 56/73 (SU, GENERALE SUCRIERE, CSM, SAY, BEGHIN, RT, SUCRES ET DENREES, SZV AND PFEIFER UND LANGEN), IN THESE CASES THE PARTIES SHALL BEAR THEIR OWN COSTS .

(B) THE COSTS OF THE INTERVENTION

629 THE INTERVENER'S INTERVENTION IN CASES 41/73, 43 TO 48/73, 50/73, 111/73, 113/73 AND 114/73 (GENERALE SUCRIERE, SAY, BEGHIN, VOLANO, EMILIANA, RT, SUCRES ET DENREES, SADAM, CAVARZERE, INDUSTRIA DEGLI ZUCCHERI AND ERIDANIA) HAS BEEN UNSUCCESSFUL, AS IT WAS ONLY INTENDED TO SUPPORT THE CONCLUSIONS OF THE COMMISSION IN CONNEXION WITH THE COMPLAINT RELATING TO THE PROTECTION OF THE ITALIAN MARKET (SUBPARAGRAPH 1 OF ARTICLE 1 (1) OF THE DECISION) WHICH THE COURT HAS NOT UPHOLD .

630 SO FAR AS THE COSTS OF THE INTERVENTION ARE CONCERNED IT NEVERTHELESS APPEARS FAIR AND REASONABLE TO ORDER THE COMMISSION AND THE INTERVENER TO BEAR THEIR OWN COSTS, SINCE, ON THE ONE HAND, THE INTERVENER IS AN ASSOCIATION HAVING AS ITS OBJECT THE PROTECTION OF CONSUMERS' INTERESTS AND, ON THE OTHER HAND, NEITHER THE COSTS INCURRED BY THE APPLICANTS NOR BY THE COMMISSION IN CONNEXION WITH THE INTERVENTION WERE VERY LARGE .

(C) THE COSTS INCURRED IN CONNEXION WITH THE EXAMINATION OF THE WITNESSES

631 THE WITNESSES WERE EXAMINED BY THE COURT IN CASES 40/73 (SU) AND 42/73 (CSM) AND ALSO IN CONNEXION WITH THE COMPLAINT THAT ECONOMIC PRESSURE WAS BROUGHT TO BEAR ON NETHERLANDS IMPORTERS (SUBPARAGRAPH 2 OF ARTICLE 1 (2) OF THE DECISION).

632 SINCE THE COMMISSION FAILED ON THIS HEAD IT MUST BE ORDERED TO PAY THE COSTS OF EXAMINING THESE WITNESSES .

Operative part

THE COURT

HEREBY :

(1) ANNULS THE FOLLOWING PARTS OF ARTICLE 1 OF COMMISSION DECISION NO COM(72) 1600 OF 2 JANUARY 1973 :

- SUBPARAGRAPHS 1 AND 4 OF ARTICLE 1 (1);

- SUBPARAGRAPH 2 OF ARTICLE 1 (1) TO THE EXTENT TO WHICH THE SAID SUBPARAGRAPH FINDS THAT PFEIFER UND LANGEN, SU AND CSM HAVE ENGAGED IN A CONCERTED PRACTICE;

- SUBPARAGRAPH 2 OF ARTICLE 1 (2);

- SUBPARAGRAPH 3 OF ARTICLE 1 (2) TO THE EXTENT TO WHICH IT FINDS THAT SZV COMMITTED AN INFRINGEMENT BY PREVENTING ITS AGENTS FROM RESELLING SUGAR FROM OTHER SOURCES;

(2) ANNULS ARTICLE 2 OF THE DECISION TO THE EXTENT TO WHICH IT REFERS TO INFRINGEMENTS WHICH IT HAS NOT UPHELD IN WHOLE OR IN PART;

(3) (A) ANNULS ARTICLE 3 OF THE DECISION TO THE EXTENT TO WHICH IT IMPOSES FINES ON EMILIANA, VOLANO, SADAM, SUEDEDEUTSCHE ZUCKER AG, CAVARZERE, INDUSTRIA DEGLI ZUCCHERI AND ERIDANIA (CASES 45/73, 46/73, 50/73, 54/73, 111/73, 113/73 AND 114/73).

(B) REDUCES THE FINES IMPOSED BY ARTICLE 3 ON THE OTHER APPLICANTS .

- IN THE CASE OF SUIKER UNIE (CASE 40/73) TO 200 000 U.A . (FL 724 000);
- IN THE CASE OF GENERALE SUCRIERE (CASE 41/73) TO 80 000 U.A . (FF 444 335.20);
- IN THE CASE OF CENTRALE SUIKER MAATSCHAPPIJ (CASE 42/73) TO 150 000 U.A . (FL 543 000);
- IN THE CASE OF SAY (CASE 43/73) TO 80 000 U.A . (FF 444 335.20);
- IN THE CASE OF BEGHIN (CASE 44/73) TO 100 000 U.A . (FF 555 419);
- IN THE CASE OF RAFFINERIE TIRLEMONTTOISE (CASE 47/73) TO 600 000 U.A . (BFRS . 30 000 000);
- IN THE CASE OF SUCRES ET DENREES (CASE 48/73) TO 100 000 U.A . (FF 555 419);
- IN THE CASE OF SUEDZUCKER-VERKAUF GMBH (CASE 55/73) TO 40 000 U.A . (DM 146 400);
- IN THE CASE OF PFEIFER UND LANGEN (CASE 56/73) TO 240 000 U.A . (DM 878 400)

(4) REJECTS THE REMAINDER OF THE APPLICANTS' CONCLUSIONS .

(5) (A) IN CASES 45/73, 46/73, 50/73, 54/73, 111/73, 113/73 AND 114/73 (VOLANO, EMILIANA, SADAM, SUEDEUTSCHE ZUCKER AG, CAVARZERE, INDUSTRIA DEGLI ZUCCHERI AND ERIDANIA) ORDERS THE COMMISSION TO PAY THE WHOLE OF THE COSTS OF THE MAIN PROCEEDINGS .

(B) IN CASES 40 TO 44/73, 47/73, 48/73, 55/73 AND 56/73 (SUIKER UNIE, GENERALE SUCRIERE, CENTRALE SUIKER MAATSCHAPPIJ, BEGHIN, SAY, RAFFINERIE TIRLEMONTTOISE, SUCRES ET DENREES, SUEDZUCKER-VERKAUF GMBH AND

PFEIFER UND LANGEN) ORDERS EACH OF THE PARTIES TO BEAR THE COSTS WHICH IT INCURRED IN THE MAIN PROCEEDINGS .

(C) SO FAR AS THE COSTS OF INTERVENTION ARE CONCERNED ORDERS THE APPLICANTS CONCERNED, THE COMMISSION AND THE INTERVENER TO BEAR THEIR OWN COSTS .

(D) ORDERS THE COMMISSION TO BEAR THE COSTS OF EXAMINING THE WITNESSES .