OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 23 MAY 1978

My Lords,

The origin of this action lies in the oil "crisis" that occurred in 1973 - 74 as a result of the decision of certain major oil producing countries, in October 1973, sharply to increase their prices for crude oil and, at the same time, to reduce their production. For some importing countries, whose attitude was considered to have been inimical to the Arab cause in the Yom Kippur war, the resultant scarcity of oil was rendered particularly acute by an embargo on shipments to them imposed by Arab governments. The countries that were subject to that embargo included the Netherlands.

The action is brought under Article 173 of the EEC Treaty by three Dutch companies, which are, directly or indirectly, wholly-owned subsidiaries of the British Petroleum Company Ltd., to challenge a Decision of the Commission dated 19 April 1977 (77/327/EEC, Official Journal L 117 of 9 May 1977) whereby the Commission declared that their conduct, during the period November 1973 to March 1974, in reducing deliveries of motor spirit to a particular customer to a greater degree than to other customers, constituted an abuse of a dominant position within the meaning of Article 86 of the Treaty. The three companies are British Petroleum Maatschappij Nederland BV, British Petroleum Raffinaderij Nederland NV and Benzine en Petroleum Handelsmaatschappij BV. I shall adhere to the practice that has been followed throughout the proceedings of referring to them collectively as "BP".

The Commission, although it held that BP had thus infringed Article 86 of the Treaty, held that there were mitigating factors rendering it inappropriate to impose a fine upon BP under Article 15 (2) of Regulation No 17. BP is nonetheless concerned to have the Decision set aside by this Court because, so Counsel explained to us on its behalf at the hearing, not only does BP not wish to remain under the stigma of having broken the law but the existence of the Decision might serve as a basis for an action in damages against it in the Dutch courts at the suit of the customer in question.

That customer is Aardolie Belangen Gemeenschap BV (or "ABG") which is a purchasing cooperative of the 19 members of the "AVIA" group in the Netherlands. "AVIA" is a trade-mark owned by a Swiss company which licences the mark to different distributors of petroleum products in different countries. Those countries include, besides the Netherlands, Belgium, the Federal Republic of Germany, France, Italy, Austria and Switzerland. There is, however, it appears, no connexion between the licensees of the AVIA mark in the different countries save the fact that they are licensees of the same mark. The licensee for the Netherlands is Avia Nederland CV, which has the same 19 members as ABG.

At the time of the crisis ABG's sales could be broken down as follows: about 49% through the AVIA network, about 12% to other customers under what are described in the Decision as "firm contracts", about 20% to regular purchasers although without contract and about 20% by way of "spot" deliveries. There is no suggestion that ABG ever sold to anyone outside the Netherlands.

Annex 1 to the Decision contains a table showing from whom ABG obtained its supplies. There were at the material time seven companies directly

engaged in the production of motor spirit (both premium and standard grades) in the Netherlands. They were BP itself and six others which it is convenient to call for short "Chevron", "Esso", "Gulf", "Mobil", "Shell" and "Texaco". In addition, two companies, "Fina" and "Total", had large quantities of motor spirit produced for them in Dutch refineries. In December 1973 a refinery built for Total at Flushing (Vlissingen) became operational. In the period of 12 months November 1972 to October 1973 ABG obtained 80.7% of its total supplies from BP, 8% of them from Gulf, 4.2% from Shell, 1.6% from Chevron and 5.5% from 13 other companies whose identities we do not know, except that they did not include any of the nine to which I have referred. Some of those 13 companies appear to have been established outside the Netherlands, because the Commission found that "ABG bought some of its motor spirit requirements on the free market, both in the Netherlands and other Member States" (Decision p. 12).

The history of the commercial relationship between ABG and BP is important.

Up to 1968 BP supplied ABG on the basis of contracts under which prices, quantities and other terms were agreed annually. Thereafter supplies were governed by contracts of indefinite duration, which were subject to six months' notice of cancellation by either side. On 21 November 1972 BP gave ABG notice terminating the current contract as from the end of May 1973. It appears that it did so because of action taken by the governments of countries where its oilfields were situate which reduced the reliability of its supplies of crude oil — in particular the nationalization of its Libyan field and the take-over by the Government of Kuwait of part of the production in that country. At all events, at no stage during the proceedings has the Commission criticized BP for giving that notice. The termination of the contract was confirmed by letters exchanged between BP and ABG on 17 January 1973. It was then agreed between them that, after the end of May 1973, BP would refine for ABG crude oil supplied by ABG.

By May 1973 it appeared that ABG's negotiations for the purchase of crude oil would not be concluded in time (though, according to BP, crude oil was available in the market). It was then agreed that, during the period June to September 1973, BP would process for ABG 250 000 cubic metres of BP's own Kuwait crude oil, which would yield, among other products, 41 500 cubic metres of motor spirit, on the terms, putting it shortly, that ABG would replace that crude oil before 1 January 1974.

By 30 September 1973 ABG had not taken delivery of the whole of the agreed 41 500 cubic metres of motor spirit. The reason for this was disclosed by ABG to the Commission during the administrative proceedings: see the transcript of the private hearing of ABG on 11 March 1975 (Annex to the Rejoinder) pp. 26-27. From a reconciliation of what was then said on behalf of ABG with the table in Annex 1 to the Decision it appears that, in July and August, and to a lesser extent in September 1973, Gulf's production in the Netherlands had overrun its storage facilities there, so that ABG was able to obtain motor spirit more cheaply from Gulf than it could have done under its agreement with BP. This explains why, statistically, ABG obtained 8 % of its supplies for the period November 1972 to October 1973 from Gulf. In fact, its purchases from Gulf were made entirely in those three months. There were also during the period June to September 1973 small purchases by ABG from Chevron and from Shell, and more substantial purchases from the 13 unidentified companies. Those pur-

chases, however, were not of an unusual kind for ABG.

At the time, BP did not know the reason for the shortfall in ABG's "take-off" of motor spirit under the agreement. However, BP agreed to the balance of the 41 500 cubic metres being taken by ABG in October 1973. This resulted in ABG obtaining 100 % of its supplies for that month from BP.

At the end of October 1973 the crisis arose. So far as I can discern from the Decision, or from any of the voluminous papers that have been placed before the Court, there was then no arrangement of any kind between BP and ABG as to the future supply of motor spirit by BP to ABG, except that the draft had been discussed of a second "processing agreement" to take effect on 1 January 1974.

To meet the crisis the Dutch Government took a number of steps.

As early as 31 October 1973 it published a decree restricting the use of motor vehicles at week-ends (Annex 23 to the Application). This decree was amended on a number of occasions (see Annexes 24 to 27 to the Application).

Also on 31 October 1973 the Minister of Economic Affairs made an order under a statute of 1939 on rationing (the "Distributiewet") bringing petroleum (crude oil and feedstocks) and petroleum products within the scope of that statute (Annex 11 to the Application). By an order dated 13 November 1973 made under the same statute the Minister established a National Office for Petroleum Products (the "Rijksbureau voor Aardolie Produkten" or "RBAP") which was to be responsible on behalf of the Minister for the implementation of the statute in relation to petroleum and petroleum products (see Annex 12 to the Application). In a statement published on behalf of the Minister in the "Staatscourant" of 14 November 1973 it was said:

"The Minister of Economic Affairs has established a National Office for Petroleum Products. It is the task of this Office to regulate the supply of petroleum products. The Office is also charged with the preparation and — in proper time — enforcement of a possible scheme for rationing petroleum products, should circumstances make this necessary.

Those to whom the provision of petroleum products may cause serious difficulties, can submit their problems to this National Office in writing."

(Annex 14 to the Application).

There had existed for some years a Liaison Committee for the Oil Industry (the "Olie Contact Commissie" or "OCC") to facilitate contacts between the industry and the Government. The nine major companies to which I have referred were all represented on it. The Chairman of it was appointed by the Minister as an unpaid civil servant. He was Mr K. Schouten, a former manager of Shell. The Minister appointed Mr Schouten to be also the Director of the RBAP. The staff of the RBAP consisted of civil servants, among whom were individuals seconded by the oil companies on account of their expert knowledge; they entered the public service on a temporary contractual basis.

A rationing scheme was eventually introduced but it lasted only from 12 January to 4 February 1974. On 6 December 1973 the Minister wrote to Mr Schouten, in his capacity as Chairman of the OCC, asking him to give directions to the operators of service stations ("without legal basis at this stage") limiting their sales of motor spirit and diesel oil in specified ways. The Minister also asked that the oil companies should reduce their deliveries of motor spirit to service stations by 20 % (Annex 19 to the Application). This was not, I believe, the only

occasion on which the Minister urged that deliveries should be cut by 15 to 20 %.

The retail price of motor spirit had, in the Netherlands, been subject for a long time to Government control under a statute of 1961 (the "Prijzenwet"). That control was maintained, by successive decrees, during the period of the crisis, though the method of prescribing the prices was changed by a decree of 22 January 1974. The details do not, I think, matter. What is of some relevance is that the maximum prices thus set were below world prices, so that petrol bought at world prices could only be sold in the Netherlands at a loss. Indeed BP states that all its sales in the Netherlands during that period were made at a loss. ABG too appears to have been a victim of the price control.

The Dutch Government was not of course alone in reacting to the crisis. The oil companies did so too, on a world-wide basis, in particular by diverting to Rotterdam crude oil from non-embargoed sources (such as Nigeria and Iran) that had been meant for other destinations. Not all the production of the Dutch refineries could however be released onto the Dutch market. Over the years, the Netherlands, and especially Rotterdam, had become a great refining centre supplying many markets other than the Dutch, among them notably the German. In the allocation of the available supplies as between national markets, the oil companies appear to have applied, or at all events the British Petroleum Company Ltd. applied, what it called the principle of "equal misery".

Within the Dutch market BP divided its customers into three categories:

(1) those to whom it was bound by contract,

(2) non-contractual but regular customers and

(3) customers towards whom it felt it had no particular responsibility.

To the first category BP gave preference. It considered itself bound to do so as a matter of commercial morality because, essentially, contractual customers were those who had been prepared to pay higher prices in normal times in order to obtain an assured supply in times of scarcity. It also considered itself legally bound to do so, because any reduction in supplies to a contractual customer below what he was contractually entitled to receive could only be justified on grounds of *force majeure*. The Commission found that, on average, in the period from November 1973 to March 1974, BP reduced its deliveries to contractual customers by 13 % (Decision p. 10).

BP also considered itself under an obligation towards its regular albeit non-contractual customers. One is reminded here of the practice of shopkeepers, in times of scarcity of this or that commodity, of putting up notices, in terms more or less terse, indicating that they can serve only regular customers, or even keeping their supplies of the scarce commodity "under the counter" for regular customers only. The Commission found that, on average, over the period in question, BP reduced its deliveries to this category of customers by 29 % (ibid.).

Among the third category BP placed those who had been only casual customers in the past and also ABG. BP considered that the responsibility for securing supplies to these lay with the RBAP.

Within a week of being established the RBAP, in conjunction with the OCC, had set up a pool of motor spirit for allocation among those in difficulties. To this pool, it appears, the nine major companies contributed in proportion to their respective shares of the Dutch market. BP, whose share of that market was between 9 and 10 %, was called upon to contribute 9.7 %. (See for

instance Mr Schouten's letter of 21 November 1973, among the documents produced by BP at the Court's request). That pool however was not large enough to cope with ABG's requirements, which had to be dealt with separately.

ABG's normal requirements of motor spirit averaged 15 000 cubic metres a month. The RBAP calculated that it should be supplied at the rate of 7 000 cubic metres a month. This would enable ABG to cover the needs of the AVIA network (representing about 49 % of ABG's sales) and of ABG's contractual customers (representing about 12 % of its sales) each diminished by 20 % as recommended by the Minister. The RBAP took the view that the needs of ABG's other customers should be looked after directly by the RBAP itself. There is no doubt that that approach was suggested by BP. The Commission sees in that something sinister. But it seems to me quite natural that BP, as ABG's erstwhile main supplier, should have been consulted. What is more questionable is whether the approach gave effect to an oft-repeated exhortation on the part of the Minister that existing channels of distribution should be maintained (see for instance a letter from the Ministry of Economic Affairs to Mr Schouten of 24 December 1973 — Annex 20 to the Application). The approach necessarily involved the consequence that ABG's regular but non-contractual customers (representing about 20 % of its sales) would have to obtain their supplies elsewhere, and that they might be weaned from ABG permanently.

At all events ABG received 6 812 cubic metres of motor spirit in November 1973 and 7 265 cubic metres in December. Those supplies came mostly from BP and Shell. There was a small contribution from Chevron. During the same two months, ABG also bought substantial quantities from the 13 unidentified companies, bringing its total supplies for November to 10 812 cubic metres and for December to 10 761 cubic metres. It seems that by the end of December ABG had no petrol left in stock at all.

On 4 January 1974 ABG and Avia Nederland CV made an application to the Commission under Article 3 of Regulation No 17, in which they claimed that Articles 85 and 86 of the Treaty had been infringed by BP, Chevron, Esso, Gulf, Mobil, Shell and Texaco. It is that application that eventually led to the Decision now in question. I think it important to bear in mind, in view of certain comments that were made on behalf of the Commission, particularly in the Rejoinder and at the hearing, that at an early stage in the administrative proceedings that were initiated as a result of the application the Commission came to the conclusion that there had been no agreement or concerted practice between those companies of a kind prohibited by Article 85 of the Treaty; and that, at a later stage of those proceedings, the Commission came to the conclusion that the circumstances would not justify a finding that those companies or any of them had a "collective" dominant position of the kind envisaged by Article 86. The Decision is addressed only to BP and is founded exclusively on its own alleged dominant position.

To revert to the facts, in January 1974, the RBAP drew up a fresh programme for the supply of ABG at the monthly rate of 7 000 cubic metres. This envisaged deliveries from each of the nine major companies in varying proportions. BP's share was to be 3 300 cubic metres a month. In fact ABG received through the RBAP 6 594 cubic metres in January, 6 877 in February and 6 584 in March. BP was among those from whom there was a shortfall, but that seems to have been due to an express request by ABG to BP to defer deliveries. ABG was able to buy 3 374

cubic metres from the 13 unidentified companies in January, though none in February and only 405 cubic metres in March.

On 31 March 1974 the RBAP was dissolved and on 4 April 1974 the Minister made a decree under powers conferred on him by a statute concerning economic competition (the "Wet economische mededinging") requiring the nine major companies to deliver between them 3 000 cubic metres of motor spirit a week to ABG. They were to do so in shares corresponding to the proportions in which they sold motor spirit on the Dutch market otherwise than under their own brand names. BP states that, as a result, its obligations to deliver to ABG were reduced.

In comparing the figure of 7 000 cubic metres a month provided for ABG by the RBAP with the figure of 3 000 cubic metres a week prescribed by the Minister, it is perhaps fair to bear in mind that, according to a graph put in by BP (p. 31 of the Reply), supplies were, by April 1974, beginning to pick up, though they did not become normal again until July 1974.

In any case where Article 86 is invoked, three main questions have to be considered:

(1) Did the undertaking concerned have a dominant position within the common market or in a substantial part of it?

(2) If so, did the undertaking abuse that position?

(3) If so, was that abuse susceptible of affecting trade between Member States?

Consideration of the first question involves of course an enquiry into what is the relevant market.

In the Decision, at p. 3, the Commission stated that:

"The relevant market is that of premium and standard grade motor spirit for carburation in four-stroke engines ... The relevant geographical market is that of the Netherlands, where ABG members do all their distribution business."

The Commission re-asserted those propositions at pp. 8 and 9 of the Decision.

The Commission, however, has never suggested that BP ever had a dominant position in the market for motor spirit in the Netherlands as such. Nor could it, for BP's share of that market was at the relevant time, as I have mentioned, of the order of 9 to 10%, and no special feature attached to it.

The Commission's reasons for holding that BP had a dominant position were expressed (at p. 9 of the decision) as follows:

"Economic restrictions such as existed in the Netherlands during the oil crisis can substantially alter existing commercial relations between suppliers who have a substantial share of the market and quantities available and their customers. For reasons completely outside the control of the normal suppliers, their customers can become completely dependent on them for the supply of scarce products. Thus, while the situation continues, the suppliers are placed in a dominant position in respect of their normal customers.

With the general shortage of supplies all the oil companies were faced with the same problem, that of maintaining supplies to their regular customers. Thus they were not able to make up the deficiencies of the other companies with substantial market shares and they were in no way in competition with each other to supply each other's customers.

In the prevailing circumstances each of these companies found itself in a dominant position relative to its customers."

On that reasoning the relevant market was the market for motor spirit among BP's "normal customers", or, at most, among its customers generally, in the Netherlands, for it is in that market alone that BP is, according to the Commission, to be regarded as having had a dominant position during the oil crisis.

The question then arises whether that market constituted a "substantial part" of the common market. With a view to answering that question, the Court asked the parties to say what proportion of the common market for motor spirit they thought was represented by the Dutch market. The Commission estimated it at 4.6 %, BP at 4.8 %. On that footing, taking BP's share of the Dutch market at 10 %, the relevant part of the common market did not exceed 0.48 %.

The view is tenable that anything under 0.5 % of a market is not a "substantial part" of it. There is, however, in my opinion, in this kind of field, a danger in focusing attention exclusively on percentages. The opposite of "substantial" is "negligible", and what may seem negligible when looked at in terms of a percentage may seem otherwise when looked at in absolute terms. The population of Luxembourg is, I believe, about 0.23 % of the population of the whole Community. I would however shrink from saying that one who had a monopoly, or near monopoly, of the Luxembourg market for a particular product, was exempt from the application of Article 86. Similarly I would shrink from holding that BP's share of the Dutch market for motor spirit was negligible. Small though it was in relation to the whole Community market for motor spirit, it was in my opinion a substantial part of that market.

The real question here is, in my view, whether the Commission is right in thinking that Article 86 is, on its correct interpretation, applicable to a situation in which, owing to an emergency causing a temporary scarcity of supplies of a particular commodity, the customers or the "normal" customers of each supplier may become dependent on him.

I do not think so.

In my opinion the function of allocating supplies in a time of scarcity is essentially a function of government. Government may choose not to intervene at all, in which case the scarcity will cause prices to rise to the point where supply and demand are once more in balance. But under modern conditions there are cases where, for obvious reasons, government cannot let that happen. The alternative is price control accompanied by some form of control of distribution. The Commission's view seems to me to amount to this, that where there is a lacuna in whatever governmental measures may have been taken, Article 86 may be invoked to fill it.

I should perhaps explain that, when I refer to "government" in this context, I do not mean to refer exclusively to national Governments. According to circumstances it may be appropriate for the necessary measures to be taken at Community level, or at national level, or at regional or local level. Indeed what may be appropriate may be a combination of measures taken at different levels. In that connexion we were referred on behalf of BP to Council Directive No 73/238/EEC of 24 July 1973 (Official Journal L 228 of 16 August 1973) "on measures to mitigate the effects of difficulties in the supply of crude oil and petroleum products", which evinces a recognition on the part of the Council that the Community has responsibilities in the matter.

Nor do I mean to imply any criticism of what the Dutch Government did in the present instance. I do not overlook the

submission that was made on behalf of BP that the Dutch Government's price control measures, inasmuch as they were such as might deter imports from other Member States, infringed Article 30 of the Treaty as interpreted in Case 65/75, the *Tasca* case [1976] ECR 291. But one may leave that point open. The present case is not about prices but about the allocation of supplies. As to that, the Dutch Government had a choice, basically, between two methods, as does any government seeking to control distribution. One is the exercise of compulsory powers. The other is the establishment of machinery through which the voluntary compliance of the traders concerned with government wishes may be obtained, with of course the help of the threat, in the background, of the exercise of compulsory powers if they do not comply. Here, by establishing the RBAP without giving it powers of coercion, the Dutch Government chose the latter method in the first instance. That method might well have been sufficient if the crisis had been short-lived. By April 1974 the Government had come to the conclusion that it was insufficient, and resorted to the exercise of compulsory powers. The difference between what could be achieved by the voluntary method and what was achieved through compulsion proved to be the difference between 7 000 cubic metres a month and 3 000 cubic metres a week. To my mind it was a difference only of degree.

Even however if that difference is to be regarded as evincing a lacuna in the measures adopted by the Dutch Government, I do not think that it was a lacuna of a kind that Article 86 was designed to fill or is appropriate to fill.

In the first place the concept of a dominant position in Article 86 connotes, as the Court has said many times, most recently in Case 27/76 *United Brands* v *Commission* (14 February 1978, not yet reported, para. 65 of the decision), that the undertaking concerned has a position of such economic strength as to have power, at least, to behave to an appreciable extent independently of its competitors and customers. The Commission itself, in its Decision in the present case (at p. 8), defines a dominant position as one in which the firm concerned may conduct its business "without regard for the reactions of competitors and customers". In a temporary emergency of the kind here in question, however, a trader cannot distribute his scarce supplies regardless of the attitude of his customers. He must have it in mind that, once the emergency is over, they will have memories of the way in which they were treated by him during the period of scarcity. Contractual customers will expect the favourable treatment to which their contracts entitle them, both as a matter of law and as a matter of commercial honour — as BP pointed out. Non-contractual but regular customers will expect the loyalty shown by them in normal competitive times to be repaid by loyalty to them on the part of their supplier in the period of scarcity. A supplier can disregard those considerations only at the peril of losing customers to his competitors after the emergency is over. So I do not think that he is, during the emergency, in a dominant position in the sense in which that expression is used in Article 86.

Secondly, if Article 86 is to be held applicable to a supplier in such an emergency, there must be found in the terms of that Article some rule, either express or implicit, that suppliers are required to observe in such a situation. I cannot discern any such rule. The Commission referred us to paragraph (c) of Article 86, which prescribes that an abuse of a dominant position may in particular consist in "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". That, with all respect to the Commission, does not seem to me in

point. We are here concerned not with the terms on which a trader supplies different customers, but with his selection of customers to supply and his decision as to the quantity to be supplied to each. Denial of supplies may of course constitute an abuse of a dominant position, as in Cases 6 & 7/73 *Commercial Solvents* v *Commission* [1974] 1 ECR 223, but not by virtue of paragraph (c). Moreover *Commercial Solvents* v *Commission* was a different kind of case from this. In its Decision in this case (at p. 9) the Commission expressed the view that, for the present purpose, "abuse within the meaning of Article 86 of the Treaty may be defined as any action of an undertaking in a dominant position which reduces supplies to comparable purchasers in different ways without objective justification". That definition does not, however, in itself, answer the questions what are "comparable purchasers" and what is an "objective justification". The Commission sought, I think, to answer those questions in the following paragraphs of its Decision (at pp. 9 to 11). But the Commission did not, in those paragraphs, set out any clear rule, unless it be that the supplier must apply a statistical test. He must look up in his books how much he supplied to each of his customers during a "reference period" preceding the advent of the emergency (the Commission suggests a year) and supply each of them in the same proportion during the period of the emergency. The Commission concedes that suppliers are "entitled to take into consideration particularities or differences which may exist in the commercial situation of their customers" but does not explain in what way they are entitled to do this beyond saying that "In particular, they are free to apply the prices and other conditions provided [1] for in the supply contracts and to choose a reference period which corresponds and is appropriate to the period of constraint" (Decision p. 10).

In my opinion such a rule, which manifestly is not expressed in Article 86, could be held to be implicit in the terms of that Article only if it were equitable, practical and generally accepted. It appears to me that it would be none of those things.

It would be inequitable because it would virtually ignore the special claims of a supplier's contractual and regular customers.

It would be impractical because a supplier could never be sure when he should apply it. A sudden scarcity of supplies may arise from any number of causes. It may be due to some human conflict, which may range in importance from a major war to a local strike, or to some natural cataclysm, which may cause the failure of a whole crop or merely the shipwreck of a particular cargo. It is seldom possible at the outset of an emergency to gauge what its duration or its intensity are likely to be. It is to be observed that, among the "mitigating factors" that led the Commission to conclude that it would be inappropriate in this case for BP to be fined was the circumstance that "The confusion which reigned on the Dutch petroleum market, because of the uncertainty as to how the crisis might develop, made it difficult to assess the reductions in delivery that were needed" (Decision p. 12).

That the rule is not generally accepted seems to me manifest from the very facts of this case. The RBAP at the outset sought supplies for its pool from the producer companies in proportion to their shares of the market. When it came to constitute a specific pool for the supply of ABG, it used an ad hoc formula, the precise nature of which remains obscure. When the Dutch Minister of Economic Affairs settled the terms of his decree of 4 April 1974, he adopted a sophisticated formula based

1 — The English text of the Decision as published in the Official Journal has "grounded" instead of "provided". This is presumably a misprint.

on the major oil companies' shares of the market for motor spirit sold otherwise than under their own brand names. So there was no generally accepted rule.

For those reasons I think that this kind of case is outside the ambit of Article 86 altogether.

Lest, however, Your Lordships should not share my view as to that, I must consider briefly the question whether, if BP did have a dominant position of the kind suggested by the Commission, it abused that position.

The gist of BP's case was that there was no legal or commercial relationship between itself and ABG that made it incumbent upon BP to supply ABG during the crisis; that ABG's problem was one precisely of the kind that the RBAP existed to solve; and that BP's duty was confined to complying with any requests of the RBAP to supply ABG, which BP always did, for, whatever may have been the legal position, BP treated such requests as binding.

The gist of the Commission's case was that BP, in failing to continue to deliver to ABG during the crisis supplies proportionate to those that BP had delivered to ABG during the previous year, had created for the RBAP a problem that the RBAP was neither designed nor equipped to solve. The Commission did, however, concede, though only as "mitigating factors", that "Although the intervention of the RBAP was not compulsory and worked only through voluntary contributions by the companies, it may nevertheless have created doubts on the part of those companies as to the obligations which they owed their customers" and that "BP might well feel" that its advances to ABG of motor spirit on account of crude oil to be delivered for processing in BP's refinery could free it "in part" from the obligation to supply ABG during the crisis (Decision p. 12).

In my opinion it was legitimate for BP, in all the circumstances, to take the view it did. That being so, if it did have a dominant position, it cannot be held to have abused that position.

I turn, also briefly, to the question whether, if BP, contrary to my view, committed an abuse of a dominant position, that abuse was susceptible of affecting trade between Member States.

As to that the Commission put its case in two ways. First it envisaged the possibility that BP's conduct might have led to the disappearance of ABG, and with it of the AVIA network, from the motor spirit market in the Netherlands. The Commission, however, clearly felt the force of BP's contention that there was in fact never any danger of ABG being forced to cease to trade. So the Commission argued in the alternative that ABG's experiences during the crisis might have led it to tie itself contractually to one or more of the major oil companies thus reducing or eliminating the possibilities for it to import supplies from other Member States. That seems to me a tenuous argument since (1) it is common ground that in normal times the market for motor spirit in the Netherlands is competitive, (2) it is evident that many purchasers in that market are not tied by contracts and (3) we know that in the 12 months preceding the crisis ABG bought something less than 5.5 % of its supplies from other Member States. It therefore seems improbable that ABG's experiences during the crisis would have driven it to adopt a purchasing policy entailing a reduction in its freedom to import. I suspect that in reality those experiences will simply induce it, in any future crisis, to press the Government to intervene sooner and more vigorously.

In the result I am of the opinion that the Commission's Decision should be declared void and that the Commission should be ordered to pay the costs of this action.