OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 16 AND 17 JUNE 1975 [1]

Contents

General introduction 2046

I — The nature of the sugar market 2047

II — The common organization of the market in the sugar sector 2049

III — The concerted action between European producers 2056

IV — Applicability of the rules of competition to agriculture 2061

V — Formal submissions of a general nature 2065

VI — Protection of the Italian market — The problem of sugar imports 2068

VII — Protection of the Netherlands market 2076

VIII — Protection of the market in the Federal Republic of Germany 2093

IX — Concerted action relating to the invitations to tender for refunds on exports of Community sugar to third countries 2112

X — The pecuniary sanctions which have been imposed 2119

Conclusions 2123

1 — Translated from the French.

Mr President,
Members of the Court,

General introduction

It was at the end of the first marketing year following the entry into force of the basic Regulation of the Council, No 1009/67, on the common organization of the market in sugar that the Commission of the European Communities was informed that there were obstacles to free Community trade in sugar.

Quite apart from refusals to sell, which caused certain sugar consumers to complain, a combination of the following facts also attracted its attention:

- the grouping, from 1 July 1968, of German producers in marketing organizations with strictly demarcated areas, and the intervention of the Bundeskartellamt (The Federal Cartel Office) in Berlin in the affairs of one of these organizations, the Südzucker-Verkauf, for the purpose of requiring production of certain information in connexion with contracts which this organization had entered into with its commercial representatives and also in connexion with loyalty rebates which it granted;
- an agreement made between French sugar manufacturers under the aegis of l'Association de défense des intérêts économiques et sucriers (Association for defending the economic interests of sugar manufacturers) for the marketing year 1968/1969, notified to the Commission on 31 October 1968, on which however it has not defined its position;
- the fact also that Netherlands producers had entered into agreements for mutual cooperation, the evaluation of which in the light of Article 85 of the Treaty culminated in the Commission initiating a procedure (under Article 3 (1) of Regulation No 17/62 of the Council) which has not yet been completed;
- finally the outbreak in the Netherlands in March 1969 of a sugar 'price war'.

As these facts raise the presumption that they are practices which restrict competition on the common market, the Commission, as far back as 1969, in accordance with Regulation No 17/62 of the Council, undertook the necessary investigations and obtained information from many producers, dealers and consumers of sugar.

When these investigations had been completed it introduced, on 31 May 1972, upon its own initiative, the procedure specified in Article 3 (1) of this Regulation against twenty-two producers and sales organizations and their members representing about 90 % of Community production.

The objections raised against these undertakings were notified to them between 24 July and the following 29 July, a time-limit of two months being given to them within which to deliver their defences in writing.

After these undertakings had acceded to this invitation their representatives, as Article 19 (1) of Regulation No 17 provides, were heard by the officials of the Directorate-General for Competition and Agriculture, in the presence of officials of the Member States concerned.

Finally, after having received on 5 December 1972 the opinion of the Advisory Committee on Restrictive Practices and Monopolies, the Commission adopted on 2 January 1973 its Decision entitled 'European Sugar Industry' based on Articles 85 and 86 of the Treaty which was notified to the twenty-two undertakings. It calls upon them, on the one hand, to put an end immediately to the infringements which

it had found to exist; on the other hand it imposes on sixteen of the undertakings fines totalling 9 million units of account.

It is only the latter undertakings which have challenged in your Court the decision which they claim should be annulled and, in the alternative, rectified so far as the amounts of the fines which have been imposed are concerned.

Apart from the recent Frubo case it appears to me that this is the first time that you have had to deal in such a direct way with the problem of the application of the rules of competition in the Treaty to the production of and trade in an agricultural product (Article 42 of the Treaty) which is covered by a common organization of the market (Article 40).

On this problem another has been grafted: are the instruments and mechanisms provided by a regulation relating to the common organizations of markets and by Community implementing regulations, on the one hand, and the systems maintained or created by national authorities in the same sector, on the other hand, such as to guarantee or permit, provided that there is neither a cartel nor an abuse of a dominant position, the free movement of the product under consideration and free competition between producers?

The anti-trust bodies of the Member States are familiar with this problem with which the Community authorities may well be confronted more and more frequently. It is namely the problem of cartels which, according to Article 59 of the French regulation of 30 June 1945 'result from the application of texts of laws, regulations and other legislative documents'; it is also the problem of 'cartels between farmers or farmers' associations' expressly mentioned by German law on competition (Article 100 (1) GWB).

In a Community context the impact of competition law on existing common organizations of the market in agricultural products calls for the consideration of Regulation No 26/62 of the Council. Article 2 of this regulation states that Article 85 (1) of the Treaty shall not apply to such of the agreements, decisions and concerted practices as form an integral part of a national market organization or which are necessary for attainment of the objectives set out in Article 39 of the Treaty.

These considerations show why it appeared to me to be advisable, before embarking on the examination of the applications, to describe the main features of the sugar market and to give particulars of the regulations in the light of which the conduct of the applicants must be evaluated.

I — The nature of the sugar market

For a long time sugar and its raw materials — cane sugar or beet sugar — has been affected, on a national level, by intervention measures adopted by public authorities and by agreements between economic operators.

At the present time there is still no country where the sugar sector of the economy is completely exposed to market forces.

The respective development of the cultivation of beet and cane sugar and competition between sugar based on these two plants have been decisively influenced by the subsidies granted to sugar beet producers.

Without going back to the decrees enacted, at the time of the continental blockade, by Napoleon I to promote sugar production, such interventions started to play a leading role in Europe from the beginning of the second half of the 19th Century. They took the form of

multiple measures for aid and support granted to beet producers and sugar manufacturers by national governments. Whatever methods were adopted by these measures, the financing of them was in the end charged to the consumer or the taxpayer, so much so that Lamartine, who, although a poet, was also a politician, could declaim in a speech before the National Assembly:

'Je vous défends d'appeler la sucrerie une industrie nationale. Elle n'a de national que les charges qu'elle fait peser sur le pays'.

'I forbid you to call the sugar industry a national industry. It is only the heavy burden of the duties which it imposes on the country which is national'.)

These policies led to large scale dumping which brought about a fall in prices on the world market and were therefore detrimental to the development of sugar producing countries.

By way of reaction these interventions by public authorities or private agreements caused endeavours to be made to organize production and sales internationally on a more or less free market basis and at the same time to make certain that the market was reasonably stable and, without creating too much disturbance, to bring the volume of production into line with the volume of consumption. Let me mention on this point the convention signed at Brussels on 5 March 1902 and the later 'International Sugar Agreement', under which export quotas were fixed for countries which are net exporters.

The world sugar market is strictly speaking a very narrow residual market ('marché résiduel') which hardly represents more than 15 % of world production. As early as 1960 two-thirds of the sugar traded internationally was sold at special prices, guaranteed and fixed under agreements; the world price, as defined by the International Sugar Agreement, only applied to about one third of the international trade in this product.

This disproportion has increased: 55 million metric tons out of the 80 million metric tons produced in the world in 1974 were consumed in the producing countries. The remainder, 25 million metric tons, that is to say hardly more than one third of world production, was traded internationally. But 13 million metric tons were sold pursuant to bilateral agreements such as the American 'Sugar Act', the 'Commonwealth Agreement' or the agreement made between Cuba and the Soviet Union. These agreements are concerned with preferential markets. Thus the volume of sugar actually put on the world market is estimated to be only 12 million metric tons. Having regard to this situation the sugar market, which is very sensitive to political or economic crises, is also used for speculative operations. It is for this reason that there is a close connexion between the movement of stocks and prices, in spite of modern methods of marketing and transport which in the normal course of events ought not to justify the building up of very large stocks.

Although sugar stocks are to some extent necessary because the sugar marketing year properly so-called is so short and because the gap between marketing years has to be bridged, building up such stocks is a highly speculative operation. It only needs an actual shortage of some hundreds of thousands of tons to make the price rocket above the highest production costs or, on the contrary, a known or potential surplus of two million metric tons to make it drop to such an extent that it falls below the cost price.

These price variations are made even larger by speculation on the futures

markets in New York, London and Paris. There are reasons for supposing that the periods of scarcity are only temporary break-downs in the development of production which continually increases and which is a long way from being caught up by consumption. In fact in the developed industrial countries consumption in practice only goes up in proportion to the population increase, the rate of which is very low; on the other hand in the developing countries, which have a large population increase, consumption is curbed by the low standard of living.

So far as the Community market is concerned its chief characteristic, just like the world market at that time, was a definite tendency to over-produce.

During the four marketing years 1968/69 to 1971/72 with which the present cases are concerned the total production of white sugar in the Community went up from 6 800 000 metric tons to approximately 8 100 000 metric tons.

During the same period consumption only increased from 5 900 000 metric tons to 6 500 000 metric tons, that is to say from 120 000 to 150 000 metric tons per year.

Production therefore exceeded Community consumption by 11 % to 24 %.

If these figures are broken down between the five Member States — Belgium and Luxembourg together being treated as one State — they show that two States, France and Belgium, have continually produced a sugar surplus, while in the other States production and consumption are in balance or there is a deficit. Owing to its economic structure Italy has a deficit.

During this period the pattern of Community trade was not enlarged to any appreciable extent except in the case of imports into Italy.

With regard to Community exports of white sugar to the world market they went up from 1 100 000 metric tons in 1968/69 to 1 600 000 metric tons in 1971/72.

II — The common organization of the market in the sugar sector

It is this very special sector of sugar production which Regulation No 1009/67 untertook to organize by trying to reconcile such contradictory objectives as: the maintenance of the standards of living of sugar beet farmers and sugar manufacturers, the stabilization of the markets, the availability of supplies, the increase of productivity in accordance with rational criteria and, finally, a reasonable level of consumer prices.

Strictly speaking only the agricultural aspect of sugar production, that is to say primarily beet growing, should have come within the agricultural provisions of the Treaty, as the sugar industry like the other industries in the Community is bound to be subject to the general system, in particular to the rules of competition. And it could appear to be calculating backwards to base the price of the product which has to be protected — sugar beet or, to a lesser extent cane sugar — on the price of a sugar product arising at a later stage. However as the Commission stated in its original proposals for the organization of the market: 'because the marketing of beet is distinguished by special characteristics the income of beet growers can only be guaranteed by means of the price of sugar'.

It was moreover impossible to succeed in obtaining comparable prices for beet in all the Member States, having regard in particular to the very different rules governing the relations between beet

growers and sugar manufacturers. Moreover the world sugar market is based on the price of white sugar.

Guided in this connexion by earlier Netherlands regulations the authors of Regulation No 1009/67 therefore tried to overcome the difficulty by taking into consideration the stage when the product is processed. Agricultural producers saw that an adequate price was only guaranteed indirectly through a link established between the intervention price in force in the production area under consideration and the price of beet.

Having said that I must add that the provisions of Regulation No 1009/67, which apply more directly to the present cases, relate to the price system, to national quotas and to the system of aids: they enclose the market and keep it within bounds both at the production stages and at the prices level.

The white sugar produced by industrial companies is a homogeneous product which is standardized in accordance with strict criteria. It is its price rather than the trade-mark which induces the buyer to purchase.

Nevertheless Community regulations proceed on the basis that there are four qualities of sugar for the purposes, *inter alia*, of sugar purchases by the intervention agencies.

Of these four grades it is Category 3 ('standard category or quality', the basic quality on the Paris Sugar Market for white sugar) which in theory is the most important: it is for this standard quality that, according to Articles 2 and 3 of the basic regulation, the target and intervention prices are fixed each year.

I say 'in theory', because in fact this quality was not produced by the manufacturers of certain countries which only offered the most expensive kinds (Categories 1 and 2).

The processing industry on the contrary considered this quality to be satisfactory for their production. In particular the wish of German sweet manufacturers to obtain supplies of sugar in this category met, soon after the Community organization had been set up, with an unconditional refusal from the sugar industry. To purchase sugar of this quality produced in the other Member States afforded them no help, because the cost of transporting the latter quality of sugar was almost equivalent to the higher price asked for the category immediately above. This situation gave rise in 1969 to the opening of an inquiry by the Bundeskartellamt (The Federal Cartel Office) which apparently never came to anything.

The production of dearer kinds of sugar was also encouraged by the Community intervention system: a producer obtains for sugar in Category 1 offered to the intervention agency a price which is noticeably higher than the price of sugar in Category 2 and much greater than the actual cost of processing it.

Eventually producers managed to get Grade 2, which was dearer, accepted as the standard quality instead of Category 3 for which there was apparently no demand and this led to an increase in the processing margin of refineries of 0·50 u.a. per 100 kg, which had already risen to 0·88 u.a. per 100 kg in 1971/72.

Let me now examine the provisions governing prices.

Originally the Commission suggested that the Council should only control the production of sugar and the sugar market — as it did in the other market organizations — by means of the price mechanism, as the restriction of production by quotas was only envisaged as a last resort in order to stabilize the market in the case of any serious imbalance.

However under pressure from the German and Italian delegations who had

come round to accepting this way of considering the problems of beet growers and national sugar manufacturers, and, moreover, with the support of the European Parliamentary Assembly (Resolution of 20 January 1965) the system of national quotas was retained side by side with the system of prices and in conjunction with this system.

Although the Community organization of the sugar market does not directly include within its field of application the wholesale and retail stages, its main feature, in comparison with the other market organizations, is a complicated 'downstream' ('en aval') price structure under which first of all the price of the finished product downstream is fixed and then the cost of the raw material upstream is determined. The target price was fixed for white sugar, a product of first-stage processing or even the end product, whereas, in the other organizations the target price is determined on the basis of the agricultural raw material. The reason for this, as I have said before, is that in most cases sugar beet is not in its original state strictly speaking capable of being marketed and exported.

We know that Regulation No 1009/67 provides that the Council shall fix each year, so far at any rate as the sugar produced in the common market is concerned, on the one hand, a target price, on the other hand, an intervention price and it is necessary to recall the respective functions which they perform in a common organization of the market.

The first price fulfils an economic objective: it is the price at or near to which it is desired that transactions are carried out on the internal Community market.

The intervention price is the price at which the intervention agencies empowered by the Member States to do so, must buy the sugar which is offered to them by producers. Fixed at a level slightly below the target price it tends to facilitate the movement of the product in question; but it is also a guaranteed price, a floor price, to the extent to which the normal effect of intervention should be to provide economic operators with a guarantee that the market price cannot in general fall, except in certain cases limited in time and space, below the intervention price.

On this point Regulation No 1009/67 in no way differs, so far as its objectives are concerned, from most of the texts governing the common organizations of the market in agricultural products. The Commission which has had the opportunity, in connexion with many disputes relating to the implementation of such organizations, to define before the Court the meaning and extent of the target price and the intervention price, cannot therefore in the present cases depart from the position which it has continually adopted.

But the system which applies to sugar is different, so far as the method of price-fixing is concerned, from the traditional plan adopted in the other sectors.

In the system adopted for cereals, for example, the basic target price and the method of fixing prices and the intervention price are fixed for the production area having the largest deficit (Duisburg in Germany) which also happens to be an area where consumption is at a high level; the prices which are derived from them decrease according to the distance from this area.

Prices are therefore effectively fixed for each region.

However the opposite system has been chosen for sugar.

The common target price and the intervention price are fixed for the production area in the Community having the largest surplus, that is to say,

the region formed by the eight sugar departments of the North of France. This price is also applicable for the three Benelux countries and Germany.

No provision has been made for fixing prices for each region, as was done in the case of the cereal sector of the market.

It is true that the regions where sugar is both produced and consumed are relatively near to each other and that Member States, with the notable exception of Italy and, to a lesser extent Luxembourg, are in a position to meet all their requirements of sugar for eating from their own production.

The immediate effect of such a situation, which moreover is due to natural and climatic factors, is that trade hardly crosses the boundaries of the region.

Target prices and derived intervention prices have only been fixed for Italy and the overseas departments of the French Republic.

Fixing regional prices for the area having a deficit which is furthest away (Palermo) is effected by adding transport costs from the North of France to Italy. To the extent to which these derived prices are higher than those fixed for the principal production zone, this system has the additional effect of placing marginal producers at an advantage.

Therefore the competitive position of producers is hardly affected by their situation in relation to the principal production area, but rather by the degree of self-sufficiency of the areas of consumption.

The common organization has, as it were, taken over the role of national provisions relating to the equalization of transport costs. The nearness or distance of the main production area, at least so far as Italy is concerned, only has a limited effect on the incomes of producers who are in the target price-intervention price bracket.

Given that with very few exceptions the situation of national sugar factories in relation to the national areas of consumption is more favourable than that of a sugar producer of the other Member States, it was foreseeable that intra-Community trade would be limited, even on the assumption of a most favourable distribution of sugar and a reduction to the minimum of transport costs.

Finally the intervention price, a guaranteed price, must come somewhere between the beet growers' income and the price which, since it is the result of market forces, should in general tend to approximate to the target price.

Between these two poles the Council was called upon to take account of the need to guarantee farmers an appropriate purchasing power, so as to avoid in this way any decline in beet growing. Further, whereas the difference between the target price and the intervention price amounts to 8 % for cereals, the authors of the regulation have reduced this difference to 5 % for sugar. This alteration was considered adequate because, contrary to what happens in the case of most agricultural products, the marketing of sugar, a product which keeps well, is only fraught with limited risks.

These considerations explain that the intervention price was fixed at a relatively high level, especially profitable at least for the most efficient and best placed producers.

But, it will be said, this fact should have persuaded those producers who have surpluses available to offer them to intervention agencies, which, within the national quotas, must purchase all the sugar which is offered to them. These agencies can only resell it on the domestic market at a higher price than the intervention price; they are only authorized to sell sugar at a lower price for the purpose of denaturing or can only sell it at the world price if it is exported

to third countries in its original state or after processing.

However, it is clear that, during the periods with which we are concerned, this system of intervention only operated occasionally — and moreover unsuccessfully — and made a loss, because the agencies hardly sold any sugar except at prices below the intervention price of sugar intended for denaturing or export outside the Community.

It appears that the Commission, on the assumption that large quantities would have been accepted by the intervention agencies, should have been able to maintain the market price at a level appreciably close to the intervention price as long as there was clearly over-production. This was evidently the case since it exceeded, during the period under consideration, domestic consumption by an average of 16 %.

So far as the producers were concerned, it would have been, as a rule, in their interests to offer their surpluses to the intervention agencies — that is to say, at the guaranteed floor price — if the price of sugar on the open market coming under the pressure of surpluses had been inclined to fall to a lower level.

But it has to be recorded that this situation never materialized to any significant extent, even in the countries which had a very large surplus like France and Belgium. On the contrary it is a fact that, with certain limited exceptions, producers of these countries and in particular la Raffinerie tirlemontoise showed a marked reluctance to offer sugar to intervention agencies whatever pretexts they put forward to justify this forbearance.

There is no doubt that the real reason for this is that the intervention agencies were in the eyes of the producers dangerous potential competitors, capable of exercising a considerable influence on the market if they had been able to intervene on a large enough scale.

In the second place I regard this as confirmation that the guaranteed price was fixed at a higher level than was made necessary by the need to avoid the risk of a decline in beet growing, although a wider distribution of beet cultivation in the Community would have been desirable.

Finally, on considering these findings I am inclined to think that, in spite of the pressure brought about by surpluses, an artificial shortage was in fact created, to a certain extent by means of export refunds and denaturing premiums which were an indisputable advantage for the sugar industry.

The most striking feature of the common organization of the market in sugar, which distinguishes it from all the other organizations of the market of the European Economic Community, is the fixing of production quotas.

This system was established, on a provisonal basis, by Article 23 (1) of Regulation No 1009/67 for a period which was to terminate on 1 July 1975; but we know that it has recently been extended, subject to an adjustment of quotas.

Contrary therefore to the initial proposals of the Community this organization of the market does not imply that the objective of freedom of production has been attained. It leads in fact in the end to a restriction by quotas of this production.

It is on the basis of a production target of 6 480 000 metric tons per marketing year in the Community that national basic quotas, expressed in terms of white sugar, were fixed for each of the Member States. They amounted during the period with which we are concerned to 1 750 000 metric tons for the Federal Republic of Germany, to 2 400 000 metric tons for

France, to 1 230 000 metric tons for Italy, to 550 000 metric tons for the Netherlands and the same quantity for Belgium and Luxembourg, production being practically non-existent in this latter State.

These national quotas, derived from the basic production target, are apportioned by the national authorities of each State among the factories and undertakings in their territory having regard, on the one hand, to their annual average production during a reference period and, on the other hand, to the size of the national quota.

In conjunction with the system of prices this system tends to restrict production and encourage its regional specialization, while at the same time guaranteeing a minimum level of production, even in those regions which are the most unsuitable for beet growing. Regional specialization should therefore, as I see the situation, cover production over and above the basic quotas.

The aim of the restriction of production by quotas is also to achieve guaranteed prices. Such a guarantee, at the level of the intervention price, was, in the beginning, granted, not at the rate of 100 % of estimated human consumption in the Community, but at the rate of 105 % of this consumption.

After having made considerable progress during the years preceding the 1964/65 marketing year, as a result of an increase in consumption per head of the population and also in the population growth, the rise in the amount of sugar consumed by human beings proved to be much slower and more limited; a partial drop in the consumption per head of the population was even recorded in Germany, Belgium and the Netherlands.

It follows that in determining the basic quotas the Council proceeded on the basis of an optimistic assumption and that, from the beginning of the first marketing year, the amount of these quotas exceeded human consumption by 500 000 metric tons, that is to say by almost 10 % throughout the Community.

In addition, so far as that part of production which exceeds this quota of 105 % is concerned, the concept of a 'maximum quota' fixed at 135 % of the basic quota is applied. The sugar manufacturers can still within this limit benefit from guaranteed outlets, provided however they pay a production levy of which 60 % can be passed on to the suppliers of beet, the sugar manufacturers themselves only bearing 40 % of it.

The effect of this levy is therefore not only to reduce the manufacturing margins of sugar producers but also to lower appreciably the price paid to the beet grower. It is, as it were, an absorption levy.

But, as a maximum ceiling has been put on the production levy and as it would have been higher had it not been for this ceiling, the result is that the cost of absorbing surpluses has fallen not only on producers but also on the Community as a whole.

With regard to the amounts of sugar produced over and above the maximum quota, they cannot be sold on the domestic market; they must be exported in their original condition outside the Community without the producers being able to benefit from any export refunds.

Now the increase in production during the period under consideration tends to prove that, except in Italy, producers did not keep to the basic quotas which they were allotted. They have made extensive use of those maximum quotas in spite of the requirement to pay the production levy which reduced their return quite appreciably. It is therefore certain that it was still in their interest to produce sugar over and above the basic quotas. It even turned out in France, Belgium and the

Netherlands that the maximum quotas themselves were exceeded.

Now that this analysis has been completed two observations can be made on the general system established by Regulation No 1009/67, so far as prices on the one hand and production quotas on the other hand are concerned:

(1) the method of fixing prices and especially the basic or derived intervention prices was, it must be admitted, scarcely such as to promote large sales of sugar between Member States;

(2) there is no doubt that the system of national quotas tends to restrict the amounts of sugar which producers are in a position to sell on the common market; together with the high cost of transporting a product, of which the value/weight ratio is small, this system has a definite effect on the volume and pattern of intra-Community trade. It amounts in itself to a factor likely to encourage the partitioning of national markets, as moreover the Commission has itself acknowledged in a recent communication to the Council and to Parliament last February.

Does this mean however that the common organization of the market in sugar has excluded all effective competition so that the concerted practices, in which the principal European producers are alleged to have engaged, could not in any case have any effect on trade between Member States?

I do not for one moment think so.

First of all the system established by Regulation No 1009/67 has in no way changed the unequal distribution of Community production between Member States in relation to national consumption. It has not in any way altered the fact that there are countries, principally France and Belgium, which owing to their structure have a very large surplus, and countries which have a deficit, especially Italy, to some extent the Netherlands and, at least for certain regions and in certain marketing years, the Federal Republic of Germany whose sugar balance has been in equilibrium since the beginning of 1971.

These facts implied that intra-Community trade should be developed, at least to the extent to which it was necessary to make good the deficits of those States which were not in a position to ensure their own self-sufficiency.

Such trade was in addition made possible by the provisions of Article 35 of the Regulation which prohibits, within the common market, any customs duty and quantitative restriction or measure having an equivalent effect and also recourse to a system of minimum prices as provided by Article 44 of the Treaty.

It is true that Community trade can only represent, in comparison with world production, a residual market covering a small fraction of this production; but this fact could not have the effect of abolishing competition within the Community. On the contrary, this competition had of necessity to be all the livelier on this market, because it could only cover relatively small quantities in relation to the total surplus production of the most favourably situated regions.

Finally the system of Community prices, which are not selling prices to users, dealers or consumers, allowed producers a sufficient margin of freedom to negotiate prices on the market, after having taken into account the strength and weakness of their position, the return, their plant and the actual level of their manufacturing costs.

In this respect fixing intervention prices at a high level allowed producers who engaged in the greatest degree of specialization to be particularly competitive and should have induced them to extend their sales to their competitors' markets in the nearest

Member States, to the extent to which transport costs were not in this respect an insuperable obstacle.

I would like to add that since sugar is a homogeneous and to a very great extent a standardized product, in spite of certain consumer habits, competition could not only cover prices but also the other conditions of sale.

The conclusion can be drawn that the common organization of the sugar market did not exclude a considerable margin of competition capable of being impeded by concerted practices within the meaning of Article 85 (1) of the Treaty.

III — The concerted action between European producers

The findings of the procedure initiated by the Commission caused it to blame the principal European producers for engaging in such practices, which from the beginning had as their consistent objective the protection of national markets or, so far as Germany is concerned, the regional markets on which these producers, neglecting completely the real opportunities for competition offered by the common organization of the market, tried to maintain their former position by obtaining acceptance of the principle of 'chacun chez soi' ('everyone in his own home').

It is therefore the partitioning of the markets which is the back cloth against which the various specific complaints made by the Commission must be seen.

It is therefore necessary to decide whether we are confronted with a general cartel or only, on the contrary, with practices which are isolated and precisely defined.

In order to do so it is necessary to take care not to confine our attention to the form of the complaints. A 'fragmented' presentation of the various infringements, artificially dividing up and severing the complaints from each other and leaving out of account at the same time the general objective of the cartel formed by the producers and the striking similarity of the techniques employed to achieve this objective would only succeed in giving a fragmentary view of the facts.

Conversely the fact that the Commission adopted a single decision and the Court ordered that for the purposes of the oral procedure the cases shall be dealt with jointly does not mean that there must necessarily be a finding in favour of a general cartel.

In fact it is indisputable that the Commission has from the beginning proceeded on the basis that there was one single cartel. If during the procedure it was led to modify this argument, the only reason is that owing to the partitioning of the national markets it was bound to examine the situation created by the concerted practices on each of the markets separately and has obviously only been able in the end to make complaints against each of the undertakings in question in connexion with those practices for which in its opinion those undertakings were to blame.

But, for my part, I do not think it is possible simply to rule out any idea of a general concerted action, because, as we shall see, the links which existed, even before 1968, between the large European producers, the common purpose pursued by them and the similarity of the methods employed to achieve this purpose throw light on their behaviour since the implementation of the common organization.

As is known the manufacturers in question are themselves responsible for 90 % of the sugar production of the Community. In each of the producing

countries the combination of producers, which had been vigorously prepared even before 1968, has since then been consolidated.

In France, the principal European producer and a country having a very large surplus, five undertakings are responsible for three-quarters of national production: the companies Béghin and Say which merged on 1 January 1973, the companies Lebaudy Suc and Générale sucrière — the latter has since 1972 owned the majority of the capital of the first company — and finally Sucre Union. The Sucres et Denrées company plays a leading role in the sugar trade.

In Belgium — a country which also has a surplus — the Raffinerie tirlemontoise alone produces directly more than half the national output. In addition, as it controls, by means of its majority holdings, the production of the factories of Warneton, Oreye and Moerbeke-Waes, and through marketing agreements the production of the undertakings of Liers, Embressin and Naveau, it exerts — or is in a position to exert — a decisive influence over approximately 85 % of Belgian production.

In the Netherlands two undertakings — Coöperatieve vereniging Suiker Unie (SU) and the Centrale Suiker Maatschappij (CSM), linked together by agreements for mutual cooperation, are responsible for the entire national production and, if account is taken of imports, control more than 80 % of the market.

In Germany the producers have grouped themselves in marketing associations the territories of which are celarly demarcated:

The Norddeutsche Zucker for Schleswig-Holstein and part of Lower Saxony:

The Westdeutsche Zucker-Vertriebs-gesellschaft for the Western part of Germany of which the most important member is the Pfeiffer & Langen undertaking which, itself, is responsible for about half of the production of this area;

Finally in the Southern part of the Federal Republic of Germany the Südzucker-Verkaufsgesellschaft, within which the Süddeutsche Zucker AG occupies the most important position as it is responsible for 70 % of production.

In the case of Italy combinations of producers in that country also increased. Three principal groups share the market between themselves:

The first group was formed round the Eridania company: it produces more than one third of sugar production;

The second, the Gruppo Padano, is in practice on a par with the first group as a result of takeovers and the acquisition of controlling interests, in particular of such an interest in Società italiana per l'industri degli Zuccheri;

A third group was formed by a combination grouped round the 'Agricola industriale Emiliana' company.

Finally if certain smaller undertakings are responsible for the balance of Italian production, there is nevertheless no independent commercial network for marketing sugar as this is under the control of the large producers.

These European undertakings maintained, before the common organization of the market was brought into force, contacts which were encouraged, if not regularized, by the creation on a national scale of groups, associations and syndicates.

In Belgium it was the Confédération professionnelle du sucre and its off-shoots, in Germany the Verein der Zuckerindustrie and the Wirtschaftliche Vereinigung Zucker, in France, the

Syndicat national des fabricants de sucre and la Chambre syndicale des raffineurs, in Italy, 'Assozucchero'. In the Netherlands close cooperation exists, it has been said, between the two undertakings which are responsible for the whole of domestic production.

These organizations of national producers have been a European Committee of sugar producers on a Community level. It is within this committee — and more particularly its common market commission — that discussions began, before the entry into force of Regulation No 1009/67, on the question of the foreseeable effects of the common organization of the market and that the measures which had to be taken by the European sugar industry in order, in particular, 'to avoid the existing imbalance between the amount of sugar at a guaranteed price and the requirements of the domestic market', were considered.

At a meeting held at Munich in May 1968 attended by representatives of national groups together with direct representatives of certain producers the common intention that 'the solutions which have been worked out allow sugar manufacturers to ensure by their own efforts the marketing on the domestic market and for export of the whole of their production' was confirmed.

The main purpose, to be implemented by identical methods on the various national markets, consists in distinguishing two markets.

- on the one hand, the market in sugar intended for human consumption, on which the producers intended to avoid any competitive inroad into their own sales territory and to maintain, as far as possible, the *status quo ante* by their concerted action;
- on the other hand, the market for surpluses intended for denaturing or export to third countries, on which the undertakings concerned had decided to come to an agreement with the object, according to the formula repeated in the agreement entered into between French sugar manufacturers on 1 July 1968, of guaranteeing each of them 'equal opportunity' to exploit their markets.

It is interesting in this connexion to refer to an introductory note drawn up by the Association syndicale française concerning this agreement which moreover was notified to the Commission and also to a draft agreement relating to a cooperative society for Belgian sugar manufacturers.

These documents enable us to understand the position taken up by the undertakings concerned in relation to the two different markets and the conclusion which must be drawn from this position, namely that 'Community producers must be put on exactly the same footing with regard to these two markets, which is tantamount to saying that they must all be given the opportunity to earn the weighted average return corresponding to the quantities absorbed by each of the two markets in question'.

In order to achieve this result the first of these texts proposed special measures for the organization of the export and denaturing markets.

On the other hand no such proposal was made for the market in sugar intended for human consumption because in this field the problem could be adequately solved within the scope of the concerted action between producers by adopting the methods which undertakings could put into effect themselves without any difficulty, in accordance with a policy which was precisely defined by the representative of the Raffinerie tirlemontoise in the formula: 'No movement of goods from country to country save by agreement between producer and producer'.

What is called 'trade based on rationalization' ('le commerce de

rationalisation') which implied close cooperation between national groups of producer-refiners and was for them a preferential market had therefore to be applied to intra-Community trade in sugar.

Similar techniques were used to carry out this policy, which is the common foundation of the various concerted practices, against which specific complaints have been made, and also lays down the all important method of controlling deliveries of sugar from one Member State to another with the object of protecting national markets.

The first of these methods consisted of direct deliveries of white or raw sugar from one country to another, from producer to producer, in other words between competing undertakings.

Deliveries of white sugar were often made in packages supplied by the purchasers and bearing their own trade-mark. The sugar was resold at the same price as their own production price. The producer-suppliers refused to accept offers to purchase either from dealers or industrial consumers of sugar, giving as their reason that the amounts available had to be reserved for their domestic market.

These practices, which were carried out regularly, cannot be convincingly justified either by the situation of the Community market in sugar or by the commercial interests alone of the producers.

They can only be explained by a coordinated policy, the principles of which, laid down by the most important producers, were intended to maintain the partitioning of national markets.

Except in the case of the Italian market which is subject to domestic regulations specially designed for State control of the economy and moreover carefully drawn up so as to reserve the largest part of imports to national sugar manufacturers, deliveries from producer to producer amount at the very least to a strong *prima facie* evidence of a concerted action having as its object the elimination of competition in sales territories enjoying privileges.

This evidence is corroborated by the fact that, although certain deliveries — in smaller quantities — were nevertheless made to industrial consumers or dealers in these protected sales territories, these operations were, as a general rule, only carried out with the consent of producers established in these areas. Further such deliveries were exceptionally large.

Another procedure was also used which was designed to prevent traders and consumers from buying directly any sugar other than home produced sugar. It consisted in applying increased prices, calculated by reference to the prices fixed by producers in their own territory, in such a way that in the end purchasers were induced to buy only from their own national undertakings.

Finally, producers brought pressure to bear on traders in order to compel them to conform to their policy, either by insisting that they refrain from operating in neighbouring countries unless they adhere to the conditions laid down by the undertakings of these countries, or by imposing clauses specifying the destination of the sugar. In this way they prevented their purchasers from putting on the market for human consumption quantities sold for denaturing, processing by industry or export to third countries.

These various methods were implemented jointly or severally, according to the situation on the various national markets, as the examination of specific complaints will confirm.

This implies, in my opinion, that, even if there was not a general cartel within the strict meaning of this word, the concerted practices between various

producers or groups of producers were carried out in accordance with a single plan, and sprang from a common intention and not simply from parallel but independent conduct based on considerations of pure commercial interest.

That is why, if the evidence of the concerted practices has to be specifically evaluated within the context of each of the complaints enumerated by the contested decision and after taking into account the individual behaviour of each of the undertakings, I am inclined to the view that the nature of these courses of conduct is such as to fall within the definition of a concerted practice which you laid down for the first time in the case of the dye-stuffs.

'If Article 85 — as you held in particular in your judgment of 14 July 1972, *Imperial Chemical Industries* (Case 48/69, Rec. 1972, p. 619 *et seq.)* — draws a distinction between the concept of concerted practices and that of agreements between undertakings or decisions by associations of undertakings, it does so with the object of bringing within the prohibitions of this article a form of *coordination* between undertakings, which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.'

'By its very nature, then, a concerted practice does not have all the elements of a contract but may *inter alia* arise out of coordination which becomes apparent from the behaviour of the participants.'

It is this requirement that there must be conduct common to the participating undertakings which enables a distinction to be drawn between the concept of a concerted practice and that of an agreement, in that, according to the case-law of your Court, provided that the existence of an agreement is established and that its *object* is to produce an adverse effect on competition in the common market, it falls within the scope of the prohibition laid down by Article 85 (1), without it being necessary to ascertain whether it has in fact had any *effect* on competition.

A concerted practice, on the contrary, cannot be entirely severed, owing to its very nature, from the effects which it has on the conditions of competition, since it must become apparent from the behaviour of the undertakings concerned.

This view which I expressed in relation to the dye-stuffs case, is on the same lines as that given by Mr Advocate-General Joseph Gand in connexion with the international quinine cartel.

Unlike an agreement, he said, 'a concerted practice presupposes, according to the majority opinion, that there is a specific concerted action, so that it is necessary to prove, on the one hand, the actual conduct of the undertakings concerned and, on the other hand, the existence of a link between this conduct and a pre-established plan'.

In fact, the finding of common or parallel courses of conduct of undertakings may not, in itself, be sufficient to amount to a concerted practice. It is still necessary to show that these courses of conduct do not originate in the structure or the economic conditions of the market. But, as you held in your judgment of 14 July 1972: 'Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to *strong evidence* of such a practice if it 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 size and number of the undertakings and the volume of the said market.

This is especially the case if the parallel conduct is such as to enable the persons concerned... to consolidate established positions to the detriment of effective freedom of movement of the products in the common market and to the freedom of consumers to choose their suppliers'... and, let it be added, so far as sugar is concerned, of industrial consumers of this product.

Reference back to this case-law leads me to give my opinion also on the question of the taking of evidence of a concerted practice.

There is no doubt in my view that the burden of proof lies on the Commission but I do not share the opinion held by some of the applicants that the power conferred on the Commission to impose fines, in a matter which is quasi criminal, excludes the admission of presumptive evidence and that the rule *'in dubio pro reo'* should prevail.

This argument in my opinion fails to acknowledge the fact that Community competition law is not governed by the principles of criminal procedure; the Commission has no judicial function; however inconsistent it must be, the procedure provided for by Regulation No 17 is at all times administrative.

On the other hand the evidence of a concerted practice may, in most cases, only consist of evidence or presumptions which the investigations of the Commission have brought to light.

It is the combination of these presumptions — provided that they are strong, precise and relevant — which more often than not alone enables the existence of a concerted action corroborated by the actual conduct the undertakings concerned to be proved, and it only remains for the Community judge to determine, finally, whether the material produced as evidence by the Commission is conclusive.

Moreover this is the view which you took in the dye-stuffs case when you held that 'the question whether there is a concerted action in this case can only be correctly determined if the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the market in question'.

IV — Applicability of the rules of competition to agriculture

Before I begin to examine each of the specific complaints made by the contested decision I must give my opinion on a question of general application.

It is the question of the application of the rules of competition enacted by the Treaty to production of and trade in agricultural products.

In fact according to Article 42 of the Treaty, the provisions relating, in particular, to cartels and the abuse of a dominant position do not apply, in this field, except to the extent determined by the Council, account being taken of the objectives of the agricultural policy of the Community set out in Article 39.

It must be clearly understood that the authors of the Treaty did not wish to exempt, in principle and permanently, production of and trade in agricultural products from the prohibitions of Articles 85 and 86; but they considered that is was necessary to adopt in this connexion specific measures taking into account the patterns of the various agricultural economies and also the implementation of the common organizations of the market.

In order to do so they gave the Council power to determine within what limits and subject to what exceptions the provisions of Articles 85 and 86 could be applied to agriculture.

Article 1 of Regulation No 26 of 4 April 1962 states, in principle, that Articles 85 to 90 of the Treaty and provisions made in implementation thereof apply to the production of and trade in agricultural products.

However this regulation provides in Article 2 (1), first sentence, for two exceptions to this principle by exempting from the rules of Article 85 (1) alone agreements, decisions and practices 'which form an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty'.

Further, and this is the object of the second sentence of the same paragraph, a specific preferential system is provided for agreements of farmers or farmers' associations belonging to a single Member State to the extent to which these agreements concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products and under which there is no obligation to charge identical prices, unless that Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardized.

This special exemption is not moreover found in the proposal for a regulation submitted by the Commission. It was inserted at the request of the European Parliament and of the majority of the national delegations which wanted in this way to legalize cooperatives and groups of agricultural producers which exist in all the Member States and are considered with favour by the national legislative systems.

By virtue of paragraph 2 the Commission is given sole power to determine either on its own initiative or at the request of any of the persons concerned, after consulting the Member States and hearing the undertakings or associations of undertakings concerned, by a decision which shall be published, which agreements and concerted practices fulfil the conditions for exemption specified in paragraph 1.

The interpretation of Regulation No 26 is bound to raise many problems which relate, first of all, to the field of application of this text, in the second place to the procedure under which it may be implemented and finally to the nature and extent of the exemptions which it provides.

There is no doubt that the main purpose of Article 2 of the Regulation is to encourage collaboration by farmers, since such cooperation leads to modernization and rationalization as well as production and marketing of their products; this intention is particularly evident in the preferential treatment given to cooperatives and associations of farmers to the extent to which for example their objective is the production or sale of such products or the use of joint facilities.

The question may therefore be asked whether the benefit of the exceptions from the application of Article 85 (1) also includes industrial undertakings which process agricultural products such as sugar factories and refineries.

There does not appear to me to be any doubt that the answer to this question is in the affirmative:

- on the one hand, the list of agricultural products set out in Annex II of the Treaty is not limited to the raw products of the soil; it expressly includes products of first-stage processing such as sugar;
- on the other hand, the exceptions to the rules of competition provided by Article 2 of Regulation No 26 are designed to exempt agreements, practices and decisions relating not only to the production and sale of agricultural products *'stricto sensu'*, but also to their processing.

In addition the enumeration made in the second sentence of paragraph 1 is not exhaustive.

Further, although the undertakings which produce sugar are not farms, the common organization of the market establishes a close interdependence between these industrial processing undertakings and beet growers, either through quotas, which are indeed fixed at the sugar factory level but which have a direct effect on the cultivation of beet, or by a production levy, if the basic quotas are exceeded, since farmers can be charged with payment of part of this levy, or again by the system of Community sugar prices which determines the purchase price of the raw material, or finally by means of agreements between persons engaged in the sugar industry relating to the cultivation and purchase of beet.

A second question therefore has to be asked: was the Commission legally entitled to make use of the powers conferred upon it by Article 85 (1) and Regulation No 17 in connexion with the concerted practices which it charged the undertakings in question with having engaged in, without having first made a decision in accordance with the conditions specified by Article 2 of Regulation No 26? In other words was it not under a duty to comply, first of all, with the procedure which this Regulation requires it to adopt?

If the answer to this question is in the affirmative, the Commission should, therefore, after consulting Member States and hearing the undertakings concerned, have taken a decision the purpose of which was to ascertain whether the conditions of exemption provided by paragraph 1 of this Article were or were not fulfilled.

Many applicants have not failed to submit that these procedural rules have been infringed by maintaining that the practices for which they are blamed were, according to the circumstances, 'an integral part of a national organization of the market', which in these proceedings consisted of the national regulations of the Italian sugar market, or 'were necessary for attainment of the objectives laid down by Article 39 of the Treaty'; they infer from this that the Commission should have taken in relation to them a positive decision, which stated that for these reasons Article 85 (1) did not apply.

I ask you, My Lords, to reject this submission. The procedure provided by Regulation No 26 and, in particular, the prior consultation of Member States is in my opinion only obligatory if the Commission intends to ascertain whether the exemption conditions are effectively fulfilled and accordingly takes a 'positive' decision stating that the prohibitions of Article 85 (1) do not apply to the agreements, practices and decisions in question.

On the other hand, it does not appear to me that the Commission has to adopt this procedure if it is of the opinion that there are no grounds for admitting that one or other of the exemptions applies.

Regulation No 26 moreover does not make any reference to the procedure which must be adopted in order to apply Article 85 to agreements or concerted practices which did not fulfil the necessary conditions for benefiting from these exemptions.

In these circumstances the implication of the principle laid down in Article 1 of this Regulation, that not only Article 85 but provisions made in implementation thereof apply, is that the procedure to be adopted is the general procedure relating to competition specified in Regulation No 17.

It is this solution which you have recently advocated in your judgment of 15 May last (*Frubo*, Case 71/74), by stating that 'To require it (the Commission) to consult Member States,

even in cases where it is in no doubt that the exceptions provided for under Regulation No 26 cannot apply would oblige the Commission to fulfil unnecessary formalities and needlessly delay inquiries into the matters concerned'.

With regard to the discussion on the merits of this question, that is to say of the question whether the concerted practices — or some of them at least — were likely to benefit from one or other of these exceptions, I will only make the following observations.

So far as the first ground for exemption is concerned three of the French applicants, the companies Générale sucrière, Béghin and Say on the one hand, and two Italian firms Eridania and Industria degli zuccheri on the other hand, maintain, within the context of the complaint relating to the protection of the Italian market, that the regulations adopted by the Italian authorities must be treated as a national organization of the market within the meaning of Regulation No 26 or represent, at the very least, an internal regulation having equivalent effect within the meaning of Article 46 of the Treaty.

If this system is considered in conjunction with the common organization introduced by Regulation No 1009/67, it can be said to have aimed at the stabilization and regularization of the Italian sugar market, in order to guarantee the employment and standards of living of beet producers; it included, according to the applicants, measures having equivalent effect to customs duties, aids to sugar manufacturers and beet growers; it fixed maximum prices; finally it contained provisions for fixing quotas and sharing out sugar imports in Italy.

The concerted practices for the protection of the Italian market, which the Commission alleges that the applicants engaged in, were indissolubly linked to this national organization; they were an integral part of it.

There are two possible answers to this argument.

The first view which can be taken is that the exception was designed to ensure that national market organizations existing before the establishment of common organizations were not adversely affected. Regulation No 26, adopted in 1962, in fact preceded the development and fulfilment of the common agricultural policy. Its application would therefore in this connexion only be transitional, since these national market organizations, in the absence of any express provision to the contrary made by Community institutions, were to be replaced by progressive stages by common organizations.

You have held that from the beginning of the entry into force of the latter organizations the Community authority alone can in fact decide whether to retain, on a provisional basis, any national market organization relating to the products in question:

— judgment of 21 March 1972, *Sail*, Case 82/71, Rec. 1972, p. 138.

Similarly you held in your judgment of 10 December 1974 (Case 48/74, *Charmasson)* that, although the Treaty provided that the national market organization may be retained until such time as a common organization is established, it only contemplated such a retention however until the end of the transitional period, which is the date when the common agricultural policy must be finally adopted.

The application of these authorities implies that a national market organization could not therefore legally exist in Italy after the entry into force of Regulation No 1009/67. Althugh it is true that this Regulation provides for certain measures for granting aid to

Italian sugar producers, it in no way guaranteed and authorized the retention, in this country, of a national market organization or domestic regulations having equivalent effect.

But it seems to me to be pointless to resolve in this field of argument the problem raised by the existence of the Italian regulations. It will be evident when the complaint relating to the protection of the Italian market is examined that it is mainly on the effects which this *de facto* system has had on competition that I shall base the reasons for my conclusions.

With regard to the second exception concerning the agreements necessary for attainment of the objectives set out in Article 39 of the Treaty, reliance thereon implies that the criterion of 'necessity' ('nécessité') be evaluated in the light of the specific facts of the case. The weight to be attached to these facts must therefore be determined during the examination of the particular complaints, to the extent to which a submission based on this exception is put forward.

V — Formal submissions of a general nature

Without referring to the submissions based on the absence or inadequacy of the reasons for the decisions or on internal contradictions in the decision, which I shall examine in connexion with the substance of the case, I would like now at this stage in my opinion to consolidate and consider the formal submissions of a general nature, whether they have been put forward by one undertaking only or are common to several of them. All these submissions may be reduced to one, namely the failure of the Commission to allow the applicants to avail themselves of their right to defend themselves. The evaluation of these submissions depends, to a great extent, on the view taken of the necessary procedure for the implementation of the provisions of Articles 85 and 86 of the Treaty and of the nature of the fines intended to punish infringements of these Articles.

In this connexion your case-law to date draws attention to some general principles that you will have to bear in mind: the procedure before the Commission is administrative and not judicial, moreover as I had the opportunity of saying following Advocates-General Roemer and Gand, fines are not criminal law sanctions.

These formal submissions are connected with the following points:

1. Taking great exception to the tendentious character of the policy adopted by the Commission for informing the public and seeing in this policy a deliberate intention to accuse them in public without having heard them before publication, the applicants submit that, even before the Commission notified them of the 'objections' it had raised against them, it — or more exactly its member having special responsibility for competition problems — should, during a press conference which aroused considerable interest, have informed the public that it had initiated the procedure specified in Regulation No 17 against the principal sugar producers of the Community and of the reasons which had led it to do so.

I do not see how this fact would affect either the validity of the administrative procedure or consequently of the decision which was made. This communication to the press in no way deprived the applicants of the opportunity of effectively stating their own case by submitting their observations on the complaints made against them. It is agreed that the Commission had taken note of their arguments in answer to the objections before it took the final decision. Or would the applicants have preferred the Commission to publish the notification

of objections in the *Official Journal of the European Communities*, as Article 2 (2) of Regulation No 99/63 allows it to do?

If I understand why the reactions of some of the undertakings or their trade associations, UNICE and CEFS were lively, then it is my belief that the dispute between the Commission and the applicants lies in a different field; it is concerned with the policy adopted by the Commission for informing the public: it must be freely acknowledged that the Commission has not only the right but is under a duty to inform the public of its policy, which is often criticized for being too technical or esoteric.

2. So far as the notification of objections itself is concerned, Südzucker AG and the marketing organization Südzucker Verkauf complain that the objections which were notified to them were not accompanied by a German translation of the documents quoted in support of them by the Commission. It is alleged that this translation was only supplied later and further, that it was defective. I do not think that, in accordance with your judgment of 15 July 1970 in Case 41/69 *(Chemiefarma*, [1970] ECR 687), this fact prevented these undertakings from making themselves effectively acquainted with these documents, nor that the irregularity — if indeed there has been any — had in this case any adverse effect on the ability of the undertakings concerned to defend themselves and on the efficacy of their defence.

Certain applicants complain that the Commission's objections were notified to them in a single text, which they allege did not specifically state the points which affected them individually. I believe that the fact that there was only one text is explained by the view which the Commission took of the cartel ('general' cartel (entente 'générale')) and that as a result this aspect of the proceedings merges into the examination of the substance of the case. It appears to me in any case that each undertaking was in a position to discover which objections referred specifically to it.

3. Several of the applicants also submit that there has been an infringement of Article 4 of Regulation No 99/63 on the hearings in that the time prescribed by the notification of objections for the submission of written observations was too short.

The last date when the notification of objections was received by the undertakings is 1 August 1972 and the date when the last reply of these undertakings was lodged is 4 October. It seems to me therefore that the undertakings had at least two months in which to define their position, the period of time which they were in fact granted in the notification of objections; Article 11 of Regulation No 99/63 prescribes a time-limit of two weeks. Although this time-limit covers the period of the summer holidays, it appears to me to be sufficient to enable undertakings to submit any observations which they may wish to make. It cannot be contrasted with the time (of necessity much longer) which the Commission took to investigate the matter, that is to say to carry out the necessary investigations and to collect all the facts and information which enabled it to initiate the procedure specified in Regulation No 17.

Moreover, during this investigation, the applicants, put on inquiry by the checks made at their head officies or various places of business and by the requests for information which had been addressed to them, were from that moment onwards in a position to know the essential facts covered by the statement of objections. They were certainly not taken unawares by the notification which was made to them officially.

Further supplementary written observations were submitted by some of

the applicants and accepted by the Commission until 21 November 1972.

4. With regard to the failure to notify the minutes of the separate hearing of certain undertakings to the other undertakings, there is no provision which places the Commission under a duty to undertake any such notification. On the contrary, some provisions could be found in Regulation No 99/63 (Article 2 (2) and Article 9 (3)) tending to show that if anything the Commission is under a duty not to make any such notification with a view to protecting the legitimate interest of undertakings in the non-disclosure of their business secrets.

5. With regard to the adoption of one single decision relating to all the applicants it appears to me that there is no reason why the Commission should not make such a decision covering several infringements, when some of the persons for whom it was intended are affected by one and the same infringement. Here again everything turns in the end on the question whether the cartel and the concerted practices are of general application or not.

The undertaking Suiker Unie argues that there has been an infringement of Article 3 of Regulation No 1 of the Council of 6 October 1958 determining the language to be used by the European Economic Community (and of Article 191 of the Treaty), on the ground that the Commission apparently sent it not only the version in Dutch of the decision of which it was one of the addressees, but also this version in the other languages, without indicating that the Dutch text was the only authentic one so far as it was concerned. It appears to me that this fact has no effect on the opportunity which the applicant had of defending itself: *quod abundat non vitiat.*

6. Some applicants also consider the fact that the contested decision did not take into consideration certain facts or arguments which they put forward in their defence amounts to a procedural defect.

It has to be remembered in this connexion that you have held that ' in the statement of the reasons upon which its decisions are based the Commission is not obliged to define its position on all the arguments which the parties concerned may submit in their defence; it is sufficient if the Commission states the facts and legal considerations which are of crucial importance in the making of its decision' (judgment of 14 July 1972, Case 55/69, *Casella,* Rec. 1972, p. 914). More recently you held that 'if the Commission has to give the grounds upon which its decision is based, it does not however have to refute all the submissions made during the course of the administrative procedure' (judgment of 21 February 1973, Case 6/72, *Continental Can* [1973] ECR 240). So far as the other aspects of this submission are concerned, I am of the opinion that they come within the purview of the examination of the substance of the case.

7. If there has been a certain development of the Commission's argument relating to the complaints which it intended to make against the undertakings when the objections which it finally raised in its decision were notified, such a development is only to be expected: this is in fact the whole purpose of the administrative procedure, provided that the Commission does not raise objections other than those in respect of which undertakings have had the opportunity of making known their views.

8. Finally, two of the Italian applicants submit that, since the Commission presumed that competition was distorted in the particular sector under consideration, it *should have* conducted an inquiry into this sector before initiating the infringement procedure. I will merely state that Article 12 of Regulation No 17 only mentions the mere *possibility* of the Commission conducting such an inquiry.

VI — Protection of the Italian market — The problem of sugar imports

It is known that Italian sugar production falls far short of national consumer demand. During the marketing years 1968/69 to 1971/72 it fluctuated between 1 100 000 metric tons and 1 300 000 metric tons, whereas during the same period consumption, showing a small but steady increase, went up from 1 400 000 metric tons to more than 1 500 000 metric tons.

Italy therefore depends upon imports, especially from the Member States of the common market which owing to their economic structure produce a surplus. It is in particular France and Belgium which have a surplus.

The Commission concludes from this situation that at least after the frontiers were opened following the entry into force of the common organization of the market Italy should have been pre-eminently a territory of lively competition for imports of sugar both for human consumption and the processing industries.

However it found that from the beginning of the first marketing year this free competition had in reality been eliminated. The reason it puts forward for this is that French and Belgian producers have shared out between them their deliveries to Italy, standardized their conditions of sale and in addition given undertakings to their customers, the Italian producers, that they would only sell to non-producers and in particular to consumer industries, at a higher price.

These concerted practices were organized and developed in a more special way from the beginning of the 1969/70 marketing year onwards when very large contracts for the import of sugar were entered into between:

- on the one hand the group of 'producer-purchasers' including to begin with the Eridania company, responsible for the coordination of these operations, and the firms Industria degli zuccheri, Romana, Volano, Cavarzere, Emiliana, Sermide and SADAM, and certain other undertakings, two of which have since been taken over by Eridania, and another of which has become la Société générale de sucrerie,
- on the other hand, the group of 'producer-suppliers' including primarily the French companies, Béghin, Say, Générale sucrière, Lebaudy Suc and at times Sucre Union (these two undertakings have not lodged any application at the Court); secondly the Belgian company Raffinerie tirlemontoise; finally Süddeutsche Zucker AG (only for the 1969/70 marketing year).

The members of this group with the exception of Süddeutsche Zucker AG entrusted a wholesaler, the French company Sucres et Denrées, with the task of centralizing the offers and organizing transport and deliveries.

The evidence of the concerted action, according to the Commission, is found in the meetings held by the parties concerned first in Paris on 29 July 1969 and then at Genoa on the eleventh of the following September. At the first meeting the parties concerned discussed the methods which should be adopted to prevent 'outsiders' making offers on the Italian market at prices lower than the ones which they applied themselves; during the second meeting they solved the problems connected with deliveries in such a way, as the commercial letters exchanged afterwards show, that sugar has in fact been imported into Italy in accordance with principles laid down by a common accord.

The Italian producers, who alone had a distribution network, resold the sugar delivered direct to them, amounting to 75 % of total imports, either direct for consumption or to the processing

industries at the same prices and subject to the same conditions as home produced sugar.

In so far as any free sales had been effected, and the volume was small, the suppliers undertook to demand payment of a surcharge which varied, according to the marketing year, from FF 1·25 to FF 1·75 per quintal.

During another meeting on 22 September 1970 the members of the two groups confirmed and clarified their arrangements with a view to overcoming certain difficulties which had arisen between suppliers and importers.

These are the main grounds upon which the contested decision is based and from which the Commission infers that these actions, which it considers are concerted practices within the meaning of Article 85 (1) of the Treaty, have eliminated all competition between operators on the Italian market.

According to the Commission's argument, had it not been for the concerted action, the producers in countries with a sugar surplus would have been able to sell their products individually to Italian buyers after freely negotiating the pricies and the amounts offered and use the normal distributive networks.

There can be no doubt, my Lords, that the suppliers and importers have engaged in a concerted action. The findings of facts disclosed by the Court file show clearly that, if exports to Italy were relatively small during the first marketing year because in this country there were stocks left over from an exceptionally good harvest in the previous year, they increased in the following marketing years to and sometimes exceeded 300 000 metric tons; nor can it be denied either that in this particular trade the proportion of deliveries to Italian producers by the supplier's group increased by progressive stages until it reached on average three-quarters of these imports.

Similarly some of the telex messages exchanged, particularly between Eridania, the representative of the Italian group, and Sucres et Denrées, show that in general the operations were carried out on the basis of the principles laid down during the meetings mentioned by the Commission.

But, my Lords, leaving out of account the formal submissions made by some of the applicants, it is my belief that the fundamental — essential — problem raised by the first complaint, which some of the applicants have not failed to stress, must be examined straightaway.

In fact their argument is based on the fact that during the relevant period Italian national regulations were in force, which they maintain made their conduct, to which exception is taken, necessary and inevitable and did not leave any appreciable margin of competition on the Italian market.

Has not the Commission itself acknowledged in its decision that there was a special situation on this market created both by Community regulations and *'special measures taken by national authorities'?*

These measures led first of all to the establishment by Order No 1195 of the Interdepartmental Committee on Prices, on 22 June 1968, that is to say on the eve of the entry into force of Regulation No 1009/67, of the Cassa conguaglio zucchero (a sugar equalization fund), which moreover replaced the three pre-existing equalization agencies. Its function is to undertake 'the necessary equalizations for the gradual integration of the Italian sugar economy into that of the Community and for the establishment of a common market in the sugar sector'.

There is no doubt that the funds of the Cassa, which were raised by a

contribution called 'sovraprezzo' levied on both domestic and imported sugar, whatever the quality and kind, had to be used for financing aids authorized for the benefit of beet producers and beet processing industries by Article 34 of the basic Community regulation, but they were also used for other purposes which are not provided for by Community regulations and arise out of various measures of aid granted by the Italian government to sugar producers, to which I shall have occasion to return to later in my opinion.

The 'sovraprezzo' fixed by the same regulation at Lit. 23 per kg – this rate remained unchanged until 1973 – represented the difference between Italian prices and the new Community prices, that is to say the derived intervention price applicable in this country.

On the other hand it had been the policy of the Italian Government for a long time to fix a uniform sugar price throughout the whole of the national territory for home produced as well as imported sugar in such a way that consumers in the regions furthest away from production centres do not pay a higher price for this foodstuff than consumers living in the Po valley.

Before the introduction of the Community system maximum prices had been fixed, the last one by an Order of 6 August 1965 (No 1119) both for sales by producers free at factory and for sales for direct consumption. These prices naturally varied according to the qualities. This order, which was repealed on the entry into force of the common organization of the market, was nevertheless reissued in November 1969: 'in order to prevent increases to Italian consumers which are not caused by "a variation in Community prices" '. Order No 1236 of the Interdepartmental Committee on Prices (CIP) did not however fix a new maximum consumer price but decided, which comes to the same thing, that the maximum limits of the 'price differentials' for the various qualities and varieties of sugar, the charges for packaging the product, the trading margins for the sale of this product for consumption must remain 'those which result from a comparison with the price quotations in Order No 1119 of 1965', both for sales by producers and for sales for consumption.

A circular, No 1237, gave the ex-works price of sugar; the maximum standard price for consumption was derived directly from that price, since it is arrived at by adding together various items, some of which arise under Community provisions fixing the derived intervention price while others arise under measures taken by the CIP.

In spite of the argument which arose on this point during the hearing it seems to me therefore to be an established fact not only that the system of maximum prices has been extended by these measures but that these maximum prices were in fact applicable not only when the sugar was consumed but also when it was produced, in particular therefore to sales of sugar to industrial consumers.

It is not moreover disputed that, although on the application of the Italian sugar industry, the Consiglio di Stato annulled on 29 February 1972 Order No 1236 and its explanatory circular, this Court admitted that the measures taken were in substance lawful; the system of prices which was implemented in this way has in fact continued to be applied.

However, as the Commission has itself conceded, the requirement that the whole of the 'sovraprezzo' must be paid in conjunction with the impact of transport costs made it in fact impossible to import Community sugar into Italy. The suppliers could in fact only offer their products at a price higher than the maximum fixed by the Italian authorities. The CIP itself took the view that imported sugar could only be

supplied to consumers at prices higher than domestic prices, which, it acknowledges, 'conflicts with the objectives to be pursued'.

Even before the common organization of the market an 'equalization fund' for the price of imported sugar had moreover been in existence since 1963, which was given the task of granting financial aid for the purpose of covering the difference between the price of sugar on the world market and the prices fixed on the home market. This body showed a loss, because it had imported sugar at a price above the home market price. This deficit had to be taken over by the new equalization fund, set up, as has been mentioned, in 1968.

It was therefore necessary to find a way of making it possible to import from the other Member States.

In February 1969 by a first transitional measure the flat rate of the 'sovraprezzo' was reduced to Lit. 8 per kg on imported sugar for industrial use. Then in May by Order No 1215 of CIP a system of open tenders for import quotas was introduced, the purpose of which was the intention of the Italian administration to obtain from successful tenderers the highest rate of the 'sovraprezzo' having due regard to the maximum internal prices.

The task of organizing the invitations to tender, open in principle to all the operators concerned, was assigned to the sugar equalization fund, which had the power to fix the proportion of the 'sovraprezzo' which it considered to be adequate. From 1969 to 1972 this rate varied from Lit. 6·40 to 11·50 per kg according to the particular invitation to tender.

The Cassa fixes the quantities as well as the qualities of sugar to be imported through each invitation to tender.

Tenders shall not be accepted unless they are for at least 1 000 metric tons.

After examining the tenders which it has received the Cassa awards import quotas according to the quantity and amount of the 'sovraprezzo' offered by the tenderers.

Completion of the arrangements made for importing the sugar covered by the quota was guaranteed by security of a relatively high amount. Finally, if a successful tenderer did not comply with the conditions specified in the notification of the award, he had to pay the whole amount of the 'sovraprezzo' on the sugar which he had imported.

This system was applied to imports of white sugar, while in the case of raw sugar a fixed reduction of about 50 % of the 'sovraprezzo' was granted outside any of the tendering procedures.

Finally in order to allow commercial operators who did not have an organization enabling them to take part in open tenders — an instructive definition which refers in particular to industrial users — it was decided by Order No 1234 of 24 October 1969 to authorize certain imports outside the tendering procedures but subject to the quantities being limited and the rate of the 'sovraprezzo' being fixed by the Cassa. However these operations could only cover a very small proportion of the import quotas awarded.

Such regulations combining maximum prices with invitations to tender could not fail to have a decisive impact on the behaviour of Italian producer-purchasers and also on French, Belgian and even German suppliers.

In this connexion the following considerations must be borne in mind:

In the first place, as it has been the aim of Italian policy only to allow those quantities to be imported which are absolutely necessary to fill the gap between home production and demand, this objective could be and has in fact been attained because the Cassa has the

right to decide when an invitation to tender should be held and how much sugar should be imported at each of these invitations.

Consequently it can be asserted that the concerted action between the buyers' group and the suppliers' group could not affect the total volume of imports coming from other Member States.

In the second place the amounts put up to tender were so large (between approximately 50 000 to 170 000 metric tons) that, on the one hand, buyers found that there was a strong incentive to turn to exporters, whose output is adequate, who can guarantee regular bulk deliveries and are able to enter into an agreement at sufficiently low prices, mainly because they can get unusually satisfactory freight rates which the railway undertakings could not have offered for smaller amounts.

These considerations account for the fact that buyers therefore applied to a 'pool' of foreign producers. With the exception of Süddeutsche Zucker AG these producers came to the conclusion that it was to their advantage to entrust an international dealer, who could give the necessary guarantees for the successful completion of the import operations, with the execution of these operations.

On the other hand because there is no independent distributive network in Italy, and also because 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, there is no doubt that the only buyers who were in a position to do so were Italian producers.

Just as Sucres et Denrées was appointed as their agent by most of the exporters, the task of conducting the commercial negotiations for each invitation to tender was assigned in the same way to one of the Italian producers, Eridania, a company, whose commercial and financial operations and output are among the largest in Italy.

Moreover the Court file gives the impression that if the grouping of Italian producer-buyers round Eridania was not actually enforced by the national authorities it was at least strongly 'recommended' by them.

Besides it is also quite clear that before the entry into force of the common organization Italian producers had already set themselves up as importers.

It must also be remembered that CIP by its Order of 24 October 1969, had to take certain special measures designed to allow consumers, even if they had not themselves applied to take part in an invitation to tender, to benefit, to a limited extent, from the tenders, provided that they gave notice of their intention to import individually amounts less than the 1 000 metric tons which is the minimum amount which participators must tender.

If however the total amounts for which these consumers applied exceeded 10 000 metric tons, the entitlement of each of them was reduced in proportion. Many of the applications submitted upon these terms were only accepted in part, a fact which was unlikely to encourage the parties concerned to make use of this opportunity. In the final analysis it suited them better to obtain their supplies direct from domestic producers. Finally the total number of licences to purchase without participating in the invitations to tender was in any case confined to 20 % and later to 25 % of total imports.

Having regard to the effects of these regulations I doubt, my Lords, whether any really effective margin of competition can still remain for those importing Community sugar.

By the use of maximum prices combined with the system of invitations to tender,

which was clearly organized so as to reserve to the greatest possible extent the right to participate to producers only, the national authorities have clearly 'locked up' ('verrouillé') the Italian market.

However, although there is no doubt that the group of purchasers and the group for foreign suppliers negotiated, conferred together and in the end saw to it that they procured by their efforts about three-quarters of the import quotas under the invitations to tender, it must nevertheless be shown that the object of the practices, to which exception is taken, was to restrict or distort competition *to an appreciable extent.*

You have invoked this criterion of appreciable extent in several judgments:
— 30 June 1966 (Case 56/65 — *Technique Minière* [1966] ECR 249),
— 6 May 1971 (Case 1/71 — *Cadillon,* Rec. 1971, p. 356),
— 25 November 1975 (Case 22/71 — *Béguelin,* Rec. 1971, p. 960).

You have not yet given your views on the question whether it cannot be said that the concerted practices restrict competition to an appreciable extent, as the Commission claims they do, if normal competition is strictly limited, if not eliminated, by national regulations for State control of the economy which force commercial operators to agree to adapt their behaviour to the requirements of such regulations. It appears to me that this is the situation in this case and that the reduction of the margin of competition must be attributed to the system worked out and applied by the national authorities and not to the concerted action of the group of importers and of the similar group of suppliers. In these circumstances deliveries from producer to producer cannot be regarded, at least so far as the Italian market is concerned, as conclusive proof of an infringement of Article 85 (1) of the Treaty.

However the Commission has merely mentioned the 'special measures taken by the national authorities' without having ascertained their consequences. It simply states that, if there had not been the concerted action to which it objects, suppliers would have been able to sell freely on the Italian market. However this statement which is not accompanied by any evidence does not seem to me plausible in the light of the analysis which I have just made of the machinery set in motion by the Italian regulations.

In my opinion it must at least be accepted that the Commission completely failed to examine what is after all an essential aspect of the problem and that it has therefore been led to take a decision, which is not only with regard to its form based on inadequate reasons but is founded on inadequate data and disregards certain crucial facts.

The conclusion to which I have therefore come is in my view sufficient to justify the annulment of the contested decision in so far as it finds that there have been infringements of Article 85 (1) relating to the protection of the Italian market and imposes fines in respect thereof.

There is nevertheless another legal ground upon which a similar solution can be based and which some of the applicants, in particular Générale sucrière and also moreover — although for other reasons — the intervener, Unione Nazionali Consumatori (The National Association of Italian Consumers) have not hesitated to invoke.

I refer to the question whether Italian regulations are not incompatible with certain provisions of the Treaty and of Regulation No 1009/67.

My examination of this question is subject to some preliminary observations.

In the first place it is advisable in this connexion to disregard the concept of a national organization of the market,

within the meaning of Regulation No 26/62, in so far as Article 2 (1) of this regulation provides that Article 85 shall not apply to such of the agreements, decisions and concerted practices which form an integral part of such an organization. There appears to me to be no doubt that any incompatibility of Italian regulations with Community law would, in itself, be likely to prevent the application of the exemption provided for in this Regulation.

However — and this is my second observation — that does not mean that Regulation No 1009/67 and the later texts have not called for the adoption by Member States of certain supplementary measures with the object of ensuring their application, if only for example for the purpose of dividing the quotas granted to Member States among their undertakings.

It must therefore be borne in mind that the organization of the European sugar market is governed both by Community rules and by measures taken by Member States intended to supplement them without nevertheless altering its structure and its scope.

In order to safeguard the exclusive powers of Community institutions your case-law has in fact unequivocally determined the limits within which national authorities can intervene when there is a common organization of the market.

The *Bollmann* judgment lays down the principle that, as a regulation relating to such an organization is directly applicable, Member States, unless otherwise expressly provided, are precluded from taking steps, for the purpose of applying such a regulation, which are intended to alter their scope or supplement their provisions (Judgment of 18 February 1970 in Case 40/69, [1970] ECR 79).

Under the same head the *SAIL* judgment holds that after the entry into force of Regulation No 804/68 a final, although in certain respects incomplete, organization of the markets in the milk and milk products sector was carried out; from that moment onwards only the Community authority could decide whether to retain, on a provisional basis, any national system of organization, intervention or supervision relating to the products in question (Judgment of 21 March 1972 in Case 82/71, Rec. 1972, p. 138).

This is also the meaning of the *Van Haaster* judgment (30 October 1974, Case 190/73 [1974] ECR 1134) in which you held that, as the organization of the markets in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage is based on the freedom of commercial transactions in conditions of genuine competition 'such a system excludes any national system of regulations which could impede directly or indirectly, actually or potentially, trade within the Community'.

Finally, and this is my third observation, to the extent to which, in the light of this case-law, it would be possible after considering the Italian regulations to sever from them those parts which would appear to be incompatible with Community regulations, such an examination could not nevertheless lead you to deliver a judgment on the illegality of certain measures in force in Italy. When an application relating to competition is brought before your Court, you cannot, when dealing with such a case, extend its jurisdiction in this way so as to include the procedures specially provided by Articles 169 or 92 of the Treaty for adoption by the Commission with the object of establishing either a failure by a Member State to fulfil its obligations under the Treaty or its implementing regulations or the incompatibility of certain forms of national aid with the common market.

On the other hand there is in my opinion no reason why you should not

accept all the consequences flowing, on the one hand, from the fact that the Commission, before taking its decision on the concerted practices in question, did not seriously consider whether the Italian regulations were not in fact incompatible with Community rules, and, on the other hand, from the fact that since 1968 the Commission has refrained from taking those measures to bring to an end the situation created by these regulations which it is empowered to take.

However, my Lords, it seems to me that there can be hardly any doubt that many aspects of the Italian system ought to have convinced the Commission of the need to examine it before making a decision.

The first of these aspects is the procedure adopted for the invitations to tender. As I have shown, the effect of the general organization and the rules of this procedure — which was moreover intentional — was to enclose importers in a tight network of administrative requirements which in fact restricted admission to the invitations to tender and consequently made importing more difficult for several commercial operators and especially for industrial consumers of sugar. The fact that imports outside the tendering procedures were in theory free does not in any way conflict with this finding, since such operations were subject to payment of the whole of the 'sovraprezzo' which made them economically out of the question.

However, as the amounts of sugar put out to tender were fixed by the Cassa conguaglio (the equalization fund), the system permitted restrictions on imports by quotas to be ensured. It is difficult not to see in this system a measure having equivalent effect to a quantitative restriction prohibited by Article 35 (1) of Regulation No 1009/67.

A second observation stems from the need for the 'sovraprezzo'. Although this contribution was levied on home produced sugar as well as imported sugar, it could no less be regarded as a tax having equivalent effect to a customs duty to the extent to which, as you have held in the *Capolongo-Maya* case (Case 77/72, judgment of 19 June 1973, [1973] ECR 623) 'an internal duty applying systematically to domestic and imported products according to the same criteria may nevertheless constitute a charge having an equivalent effect to customs duty on imports if this duty is intended exclusively to support activities which specifically benefit the taxed domestic product'.

However the fact is that the 'sovraprezzo' was intended to finance aids for the benefit of Italian beet and sugar producers, whether these aids were authorized by Regulation No 1009/67 or granted unilaterally by national authorities. There are therefore grounds for thinking that this method of financing contravenes both the prohibition in Article 35 (1) of this regulation on the levying on sugar, within the Community, of any customs duty or tax having equivalent effect and also the prohibition under Article 95 of the Treaty on imposing any discriminatory internal taxation.

Further, as has just been mentioned, the revenue from the 'sovraprezzo' was not only appropriated to the financing of aids authorized by Community regulations; it is clear from Article 6 of Order No 1195 of CIP that part of this revenue was used to provide other financial advantages for Italian sugar manufacturers.

This is what happened in the case of the repayment of certain revenue duties charged on the purchase and carriage of sugar beet; in the case of aid granted to sugar manufacturers by way of compensation for all payments made to beet growers under a previous Italian decree; in the case of aid relating to the cost of storing the exceptionally large

production of the 1967/68 marketing year or even in the case of making good by means of the 'sovraprezzo' the deficit accumulated by the preceding 'equalization fund' in relation to the price of imported sugar.

Even if it is conceded that the 'sovraprezzo' does not *ipso facto* infringe Article 95 of the Treaty, such aids appear to come within the field of application of Article 92 (3). Again even if it is assumed that they can be regarded as being compatible with the common market, they must in addition not alter conditions of sale to an extent which is contrary to the public interest. However it is for the Commission, which is under a duty to examine these aids together with the Member State concerned, either to authorize their retention or to decide to abolish or modify them under Article 93.

The method of financing these aids may in itself make them illegal, as you held in the case of *France* v *Commission* (Case 47/69, judgment of 25 June 1970, [1970] ECR 493).

Finally the question arises whether, after the entry into force of Regulation No 1009/67 and the application of Community sugar prices, the Italian authorities could still, even at the consumption stage, lay down maximum prices if only by using the system of price differentials in relation to the derived intervention price.

For all these reasons there are serious grounds for doubting whether the Italian regulations: that is to say levying and appropriation of the 'sovraprezzo', maximum prices or price differentials, the system of invitations to tender, are compatible with the objectives and principles of Regulation No 1009/67 and with certain provisions of the Treaty.

As I have already mentioned you do not have to decide this question in the present actions. But may I be permitted to say that, before finding the applicant undertakings guilty of infringing Article 85 (1), the Commission was under a duty to carry out a careful examination of this problem and, to the extent to which it could, it seems to me legitimately, presume that some of the essential parts of the Italian national system were illegal under Community law, it should have made use — either under Article 69 or Article 92 of the Treaty — of the powers vested in it to obtain their modification or repeal.

However it acquiesced in the continuance of the situation created by the system, which, as I have said, had a definite effect on conditions of competition and, therefore, on the conduct of importers and suppliers. It is only after more than six years that in connexion with one specific point — the method of financing aids granted to beet producers and to the sugar industry — it decided, as it has just informed the Court, on 4 December last to commence proceedings for failure to fulfil an obligation by a letter addressed to the Italian Government.

This delayed initiative can only strengthen my opinion.

For all these reasons I submit that the contested decision be annulled *in parte qua*.

VII — Protection of the Netherlands market

So far as the sugar market in the Netherlands is concerned, the Commission claims that two Netherlands producers: Suiker Unie and Centrale Suiker Maatschappij, on the one hand, and the Raffinerie tirlemontoise and Pfeiffer & Langen, on the other hand have committed infringements of Article 85 (1) of the Treaty, the first three undertakings during the four marketing years in question, whereas the German firm is only proceeded against in respect of the 1971/72 marketing year.

These infringements consist of concerted practices which are alleged to have as their object and effect the control of sugar deliveries on the Netherlands market from Belgium and the Western part of Germany and, consequently, the protection of that market.

Two other complaints, which are in law different from the first, since they are based on Article 85 of the Treaty, are directed against the Raffinerie tirlemontoise which the Commission blames for having brought economic pressure to bear on the two principal Belgian dealers, the firms Export and Hottlet, in order to compel them to limit their exports to the Netherlands or, furthermore, in a more general way, to the Community market and to third countries.

The Netherlands producers are said to have acted in the same way in relation to certain national traders, the firms Internatio, Jacobson and Dudok de Wit, with a view to compelling them to stop importing certain sugar, in particular sugar from France.

Although these three complaints apply to different aspects of the producers' conduct, concerted practices, on the one hand, abuse of a dominant position, on the other hand, they are no less linked together to the extent to which they originate in the same plan, in a coordinated policy by which the producers of the two countries not only endeavoured to maintain absolute control of the sugar trade between Member States by means of direct deliveries from producer to producer, but also to force dealers, over whom they had an advantage, to conform to their policy and only to carry out transactions within the terms of this policy.

Having made these observations I must, before examining the merits of these complaints, pause and consider for a few moments a submission put forward as a preliminary issue by Suiker Unie. This undertaking raises against the Commission the objection that it has only been in existence, in its capacity as a legal person, since 2 January 1971; that, as a result, the defendant cannot in law impute to it infringements committed before its formation.

In order to come to a conclusion on this issue it is necessary to recall that in 1966 four Netherlands undertakings which were sugar producers, incorporated as cooperatives, the members of which were sugar beet farmers, decided, with a view to coordinating their operations, to form a cooperative association or society under the name: 'Coöperatieve Vereniging Suiker Unie UA', with power to take certain common decisions for making the best possible use of plant at sugar factories, investments and prices. However the farmers who produce sugar beet were, under this first organization, still members of the original cooperatives which themselves continued, in accordance with instructions given by the association, to be responsible for the marketing of sugar which it produced.

In the minds of the persons concerned this organization was only meant to be temporary; it was one of the stages leading to the formation of a completely integrated sugar association of which sugar beet farmers were to become members at a later date.

This objective was attained in 1970. A new 'Coöperatieve Vereniging Suiker Unie UA' was formed, while the old association added to its name the word 'Beheer', which means administration. Moreover it ceased trading on 31 December of the same year and ceased to exist some months later.

On 2 January 1971 the new association replaced the four original cooperatives and assumed all their rights and obligations, thus becoming itself a producer and not only a coordinating body.

The applicant infers from this conversion that it is a new legal person different in law from the original association, although it has retained the name. The Commission could not therefore make it liable for acts and things said to have been done and executed by the former.

Even if it is admitted, my Lords, that there is authority for this reasoning in the domestic laws of the Netherlands, it would imply that the pecuniary sanctions imposed by the Commission in application of Regulation No 17 are criminal law sanctions within the strict meaning of this expression.

I have already said that they are nothing of the kind; this is expressly confirmed by Article 15 (4) of the regulation.

The fines are not imposed on natural persons; they are imposed on undertakings, which are without any doubt legal persons, but in their capacity as economic entities.

And it is the economic facts which must be made to prevail in this case without going into the question whether or not the applicant Suiker Unie is or is not the legal successor of the former association.

In this connexion it is sufficient to state that, under the first organization the four original cooperatives, which were without any doubt owners of plant for the production of sugar, although the operations were closely coordinated by an association enjoying wide powers, existed side by side.

This trading complex has been replaced by the applicant association which, having acquired the assets and taken over the liabilities of the original cooperatives, not only enjoys powers of coordination but has also become a single economic entity.

It appears to me to be in conformity with the spirit of Regulation No 17 that the prior conduct of the organization which this entity has replaced without any break in continuity must be imputed to it.

To reject this interpretation would be tantamount moreover to depriving the regulation of all useful effect and the Commission of the powers conferred upon it by this text, in the event — which is a practical possibility — of a change in the legal personality of an undertaking occurring between the date when a course of conduct designed to prevent freedom of competition has been established against that undertaking and the date when the Commission makes its decision. The latter is entitled in such a case to impute the prior course of conduct to the new legal person, provided that the latter is responsible for the same economic entity.

I submit therefore that you should reject the preliminary submission put forward by Suiker Unie.

It is now necessary to consider how the Netherlands producers, of the one part, and the Raffinerie tirlemontoise, of the other part, arranged to channel imports of Belgian sugar onto the Netherlands market.

First of all it is a fact, that during the four marketing years in question Suiker Unie and Centrale Suiker bought directly from their competitor increasing amounts of white sugar which they sold to the Netherlands, through their own distributive network, subject to the same conditions and at the same prices as home produced sugar and, more often than not, under their own trade-mark.

It can at the same time be recorded that the Raffinerie tirlemontoise in fact made no other deliveries on the Netherlands market with the exception of a few hundred metric tons exported freely for denaturing.

Further this undertaking made it absolutely clear to the Belgian dealers

that the latter would only be allowed to export to the Netherlands at the request of and through Netherlands producers.

Moreover, during the first two marketing years, it appears that the Netherlands producers were unable to control their national market completely. In fact owing to imports of large quantities of sugar from France — to which I will return — or of smaller amounts from Belgium by small independant undertakings of the Raffinerie tirlemontoise, there was quite lively competition on the Netherlands market, which even triggered off what was called the 'sugar war'.

There is no doubt that it was these events which caused the Raffinerie tirlemontoise and the Netherlands producers to decide from the beginning of 1970/71 to bring pressure to bear on national dealers with a view to making them maintain strict discipline in the sugar between both countries.

The Raffinerie tirlemontoise granted the two Belgian exporters Export and Hottlet the exclusive right to sell sugar in the Netherlands, provided that they restrict their deliveries to those purchasers or consumers who would be approved by the producers of this country and cease to export any sugar produced by independent Belgian refiners to the Netherlands market.

For their part Suiker Unie and Centrale Suiker, which aimed at acquiring exclusive control of the market for sugar for eating in the Netherlands, made their consent to deliveries of Belgian sugar — other than those which were delivered direct to them — subject to the condition that this particular product is only sold to the milk products industry which consumes 50 000 to 70 000 metric tons of sugar per year and moreover exports from the Netherlands tinned condensed milk which it manufactures.

The Netherlands traders who traditionally supply this industry were therefore forced to point out that the sugar imported from Belgium by them was in fact intended for the milk products industry and to state in their offers to purchase that they would only resell to customers approved by national producers.

The same restriction was applied to sales of sugar to the chemical industry but the amounts involved were much smaller.

The result was that from the beginning of the 1970/71 marketing year these dealers had in turn become an integral part of the system implemented by a common accord between the Raffinerie tirlemontoise and the Netherlands producers, the deliveries of Belgian sugar being effected through the wholesale trade of both countries.

In short therefore the policy adopted in order to protect the Netherlands market is based, on the one hand, on direct deliveries from producer to producer, which are not disputed, and on the other hand, on channelling Belgian exports through dealers to specific destinations or consignees.

The implementation of this plan appears to me to be sufficiently proved by numerous documents from the Raffinerie tirlemontoise itself as well as from the firm Export, the latter providing the principal evidence.

I do not intend to make a detailed analysis of the contents of these documents as I need only refer again to the facts which emerge from them:

— In the first place they confirm that each export to the Netherlands was subject to a precise destination clause, the Netherlands milk products industry being expressly designated in telex messages or letters exchanged between the Raffinerie tirlemontoise and Export, between Export and Jacobson, between the Raffinerie Notre-Dame at Oreye and again Export, as well as in a series of

purchase contracts entered into by Export and Hottlet with the Raffinerie tirlemontoise;

- In the second place they include commercial documents of the Raffinerie tirlemontoise, of Export, of Comptoire Sucrier d'Anvers or of Belgian producers controlled by the Raffinerie tirlemontoise, which confirm a refusal to deliver sugar to Netherlands consumers other than those in the milk products or chemical industries.
- Finally the conditions under which the Belgian dealers accepted the policy imposed by the producers are clearly set out in a telex message between the Raffinerie tirlemontoise and Export of 19 and 20 August 1970. After the Raffinerie tirlemontoise had stated that it was willing to make sugar available to Export for the Netherlands milk products industry, this commercial firm indicated that it agreed to help the refinery, 'to work out an agreement with Suiker Unie and Centrale Suiker'.

Export declares *inter alia:* 'that it has decided to give up negotiating sales of Belgian sugar with Netherlands consumer-purchasers' to meet what this firm calls *'the particular demand in the Netherlands* which consists, on the one hand, of sugar for eating, on the other hand, of consumption of sugar products in the Netherlands, excluding the milk products industry. Export also excluded from its renunciation its trade in denaturing sugar and with the chemical industry'.

Similarly, so far as the relations between Netherlands producers and dealers is concerned, a note from Export to the Raffinerie tirlemontoise refers to the undertaking given by the three traditional importers of the Netherlands to Suiker Unie and Centrale Suiker: 'not to import for *consumption in the Netherlands* except with their consent'. That this undertaking was in fact honoured by the three importers emerges in particular from the commercial correspondence between Jacobson and Export.

In the case of the Netherlands market these documents substantially confirm and throw light on the principles which can be extracted from the general circumstances surrounding the concerted action between the principal European producers and which the Raffinerie tirlemontoise in a letter to Export of 31 August 1970 moreover defined in a concise, distinct and clear manner:

'So far as Holland is concerned, the basic principle is that we wish to do nothing which would upset Suiker Unie or Centrale Suiker just as they do not want to do anything to disturb us'.

These could not be a more explicit admission.

The Raffinerie tirlemontoise is so aware of this that it acknowledges that the documents produced for the court file are 'damning' ('accablantes'). It should moreover be borne in mind that production of some of these documents, which come from its own records, were only obtained with difficulty since, in September 1971 the Commission had to impose upon it a fine of 4 000 u.a. for having only supplied the investigators with inadequate and incomplete information.

Without challenging the authenticity of the documents which have been produced, any more than the relevance of the facts which they disclose, the Raffinerie tirlemontoise endeavours to justify itself by pleading that its relationship with Export at that time was difficult. This company feared that it would in fact be deprived by progressive stages of its commercial function with the Raffinerie, the main reason being the direct deliveries from producer to producer.

The Raffinerie tirlemontoise, instead of explaining frankly to Export that 'it was in its own interests to eliminate agents in certain transactions', said that it preferred 'to take refuge behind its foreign colleagues'.

In other words it invoked the requirements of a concerted action between producers who were competitors, so as not to hurt the feelings of the directors of Export.

It cannot be denied that relations between the two firms were definitely strained at least until the time when Export, as has been seen, finally conformed to the common policy. There is no doubt that the Commission was made acquainted with the concerted action by exchanges of letters and notes stressing the difference of opinion which became apparent during the first two sugar marketing years between the two undertakings.

But the fact remains that these documents can be produced as conclusive evidence, not only moreover to establish that pressure was brought to bear on Export but also to bring to light the conduct of Suiker Unie and Centrale Suiker in their relations with the principal Belgian producer and the exporters of this country.

The fact that the evidence against the Netherlands producers is thus based on correspondence exchanged between third parties in no way weakens the position taken up by the Commission, to the extent to which this correspondence makes it possible to establish the relevance of the facts, which moreover an analysis of the actual behaviour of the Netherlands undertakings fully confirms.

I consider that the existence of concerted practices between these undertakings and the Raffinerie tirlemontoise has been proved, as they knowlingly substituted practical cooperation between them for the risks of competition with the object of enabling Netherlands producers to maintain positions which they had established on their national market.

Therefore trade between two Member States was directly affected.

Therefore it is equally true that the competition which should normally have existed has been distorted, as consumers and industrial users of sugar were not able to enjoy the advantage of freely choosing their suppliers.

Moreover whether the operations were direct deliveries from producer to producer or the channelling of deliveries of Belgian sugar to the Netherlands to specific destinations or consignees, they in fact covered a substantial proportion of all Belgian exports. According to the Commission these 'supervised' operations represent on average 70 or 80 % of total production for three of the marketing years in question. The only notable exception relates to the 1969/70 sugar marketing year during which, before moreover the concerted action had produced all its effects, independent Belgian producers of the Raffinerie tirlemontoise could still operate on the Netherlands market.

In view of these facts it is useless for the applicants to claim that deliveries from producer to producer do not come within Article 85 (1) of the Treaty. These deliveries in themselves amount to no more than an indication of a concerted practice but they fit into the pattern of the concerted practices, the implementation of which has been proved; they are one of the means of engaging in these practices and cannot therefore be severed from them.

It only remains for me to add that, if, from the beginning of 1970, large supplies of sugar produced by the Raffinerie tirlemontoise were no longer delivered direct to Suiker Unie or to Centrale Suiker, but through the usual dealers, this fact does not alter the

conclusion that must be drawn, because the destination clause which had to be accepted, as has been seen, by Belgian exporters is, in this case, a determinative part of the concerted action.

Before dealing with the situation of Pfeifer & Langen in its relations with the Netherlands market, it remains for me to reject a formal submission by Suiker Unie and Centrale Suiker based on an alleged infringement of Article 190 of the Treaty. They assert that certain of the allegations or statements in the statement of the reasons upon which the contested decision is based are too general, too concise or sometimes even too disjointed to fulfil the requirements for statements of reasons imposed upon the Commission by Article 190.

In fact, my Lords, it would be difficult to imagine that some inaccuracies in the drafting or certain elliptical forms of wording could not be found in such a long and detailed decision. But the purpose of the obligation to state the reasons upon which a decision is based, so far as the decisions taken in application of Article 85 *et seq.* of the Treaty are concerned, is to enable the undertakings concerned to understand the exact scope of the complaints made by the contested decision so that they can challenge their validity effectively. It is obvious that in this case the ommission cannot be accused of any infringement of an essential procedural requirement, because the statement of the reasons upon which the contested decision is based leaves no room for any ambiguity not only with regard to the nature and the seriousness of the complaints which it made, but also with regard to the facts upon which these complaints are based.

I must now dispose of a final submission, put forward by both Centrale Suiker and the Raffinerie tirlemontoise. These two applicants invoke the benefit of the second exception provided by Article 2 (1) of Regulation No 26 in that their conduct should, in any event, be held not to come within the application of Article 85 (1), on the ground that it was 'necessary for attainment of the objectives set out in Article 39 of the Treaty'.

Centrale Suiker for its part maintains that, if it had decided not to buy sugar from the Raffinerie tirlemontoise, its production and distribution facilities would have been under-utilized; in such circumstances it could not have paid producers of Netherlands beet a price higher than the minimum price specified by Community regulations. The result would have been that one of the objectives laid down in Article 39, namely the one which is 'to ensure a fair standard of living for the agricultural community' could not have been attained in the Netherlands.

This is just a straightforward statement which is not supported by any *prima facie* evidence; Centrale Suiker does not even endeavour to show that its purchases of sugar from the Raffinerie tirlemontoise alone would have enabled it to guarantee sugar beet farmers a price higher than the minimum Community price. In addition its reasoning implies that the Community authorities fixed this minimum price themselves at too low a level to ensure attainment of the objective in question. This seems to me to be contradicted by the link which Regulation No 1009 establishes between the intervention price of white sugar and the guaranteed minimum price which sugar beet farmers may charge. Finally, Centrale Suiker does not state that the concerted practices in which it engaged would have been equally necessary for attainment of the other objectives referred to in Article 39 of the Treaty.

It is a similar argument which the Raffinerie tirlemontoise puts forward relying specifically on the link established between the intervention price of sugar and the price of beet. It

maintains that if it could not sell, particularly in the Netherlands, part of its surpluses, to the full extent of its maximum quota, and earn at least as much as the intervention price, it could not pay Belgian sugar beet farmers the minimum price which Regulation No 1009/67 guarantees them. In any case it explains that it could not sell sugar to the Belgian intervention agency because the national authorities would have dissuaded it from doing so.

It wishes to justify in this way its policy which consisted in particular of selling direct or through the trade considerable amounts of sugar to competing producers or to large-scale purchasers, in particular to the Netherlands milk products industry and at a price at least equal to the intervention price.

This argument is wrong. By virtue of Article 9 (1) of the basic regulation the national intervention agencies must buy all the sugar offered to them by producers; if these producers had requested the Commission to do so it would have not failed to intervene to make sure that this obligation was fulfilled by the national authorities.

In fact the Raffinerie tirlemontoise endeavoured to avoid using the intervention system as much as possible.

There are even less grounds for its view that the intervention price must be regarded as a guaranteed price; that is only true to the extent to which the intervention system operates effectively, which has not been the case on the sugar market and particularly in Belgium.

With regard to the sugar which the Raffinerie disposed of at a lower price, for denaturing, it is known that its agents were forbidden to resell it on the market for human consumption, in order to avoid a fall in prices on this market. It cannot claim to have contributed in this way to the attainment of another of the objectives of Article 39, which is 'to ensure that supplies reach consumers at reasonable prices'.

In any case Article 39 does not appear to me to be compatible with a policy of partitioning national markets adopted by producers by concerted action.

Up till now I have only examined the relations between the Raffinerie tirlemontoise and the Netherlands market. But the Commission also blamed the German firm Pfeifer & Langen for engaging in a concerted practice with producers in the Netherlands and particularly Suiker Unie.

The facts relating to the conduct of Pfeifer & Langen are similar to those which have been used against the Belgian undertaking, to the extent to which they make it clear that there was, if not a general cartel between European producers, at least a common policy for not interfering with situations which had been established on the various national markets.

Apart from the fact that, according to the Commission, the participation of Pfeifer & Langen in the protection of the Netherlands market is shown by the fact that this company delivered sugar to Netherlands producers, whereas its deliveries to other purchasers of the Netherlands were insignificant, its conduct is established by certain documents on the Court's file — although they are fewer and less illuminating than the documents which 'condemn' ('accablent') the Raffinerie tirlemontoise.

In the first place there are documents relating to the conduct of Pfeifer & Langen before 1 July 1970, even though complaints are only made against this undertaking in respect of facts occuring after this date. These documents might at least amount to evidence of the German firm's intention not to undertake anything on the Netherlands market

which would offend Suiker Unie or Centrale Suiker. But in fact the few cases where supplies were refused, which these documents disclose, can be explained by the state of production at that time in the Western part of Germany; it seems to me that they cannot be used in evidence against Pfeifer & Langen.

In the second place the notes and minutes drawn up by Export on 23 April and 6 May 1970 only refer specifically to this company's relation with the Raffinerie tirlemontoise and not to the conduct of German producers on the Netherlands market.

These documents indeed refer to the existence of a comprehensive concerted action between European producers and set out its guiding principles. But it must be conceded that their contents are too general and too vague to afford proof that this concerted action was the subject of implementing measures between Pfeifer & Langen and Netherlands producers.

The fact that Pfeifer & Langen did not supply the Netherlands market with a large amount of sugar is also explained by the fact that the level of prices in Western Germany was not apparently below the price level of the Netherlands; it can therefore be accepted that the German firm found that there was little point in trying to get a footing on the market in question. Having regard moreover to the position of Suiker Unie and Centrale Suiker there would be every reason to suppose that any serious attempt in this direction would have encountered vigorous opposition from these undertakings.

Having made these observations I am therefore, after taking into account the evidence produced by the Commission for the Court's file, extremely doubtful whether the Netherlands producers and Pfeifer & Langen did in fact engage in a concerted action.

The fact remains however that at the beginning of 1971 this undertaking did sell to the Limako company, a subsidiary of Suiker Unie and controlled by the latter, quite a large amount of sugar (20 000 metric tons according to the Commission, only 10 000 metric tons if Suiker Unie is to be believed), subject to conditions which could only be connected with the general objective of the concerted practices which had as their object the protection of the Netherlands market.

This sugar, produced over and above the quota after 1 July 1969 by Pfeifer & Langen could not be carried forward under the provisions of Article 32 of Regulation No 1009/67, as its manufacturer did not produce evidence that it had exported it outside the Community in its original state and without a refund before 1 July 1971. It had therefore by virtue of Regulation No 2645/70 of the Commission, to be considered to have been disposed of on the domestic market and a levy equal to the sum of the highest levy and 1.00 u.a. per 100 kg had to be levied on it as such.

In this case it is known that the Commission has, by Regulation No 458/73, retroactively applied for this sugar a flat rate amount of only 2.00 u.a. per 100 kg. One of the ways of proving that the sugar had been exported was for the manufacturer in question to certify that he had produced the exported sugar. However, without committing myself on this point, this sugar produced over and above its quota by Pfeifer & Langen seems to have been replaced by an equivalent amount of sugar produced within its quota by Suiker Unie. In fact it appears that this amount was exported to third countries, while Suiker Unie saw to it that the sugar delivered to Limako was sold on the domestic market.

Therefore the operation could amount in the final analysis to a delivery from producer to producer. It amounts also to evidence *a contrario* of the practical implementation of a concerted action between Pfeifer & Langen and Suiker

Unie, to the extent to which the sugar delivered to the subsidiary of the Netherlands producer would in the end have been intended for human consumption and for this reason had to be delivered by one producer to another.

But, my Lords, even if it is accepted that this reasoning can be upheld — and having regard to the evidence on the Court's file I am unable to say definitely that it can — it appears to me impossible to consider this transaction, which was moreover an isolated case, as being sufficient evidence of an concerted practice.

I submit therefore that you should reject the complaint which has been made, so far as the protection of the Netherlands market is concerned, against Pfeifer & Langen and should consequently annul the contested decision on this specific point.

The Commission's specific claim against the Raffinerie tirlemontoise is that it has infringed Article 86 of the Treaty.

As the undertaking has a dominant position on the Belgian and Luxembourg sugar market, it blames it for having abused this position by bringing economic pressure to bear on two Belgian exporters, the Export and Hottlet companies, during the four marketing years under consideration, with a view to compelling them only to resell to specified customers or for particular purposes the sugar with which it supplies them and also to make their own customers accept the same conditions. I have already stated that the applicants forced these dealers to conform to its sale policy, so that they would further the objects of the concerted action with Netherlands producers. In a more general way the Commission claims that the applicant strictly limited their commercial freedom of action in relation to intra-Community trade and also to exports to third countries and sales of sugar for denaturing.

The discussion of this complaint implies that attention be drawn to the three conditions which must be fulfilled in order that Article 86 can be applied.

It must be shown first that the dominant position relates to a 'substantial part of the common market'.

This first condition is concerned less with the geographical size of the actual territory in which the undertaking concerned exerts its influence as with the economic importance of the market which it controls. Consequently, for the purpose of determining whether this condition is fulfilled, certain purely quantitative factors such as the level and the pattern of production and consumption have to be evaluated. But the qualitative facts which enable the relative size of the market on which the dominant position is maintained to be gauged in comparison with the whole of the common market are even more decisive. The density of the population, the level of its standard of living and the volume of trade must therefore be considered.

In this case the dominant position covers the Belgian and Luxembourg markets. It is a very significant fact that the production of sugar in these markets is relatively speaking very large; exceeding 500 000 metric tons in 1968/69, reaching 770 000 metric tons in 1971/72, that is to say nearly 10 % of all the sugar produced in the Community. In addition it produces large surpluses which have to be sold either in the other Member States or outside the common market, since local consumption, which is far from being small, is only on average approximately 350 000 metric tons per year.

The main feature of the sugar economy of this region is therefore very large production which increased rapidly during the years 1968 to 1972.

Account must also taken, in relation to the size of the area, of its population

which enjoys a high standard of living and of the high degree of industrial development in Belgium and Luxembourg.

The Belgian-Luxembourg market therefore appears within the Community to be a regional market distinguished by its special features from those adjoining it on the North and East.

It constitutes therefore a substantial part of the common market, as moreover you have already acknowledged in your judgment of 21 March 1974 (Case 127/73, *BRT* [1974] ECR 315).

In the second place it has been shown beyond doubt that the Raffinerie tirlemontoise has a dominant position on this market, of which it is by far the largest producer since, according to its own statement, it accounts itself for 65 % of sugar produced in Belgium. This fact would be sufficient to show that it is able to exert a predominant influence. But there are other facts. It owns at least half of the capital of the two other refineries, the NV Suikerfabrieken van Vlaanderen at Moerbeke-Waas and the Raffinerie Notre-Dame company at Oreye; the board of directors of the three firms include certain common directors; it therefore has the power to control these undertakings. Although it denies that it has ever actually exercised this power, it is clear from the documents produced by the Commission that the latter undertakings have in a very general way adopted the sales policy applied by the Raffinerie tirlemontoise. The agreement entered into between these manufacturers and Belgian exporters contain in fact destination clauses which are exactly the same as those which the applicant makes its dealers accept.

This means that the 'Tirlemont group' exerts influence upon 85 % of the market, after taking into account the fact that imports of sugar into Belgium are very small indeed. Finally the Raffinerie tirlemontoise also exerts influence upon other sugar factories or refineries having a smaller production capacity, either through a majority shareholding, which was the method used in the case of Warneton, or through marketing agreements, which was the method adopted in the case of Naveau.

The influence exerted by the Raffinerie tirlemontoise over the sugar manufacturers Liers and Embresin and Couplet and Donstiennes is just as effective.

This situation enables it to act independently, to determine its policy without taking account of the operations of its competitors, buyers or suppliers on its market.

Even though certain undertakings which it controls occasionally effected free exports of sugar to the Netherlands or Germany, these limited breaches of the policy of the Raffinerie tirlemontoise in no way call in question the fact that the latter undertaking effectively controls the Belgian-Luxembourg market.

As the applicant therefore dominates to a very great extent sugar production, has large surpluses, is engaged in carrying out a concerted policy with Netherlands producers and, as we shall see, with Pfeifer & Langen for deliveries to the Western part of Germany, it cannot permit Belgian exporters to transact business operations which would endanger its own policy.

It had therefore to persuade them to come to terms with it, if not simply to give in and carry out its instructions. It is in this way that the Raffinerie tirlemontoise abused its dominant position.

In this connexion the documents produced which relate to the supplying of Belgian sugar for the Netherlands market and the market of the Western region of Germany are in the first place highly significant.

These documents, which refer to the relations between the Raffinerie tirlemontoise and the firms Export and Hottlet, reveal that the applicant made its sales of sugar to these dealers conditional on the proper performance of the undertakings entered into with regard to foreign producers, whose consent had to be obtained to import sugar onto their market and for specific destinations and customers.

The abuse of the dominant position emerges not only from the instructions given to Export and Hottlet, within the context of the sales policy which they had to adopt, but also from the methods employed by the applicant to make them fall in line.

The applicant confronted exporters with an alternative: either the latter would submissively carry out their instructions and then reap the benefit of relatively favourable treatment, and this applies in particular to Export, or, if they intended to carry on business independently, they would find themselves deprived of their main, if not their only, source of sugar supplies. In fact most of the business transacted by the Belgian dealers consists of exporting this product, in particular to third countries. However, taking into account the fact that the Raffinerie tirlemontoise enjoyed a position which was almost a monopoly, they could only reasonably expect to buy sugar in sufficient quantities from the latter or from refiners which it controlled. Their actual commercial position, and even their survival, was at stake.

In addition it is a fact that owing to the applicant's relations with its counterparts abroad it was in a position to dispense with the use of dealers when disposing of a large part of its exports.

It is of course quite clear that the threat which it caused to press heavily on its exporters was never made in terms which amounted to crude menaces. It was expressed in modified language, although certain letters show quite clearly the fixed intention of the applicant not to tolerate any departure by traders from its requirements.

The pressure therefore took various forms according to the development of the relations between the applicant and traders and in particular with Export.

Sometimes it is only a question of the Raffinerie indicating to this firm the limits within which its commercial cooperation can be tolerated. This is borne out by the minutes, drawn up by Export, of a meeting with the representatives of the Raffinerie tirlemontoise on 20 April 1970. This document confirms that Export will remain 'a preferred buyer of sugar from the Raffinerie without being able to claim that it has been granted exclusive rights. Part of the surpluses are to be reserved to Hottlet within the terms of a gentleman's agreement'.

However, after taking account in particular of the concerted action between European refiners '... a series of direct transactions between refiners and producers are eliminated from the field of application of the commercial relations between Tirlemont and Export'.

Going still further Export, in a note of 23 April, expresses the fear that 'the policy of the refiners does not allow it to supply the frontier regions of Benelux, France and Germany'.

It is doubtful — this note records — whether 'we can obtain a quota, because the Raffinerie tirlemontoise will not wish to continue to adopt a policy contrary to the agreements it has concluded with other refiners'.

Although expressed in the form of a doubt Export's fear of being confronted with a refusal to sell is easily detected in this document.

In other cases the pressure is much more obvious. On one occasion when some

raw sugar was to be exported to a British undertaking, Tate and Lyle, with which the Raffinerie tirlemontoise is moreover linked financially, RT suggested that Export should act as broker, but 'on condition that the clearly defined common policy in relation to invitations to tender for exports be complied with'.

Export's note relating to a conversation with a director of Tirlemont ends: 'as consideration (for the transaction in question), he asks us to *give up* our freedom to attend the invitations to tender for the export of raw sugar and also for white sugar. It is implied — the note adds — that the Raffinerie tirlemontoise refuses to offer us raw sugar which we would be free to sell wherever we like'.

The telex messages exchanged between the two companies on 19 and 20 August 1970 must be noted as they point in the same direction; they have already been mentioned in connexion with the protection of the Netherlands market. These documents clearly define the conditions under which Export, in consideration of being allowed to continue to participate in the export trade to the Netherlands, had to stop dealing with Netherlands purchaser-consumers in connexion with deliveries of sugar for eating. The link which Tirlemont created between compliance with the strict destination clauses and the promise that Export could be called upon to cooperate by effecting the exports which had been authorized clearly emerges from these documents.

With regard to exports to third countries similar sacrifices are demanded from Export, which, on several occasions, according to an expression which could not be clearer, had to 'sacrifice its principals' and, either refuse to submit tenders in answer to certain invitations to tender for exports, or agree to reduce its tenders.

This is confirmed by a note from Export acknowledging that Tirlemont had limited still further its freedom of action and its opportunities for taking action in connexion with applications for export refunds.

Finally, to take an unusually clear example of the requirements of the Raffinerie tirlemontoise, it is interesting to note that the confirmation of a sale sent by Export to the Netherlands firm Jacobson on 1 October 1970 stated that Export and Hottlet had been granted for the marketing year 1970/71 the exclusive right to sell granulated sugar belonging to Tirlemont for export to Belgium, but subject to the overriding condition that the trading policy of the Tirlemont group be adopted: 'as no transaction in Belgian sugar outside this policy can be approved by this group and cause us to lose the exclusive rights which have been granted'.

The relations between the applicant and the Hottlet firm conform to the same pattern in the case both of deliveries for a specific purpose or for the sale of sugar exclusively for denaturing.

All the facts and information which have been obtained justify the assertion that the Raffinerie tirlemontoise has abused the strong position which it has on the Belgian and Luxembourg market by depriving Export as well as Hottlet of any opportunity to adopt an independent commercial policy. In this way it has restricted within narrow limits competition on the market for the sugar trade, in intra-Community trade and also in the case of exports to third countries.

These two dealers, whose operations were mainly devoted to the export of sugar, particularly to third countries, were of necessity almost entirely dependent on a producer who accounts directly for or controls very nearly all sugar production, which moreover included a large surplus.

Since they had no other large source of supplies, they could not take the liberty

of refusing to comply with the requirements of an undertaking which enjoys a position amounting almost to a monopoly.

The Raffinerie tirlemontoise exploited these relations which were forcibly imposed (by its dominant position) in order to dictate to exporters the policy they were to adopt. It restricted, if it did not eliminate, competition in the Belgian sugar trade.

Such conduct certainly comes within Article 86 of the Treaty. If a powerful undertaking threatens to place a weaker undertaking under an economic disadvantage if the latter does not accept its conditions, such a threat is an abuse of a dominant position. Objective criteria must be applied to such a situation. It does not matter therefore what methods are adopted provided that they result in economic pressure likely to restrict competition.

Article 85, which must be interpreted in accordance with the principle laid down in Article 3 (f) of the Treaty, requires that competition shall not be distorted, let alone abolished by such pressure.

Moreover the abusive practices mentioned in paragraph 2 of Article 86 include

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, as well as
(b) limiting production, markets or technical development to the prejudice of consumers.

I think that the methods used by the Raffinerie tirlemontoise in relation to Export and Hottlet come within one or other of these examples of infringement under Article 86.

Can a similar complaint be made against the Netherlands producers?

The Commission maintains that it can. During the 1968/69 marketing year the three Netherlands dealers: Internatio, Jacobson and Dudok de Wit, old established importers of sugar, entered into contracts for the purchase of a large quantity of French sugar — in the region of at least 70 000 metric tons — the delivery of which was to be spread over several marketing years.

Following these operations the national producers and in particular Suiker Unie, displeased by the fact that part of this sugar was resold, at a price lower than the price of the sugar which they themselves produced, on the market for human consumption — which they reckoned was reserved for them — threatened the dealers that they would make it impossible for them to carry on their traditional business of importing sugar admitted duty free (being a product intended for re-export after processing) for the milk products industry by themselves supplying this industry on the terms prevailing on the world market.

The dealers, forced to give in to this threat, then undertook on the one hand, to sell the sugar imported from France at a price which would not be too competitive compared with the price of sugar produced in the Netherlands; on the other hand, to transfer the final quantities of sugar imported in this way direct to producers who would market these amounts themselves; finally, not in future to import sugar in this way into the Netherlands without the consent of the latter producers.

It is in these circumstances that, during the following marketing years 1969/70 and 1970/71, more than 14 000 metric tons of sugar from France were bought by Suiker Unie and Centrale Suiker.

The dealers were then integrated in the commercial networks arising out of the concerted action between the Netherlands producers and the Raffinerie tirlemontoise. We have in fact seen that Belgian sugar intended mainly for the

milk products industry had been imported through traditional Belgian and Netherlands trade channels on condition that the destination clauses, which had been made obligatory, were complied with.

The Commission's allegations concerning the pressure brought to bear on Netherlands traders by Suiker Unie and Centrale Suiker are based mainly on an internal memorandum of the Belgian company Export dated 8 June 1970.

As we have learnt, this memorandum, drawn up by Mr Lemaire, a director of this firm, for his president, reports a conversation which Mr Lemaire had a few days before with Mr Dudok de Wit, who at that time was himself a director of the Netherlands trading company having the same name.

This document expressly refers to the 'representations' which the Netherlands producers made to Netherlands importers through Mr Lindeboom, a director of Suiker Unie and to the 'threat' to deprive the dealers of their traditional trade of supplying the milk products industry if they did not accept the terms of the agreement which they had thus been forced to accept.

The main foundation of the Commission's case is the conclusion it draws from this data that Suiker Unie and Centrale Suiker, linked together through close cooperation and having a dominant position on the Netherlands sugar market, compelled dealers to accept their conditions. The Commission regards this conduct as an abuse of their dominant position, an infringement coming within Article 86 since its effect was to restrict, indeed even to prevent, the sale in the Netherlands, under free conditions, of sugar from other Member States, in this case France, and in this way to affect trade between Member States.

Having regard to the importance of Export's memorandum for the purpose of checking the relevance of the facts put forward by the Commission you decided to hear the evidence, not only of the person who drew up this memorandum and of his interlocuter, Mr Dudok de Wit, but also of Mr Sanders, at that time the authorized representative and now deputy director of the Jacobson firm and finally of Mr Lindeboom, whose intervention was specifically called in question by Mr Lemaire.

It is true that the latter confirmed that he had recorded accurately and in full the tenor of his discussions with Mr Dudok de Wit, but in answer to the question which was put to him, he was unable to say whether the 'agreement' entered into between Netherlands producers and the dealers had been concluded 'under some pressure, or, on the contrary, freely'.

He said that this agreement related to commercial relations which were unconnected with Export's direct contacts; it was therefore impossible for him to give an accurate reply on this point.

Messrs Dudok de Wit and Sanders explained that the Netherlands dealers, who are concerned in the purchase of a large amount of sugar in France ordered at a time when the fall in the French franc made this operation attractive, found, after the official devaluation of this currency, that they were in an awkward situation. In fact the sugar which had still not been delivered in October 1969 could no longer be imported into the Netherlands except on payment of compensatory monetary levies which were such a burden on the cost price that it became difficult for them to sell this sugar on the Netherlands market without incurring losses.

Only national producers would have been able to buy it in sufficient quantities and at short notice.

Dealers and producers were in regular contact with each other: it seems, according to the evidence of the witnesses, that on this occasion the dealers themselves took the initative and approached Suiker Unie and Centrale Suiker with a view to offering them the French sugar which they held.

The producers did not therefore make any inquiries with a view to purchase.

So far as the alleged 'threat' which is said to have been uttered by Mr Lindeboom is concerned, Mr Dudok de Wit stated that Mr Lemaire had not properly understood what he said. In fact the declared intention of the producers to import directly themselves in order to supply the milk products industry was nothing new and, moreover, had begun to be put into practice. This fact in itself constituted a threat to the Netherlands trade. But during the negotiations between producers and traders relating to the sale of French sugar in the Netherlands, Mr Lindeboom never at any time adopted this method of pressure, at least not by using the words reported by Mr Lemaire.

Mr Sander's statement is somewhat different. He admits that 'in the heat of a conversation concerning the conclusion of an agreement allowing dealers to sell part of the sugar imported from France the producers may have intimated that they would take retaliatory measures if the dealers did not in future stop importing French sugar'.

But in his opinion the threat was hardly credible, because, on the one hand, it was unlikely that the producers would as it were compete with each other by importing sugar from third countries; on the other hand, in this field, the old-established importers were in any event better placed than they were for negotiating on the world market; finally the producers could not be given any guarantee that such imports would be possible in the future, as Community regulations relating to the import of sugar coming from third countries can be modified from one marketing year to another.

So far as Mr Lindeboom is concerned he categorically denies that he used threats during the conversations which he had on the matter in question with the Netherlands trade.

In fact these contacts were limited to a conversation between himself and Mr Kopmels, at that time an official of the Jacobson firm, with whom he had personal relations based on mutual trust. He merely convinced the latter of the need, both for producers and for traders to practise together 'self discipline' in order to ward off the potential danger to the domestic price of sugar in the Netherlands caused by the currency situation. In addition the very idea that the Netherlands trade, represented by Mr Kopmels, could let itself be threatened by Suiker Unie appears to him to absolutely incredible.

To sum up the applicants maintain that their attitude does not amount to an abuse and merely represents normal commercial conduct: the French sugar had been offered to old-established traders at the dumping price and it was only logical for the manufacturers to counter this move by 'under-quoting' their own prices. It was to be expected that their reaction to the loss of part of their traditional market, that for human consumption, would be temporary price concessions on the market (condensed milk) of their competitors. In addition the introduction of the compensatory money levies after the devaluation of the French franc made it necessary for dealers to find an outlet at prices which were not very competitive.

In order to determine the nature of the conduct in question, it seems to me that criteria must be applied which are not moral but objective: in order to establish that there is an abuse within the meaning of Article 86 it is not necessary

to show that threats have been uttered or that they have been accompanied by a properly organized boycott, as happened in the case of the retail grocers at the time of the sugar war.

The grounds of your judgment in *La Technique Minière* of 30 June 1966 ([1966] ECR 250) apply, *mutatis mutandis*, to such abuses. It is appropriate you said to take into account in particular the nature and quantity, limited or otherwise, of the products, the position of the partners on the market for the product concerned, the relationship of the conduct to the whole of the relevant circumstances, the opportunities allowed for other commercial competitors in the same products through other channels.

If these criteria are applied to this case we reach the following conclusions:

(a) With regard to the quantity of the products, we know that the Netherlands was a country having a deficit; in such a situation of scarcity old-established traders would have been able to play a very active role.

(b) A mere glance at the forces in the field is enough to show that it was in the interests of the traders to come to terms. Compared with the trio of old-established traders — who were desirous of and perfectly capable of selling sugar intended for human consumption — the manufacturers have a position which is almost a monopoly so far as production is concerned, since they can moreover count on the cooperation of the only other supplier to be taken into account (Raffinerie tirlemontoise), which makes its agents (Export and Hottlet) undertake only to sell sugar to destinations approved by the Netherlands sugar industry and which, at any moment, may supply that industry with the means for destroying the old-established traders' market.

(c) The practice for which the Commission blames the Netherlands manufacturers fits into a general plan. As in the case of Tirlemont, the exclusion by Suiker Unie/Centrale Suiker of old-established traders from access to sugar intended for human consumption complemented their general strategy: the concerted action with other producers was not to be called in question by the old-established traders and the actions of the latter had therefore to be controlled.

This is what happened:

after Sucre-Union had refused to cancel the remaining deliveries French sugar was bought direct by Netherlands producers and marketed under their trade mark. The sugar sold to Netherlands traders later on by their Belgian counterparts was always assigned to the market for the condensed milk industry (for example, 5 000 metric tons was sold on 1 October 1970 by Export to Jacobson). The sugar, which Hottlet purchased on 3 August 1971 from the Raffinerie tirlemontoise, was to be 'delivered in polythene jute sacks of 50 kilogrammes to be supplied by the purchaser, with the trade mark Suiker Unie' and its destination was Holland — Suiker Unie.

Proof of the abuse appears to me therefore to flow objectively from the trend of the market, as shown by the specific conduct of the undertakings.

In this connexion Export's memorandum of 8 June 1970 is almost superfluous, although it is certainly relevant for the purpose of understanding the conduct of the undertakings.

The result of the hearing of the witnesses actively engaged in the matter, which you undertook — more than five years after the events — was requested in accordance with the procedure that all parties in an action should be heard, which is the usual practice in such circumstances. This hearing brought to

light a shift of emphasis, certain understatements, some remorse, which is understandable having regard to the positions occupied by the participants, but it cannot replace an objective analysis of the facts or be a substitute for written evidence.

The only doubtful point is whether this episode of the 'sugar war' ended with an agreement in proper form between traders and producers.

It appears that there was some bargaining between the Netherlands traders and their French supplier with the object of arranging for the disposal of the balance of the deliveries (in particular the question of containers) and there was on the other hand a written agreement between the Belgian and Netherlands trades (confirmations of sale were sent by Export on 1 October 1970 to Jacobson asking the latter to return a duplicate to him after signature).

But it does not seem to me — taking into account the dominant position of the manufacturers — that the fact that Suiker Unie and Centrale Suiker 'agreed' with the old-established traders that the latter should only supply foreign sugar to the condensed milk industry — and the effective acceptance of this sharing out of the market — should be evaluated in a different way than the lines of action adopted by the Raffinerie tirlemontoise in relation to the Belgian trade or, as we shall see, the system established by Süddeutsche Zucker AG and Südzucker-Verkauf with their trade representatives. I am almost inclined to say that these methods reflect the variety of national temperaments.

When there is a dominant position which cannot be counteracted by competition, it is sufficient, in order to show that there has been an abuse, as Article 66 (7) of the ECSC Treaty states, that the undertaking holding this position 'uses it for purposes contrary to the objectives of the Treaty'.

It appears to me that in the light of these criteria, the conduct of Suiker Unie and Centrale Suiker cannot be held to conform with the objectives of the common organization of the market and that, taking into account their dominant position, it represents an abuse of this position. These applicants have applied, according to the provisions of Article 86, dissimilar conditions to other trading partners and have thereby placed them at a competitive disadvantage. If, in addition, there was an agreement it could only in fact have been 'dictated'.

VIII — Protection of the market in the Federal Republic of Germany

To a lesser degree than the Netherlands and in particular than Italy the Federal Republic of Germany was one of the Member States where markets should have been found for the surpluses of the other countries in the Community (Belgium and especially France). The importance of these potential trade outlets varied however according to the region under consideration since it depended on the requirements and availability each year of domestic sugar in this region.

In this connexion a distinction can be drawn between the Western part of the Federal Republic of Germany, which has a small deficit, and the Southern part of this country where, with the notable exception of Saarland, requirements and supplies are almost in balance, subject to seasonal variations. It must moreover be noted that since the establishment of the common organization, the cultivation of sugar beet has moved to the Southern part of Germany and expanded, and this region has almost attained 'self sufficiency'. The principal undertaking in this region, the Süddeutsche Zucker AG, took part in the Italian invitations to tender and exported sugar to Italy at the rate of 10 000 to 20 000 metric tons per annum.

I shall therefore have to distinguish between two markets so far as the present applications are concerned; the one in the West and the one in the South of the Federal Republic of Germany.

A feature which these two regions have in common is that, until 30 June 1968, the date of the entry into force of the common organization, production of and trade in sugar was governed by a national organization of the market.

The Federal Law on sugar of 1951 (Zuckergesetz) was itself completed by three other regulations relating to the price of sugar beet, the price of sugar and the equalization of transport costs. Under this law the Federal Republic of Germany was divided into sales areas. In order to avoid uneconomic transport costs each sugar factory was assigned a particular sector and could only sell its production within this sector. Refunds were only granted by the Caisse de compensation (compensation fund) for deliveries effected inside the area which had been assigned. In addition, in the field of contract the organization was strengthened by a commercial network which used a variety of methods of entering into agreements.

For the Federal Republic and also for the other Member States the transition of this organization to a common organization of the market entailed therefore a fundamental change of policy and it was undoubtedly to help it and its members to get used to the new organization that the Wirtschaftliche Vereinigung Zucker (sugar union) instructed a barrister in chambers in Stuttgart to give an 'opinion on the question of competition in relation to the common organization of the markets in sugar'.

We know that the agreements for an association of German producers were worked out on the eve of the first sugar marketing year in the Community (1 July 1968), no doubt in order to take into account the new regulations, and that they covered the setting up and operation of three marketing organizations.

These agreements were notified to the Commission and are the subject-matter of a procedure which is still in progress. It can only be regretted that this aspect of the matter, which certainly has a bearing on the present proceedings, has not yet been clarified; the evaluation of the question whether the infringements for which German producers and their marketing associations as well as their partners in the common market are blamed can be upheld is closely connected with knowledge of the agreements notified to the Commission and of the agreements linking producers or marketing organizations and agents who resell the sugar.

It seems to me that it is in any case impossible to attempt to evaluate the trend of the market in the Federal Republic of Germany without taking account at one and the same time of the concerted action of the German sugar undertakings with their counterparts in the other Member States, the existence of this national partitioning of the market into sales areas and finally the setting up of the producers' commercial network.

This is why you will allow me to divide by argument into two parts, one centred on the complex formed by the Western part of the Federal Republic of Germany and the two complaints relating to it; the concerted action between the Raffinerie tirlemontoise and Pfeifer & Langen and the agreements entered into by Pfeifer & Langen and the Westdeutsche Zuckervertriebsgesellschaft with their agents and the other centred on the Southern part of the Federal Republic of Germany: the concerted action between the Süddeutsche Zucker AG and Béghin; to a lesser extent, the concerted action between Franken, a subsidirary of the Süddeutsche Zucker AG, and Sucre Union, and agreements entered into

between the marketing organization Südzucker-Verkauf, of which the Süddeutsche Zucker AG is the principal member, and the resellers.

1. So far as the protection of the market of the western part of Germany is concerned the Commission refers to concerted practices between the Raffinerie tirlemontoise and Pfeifer & Langen during the three marketing years 1969/70 to 1971/72.

These practices can be grouped together under the following heads:

— Most of the deliveries of Belgian sugar in this region of Germany were made direct from producer to producer subject to conditions similar to those which were found to exist on the Netherlands market, at least so far as white sugar is concerned.

These deliveries, which were relatively limited in volume during the first marketing year, increased by progressive stages during the following years until they reached quite large amounts. They went up from 3 400 metric tons in 1968/69, of which only 800 metric tons were delivered direct to Pfeifer & Langen, to 45 300 metric tons for the last marketing year, of which nearly 30 000 metric tons were delivered to this undertaking.

The proportion of direct deliveries represents in the case of the two last marketing years about 75 % of Belgian exports to the region under consideration.

It must however be noted that to a large extent these operations covered raw sugar. I will return later on in my opinion to this aspect of the problem.

The main lines of the policy adopted by the Raffinerie tirlemontoise in relation to Pfeifer & Langen are in every way similar to those which have been found to exist in relation to the Netherlands producers.

A telex message from Export to the applicant dated 11 September 1970, is a very clear reminder of the latter's instructions, namely 'to do nothing which can disturb the pattern of the domestic German sugar market so far as Pfeifer & Langen's customers are concerned'. This principle is confirmed by a letter of 14 September from Export to a German wholesaler.

This policy explains the refusal by the Raffinerie tirlemontoise to sell to German dealers as well as the obligations which it imposed on Belgian exporters and which were intended to make them only apply in their sales to German consumers prices approximating as far as possible to those applied in the region for which the sugar is intended so as to put off these purchasers.

The pressure brought to bear by the Tirlemont Group on Belgian exporters with a view to forcing them only to export with the consent of Pfeifer & Langen is a reflection of the applicant's similar conduct with regard to exports on the Netherlands market. There is no doubt that the aim of this pressure was to make Belgian exporters accept clauses in their agreements specifying the destination of the sugar.

In so far as these practices relate to deliveries of white sugar it seems to me to have been proved that they originate in a concerted practice between the Raffinerie tirlemontoise and Pfeifer & Langen and are in keeping with a carefully coordinated course of conduct between these two undertakings.

The documents produced for the Court's file are illuminating on this point.

When the Raffinerie tirlemontoise discovered in July 1969 that Belgian sugar, sold for denaturing, was in fact imported on the German market for human consumption it reacted sharply by reminding those concerned that 'putting this sugar on the market for

human consumption is only possible if its prices are lower than those which the German producers asked for; the latter therefore deplore the pressure which has been brought to bear in this way on their market'. Ever since it has insisted that Belgian dealers put an end to such operations. And it transpires in fact that Export as well as Hottlet have undertaken in future only to resell for denaturing the sugar bought for this purpose.

Similarly several letters between the Belgian dealers and the Raffinerie tirlemontoise or the producers which it controls confirm, in 1970, that exporters undertook not to sell in Germany sugar for human consumption.

With regard to the obligation exacted from them not to export independently to industrial consumers or in the region of Germany bordering on Belgium except with the consent of Pfeifer & Langen, or at prices harmonized with those of the German firm, it is expressly mentioned in documents which come from Export and confirm in this connexion the meaning of the minutes of 30 April 1970 by which the policy defined by the Raffinerie tirlemontoise is reaffirmed in words which I have already quoted: 'no movement of sugar from country to country save by agreement between producer and producer'.

It comes therefore as no surprise to learn from a series of telex messages exchanged between Export and the Raffinerie tirlemontoise, that when the latter was confronted with an offer to Export to purchase a large amount of white sugar from a German dealer at a price which seemed to it to be much lower than the price applied by Pfeifer & Langen, it insisted on the price being increased on such terms however that in the end no deal could be made.

Finally a series of offers to purchase or confirmations of purchases sent during the marketing year 1969/70 by Export and Hottlet to Belgian producers show that the latter did not agree only to sell sugar intended for Germany at an ex-works price above that which they had to fix for other destinations.

Refusal to sell on the German market is also proved by letters exchanged between the Raffinerie tirlemontoise and Export, from which it emerges that the Tirlemont group showed, sometimes covertly, that it was opposed to sales on the German market by asking unacceptable prices. This is confirmed by the disappointment expressed by German commercial undertakings because they did not receive at the right time offers from Belgian dealers at sufficiently attractive prices.

The Commission relies on these documents when it claims that these practices are the consequence of a concerted practice. I myself am of the opinion that these documents not only in fact constitute evidence to which great importance must be attached but reveal methods similar to those which have been found to exist in the relations between the Raffinerie tirlemontoise and the Netherlands producers. The course of conduct which they disclose can only be logically explained to the extent to which it consists of methods of implementing the general policy of the concerted action between producers.

Is there any other way of understanding the refusal or hesitation to accept offers to purchase from German dealers or consumers even though Belgium, during the three marketing years in question, produced a considerable surplus and there was a big demand in the Western part of Germany. They demonstrate the intention of the Tirlemont group not to compete with Pfeifer & Langen on its own territory.

In the same way as Suiker Unie and Centrale Suiker the applicants do not fail to deny that these documents which generally only deal with the relations

between the Raffinerie tirlemontoise and Belgian exporters, principally Export, have any evidential value. But there is no reason to think that the information which is found in this correspondence or even in the internal memoranda of Export is not consistent with what in fact took place. It is moreover corroborated by letters exchanged with certain German dealers.

The fact mentioned by Pfeifer & Langen that the interests of Export in this matter conflicted with those of the Raffinerie tirlemontoise, in that the effect of the latter company's policy was to frustrate on many occasions the operations which Export wanted to carry out, does not appear to affect in any way the authenticity of the letters and documents of this latter firm; on the contrary this conflict is in itself an example of the conduct of the Raffinerie tirlemontoise which, moreover, has not alleged that its own statements were distorted or misrepresented by Export.

Finally the arguments submitted by Pfeifer & Langen in support of its objection that it has never been specifically named as a participator in the concerted action do not stand up to investigation. Although some of the documents produced only refer in general terms to 'German producers', this firm is expressly mentioned in other documents. It is moreover clear that, of all the German producers, Pfeifer & Langen is the one undertaking marked out by its geographical situation in relation to Belgium to be in direct competition with the Tirlemont group.

The mere fact that it bought Belgian sugar direct and later sold it at the same price as the sugar which it produced itself under the same conditions and using its own trade mark would in any case suffice to show that it and the Raffinerie tirlemontoise were partners in the said concerted action. I should add that the applicant markes no serious attempt to deny that it nofified the Raffinerie tirlemontoise of the ex-works price which it applied and that the circumstances in which this information was requested and obtained can only be regarded as additional evidence of the concerted practice, since, in fact, this information enabled Belgian producers to adapt — or to force Belgian dealers to adapt — the price of Belgian sugar exported to the sales area of Pfeifer & Langen for the purpose of avoiding any competition with this undertaking on its own market.

Therefore, for the reasons already mentioned in connexion with the protection of the market in the Netherlands, it must in my opinion be held that concerted practices were engaged in, which had as their object the protection in a similar way of the market of the Western part of Germany. Since they clearly affected trade between Member States, their object was also to impede the competition which should have been in operation in this region, as they thereby permitted Pfeifer & Langen to maintain the position which it had established.

I now have to ask myself whether the existence of these concerted practices, proved by direct evidence so far as the operations covering white sugar are concerned, can also be accepted in the case of the deliveries of raw sugar from the Raffinerie tirlemontoise to Pfeifer & Langen which amounted during the three marketing years in question to a total of about 55 000 metric tons.

Since they were direct deliveries and since there are no documents capable of proving the existence of a concerted practice, the Commission, in order to bring them within the scope of the general concerted action, can do no more than assert that it was not in the interest of the Raffinerie tirlemontoise to make such deliveries. On the one hand, in fact, it had, including the factory at Oreye, a refining capacity, which enabled it to process all the raw sugar which it

produced; on the other hand when the Raffinerie tirlemontoise was faced with a big demand for Belgian sugar from German dealers or consumers – which we have seen was for the most part not met – it had the opportunity to supply its purchasers with white sugar, which it had manufactured itself, and it was at the same time in its interest to do so, since in this way it would have obtained the benefit of the refining margin. However neither transport costs, since its purchasers were in an area which was very near, nor the need to create an independent distributive network would in the opinion of the Commission have been insuperable obstacles.

Pfeifer & Langen had, in addition to producing its own raw sugar, the opportunity of buying the necessary additional supplies from producers in the Northern part of Germany in order to run its refinery at full capacity. This is moreover what it did. In these circumstances it had no need at all of the raw sugar produced by the Raffinerie tirlemontoise. In addition the price at which it bought the Belgian raw sugar was so high that it could not obtain the benefit of the normal refining margin.

Therefore the conduct of the applicants can only be explained by the common intention of the two undertakings to prevent the quantities of raw sugar delivered to Pfeifer & Langen from being processed into white sugar by Belgian refineries and exported as a finished product to the sales area of the German undertaking.

The applicant undertakings can easily counter this argument, with the support of figures, by technical considerations based, in particular, on their respective refining capacities. The capacity of the Raffinerie tirlemontoise was less than that which the Commission attributes to it: only 200 000 metric tons per year and not 225 000 metric tons, because it is in particular wrong to add to its own capacity that of the Raffinerie Notre-Dame which is unable to refine raw sugar outside the harvest period. Further account must be taken of the fact that the applicant is under an obligation to refine raw sugar of certain Belgian sugar factories which do not have any refining plant as well as syrups – called the 'effluent' of the sugar factories – produced in eight factories forming part of its industrial complex.

Taking into account these amounts the Raffinerie tirlemontoise disposed of 230 000 metric tons of raw sugar on average each year. It therefore had to make a direct transfer of part of it not only moreover to Pfeifer & Langen but also to refiners established in other Member States and even in third countries. In these circumstances it is both in its industrial and commercial interest to sell raw sugar direct to Pfeifer & Langen at a favourable price for itself rather than to attempt to sell white sugar to German dealers and consumers and run the risk of losing Pfeifer & Langen's customers.

This undertaking, with a refining capacity of 260 000 metric tons each year which exceeded therefore by a long way its own production, had, in order to make full use of this capacity in conditions yielding a satisfactory profit, to buy very large quantities of raw sugar not only from the Raffinerie tirlemontoise but other producers, in particular those in North Germany. The supplies from the Belgian manufacturer moreover were only a relatively small proportion of the total volume of these deliveries. In addition it was in the interest of Pfeifer & Langen to have more than one source of supplies, in particular to mitigate the effect of a possible, although unlikely, reduction of supplies from Lower Saxony. Finally the raw sugar from Belgium would have enabled it to manufacture white sugar of high quality, the sale of which allowed a larger profit margin.

I do not intend, my Lords, to enter into a technical discussion concerning the respective refining capacities of the

Raffinerie tirlemontoise and Pfeifer & Langen more especially as I am confronted by conflicting statements on this question by the Commission and the applicants. It seems to me that I must take up my stand in another field.

The Commission takes exception in principle not to the deliveries of raw sugar by the Raffinerie tirlemontoise to Pfeifer & Langen as such, but to the fact that these deliveries were not accompanied by substantial deliveries of white sugar even though the known interest of the Raffinierie tirlemontoise should have prompted it to effect such sales on the free market of the Western part of the Federal Republic of Germany, this undertaking had the means to do so, and finally its excuse that it did not have a commercial network was untenable. In fact these deliveries of raw sugar are a substitute for deliveries of white sugar. They are open to criticism to the extent to which they represent a corresponding amount of Belgian white sugar which could and should have been sold at a profit on this market.

It is surprising moreover that during the marketing year 1970/71, when there was a deficit of white sugar in Germany, the Raffinerie tirlemontoise delivered raw sugar to Pfeifer & Langen, and at the same time the French producers delivered to this same undertaking white sugar in larger quantities.

Another point which the Commission stresses is that the cost of these deliveries to Pfeifer & Langen were relatively high, after taking into account moreover the distance from Liers to Elsdorf; it regards this as the consideration for the loss of profit suffered by the Raffinerie tirlemontoise because it desisted from selling an equivalent grade of white sugar.

The Commission has not failed to call attention to the contradiction in Pfeifer & Langen's statement that it was in its interest to buy raw sugar from the Raffinerie tirlemontoise, independently of the fact that it was anxious to prevent the latter company from making an inroad into its own market for white sugar. Therefore in order to dispel the impression that the deliveries of raw sugar could explain the absence of deliveries of white sugar on its market, Pfeifer & Langen in answer to questions put by the Court on this point, explained that the benefit which it obtained from the deliveries of raw sugar by the Raffinerie tirlemontoise was not such as to warrant the acceptance in exchange of the competition of the Raffinerie tirlemontoise on its own market for white sugar. But this means that there are good reasons for asking whether the Raffinerie tirlemontoise was not in exactly the same situation; the benefit from selling raw sugar to Pfeifer & Langen was not such as to make a large scale undertaking like the Raffinerie tirlemontoise, operating independently and in normal conditions, abandon the sale of white sugar in the sales area of Pfeifer & Langen.

Pfeifer & Langen, which takes the view that these transactions were also very much in its interest, answers the Commission's statement that the deliveries from the Raffinerie tirlemontoise can only be explained by the fact that Pfeifer & Langen paid a 'particularly attractive' price for the raw sugar, which the Raffinerie tirlemontoise admits was the case, by explaining in the final analysis that the sale of raw sugar was especially profitable for the Raffinerie tirlemontoise, because it earned for this undertaking in fact the same profit which it would have earned if it had itself refined the raw sugar. Pfeifer & Langen did not pay such a high price for the raw sugar because it was intended to be processed into special kinds of sugar, for which the processing margin is exceptionally high and which could not be sold in the Federal Republic of Germany by a foreign producer such as the Raffinerie tirlemontoise.

It is difficult, my Lords, for the layman to follow the intricate pattern of this exchange of arguments and to make at the end of the day an explicit economic evaluation of a situation which is extremely technical. Let me just say that, if it is true that on the world market it sometimes happens, during periods when there are surpluses and unusually high stock levels — in particular of white sugar — that the price of the latter falls below the price of raw sugar, this situation can scarcely arise on the common market, in any case not during several consecutive marketing years.

If there were only deliveries of raw sugar, it is doubtful whether they are sufficient to establish the existence of a concerted practice.

But this aspect of the complaint against Pfeifer & Langen and the Raffinerie tirlemontoise must, in my opinion be considered together with the concerted practice, which in my opinion has been established so far as white sugar is concerned.

Deliveries of raw materials between manufacturers are not open to criticism if these manufacturers compete with each other at the finished products stage. They are, on the contrary, from the moment when these producers agree not to compete with each other at the stage of the finished product. Now this is exactly what happened in this case.

I think therefore that the need for the Raffinerie tirlemontoise to reduce the load on its refining capacity alleged to be overburdened and the need to use the whole of Pfeifer & Langen's supposedly surplus capacity do not adequately account for these deliveries of raw sugar which had, a fact sufficiently unusual to be noted, the advantage of being particularly attractive to the two competitors. They are only explained by the certain knowledge that the Raffinerie tirlemontoise would not either intervene on Pfeifer & Langen's free market for white sugar. This certainty was accompanied by the assurance that offers to purchase from customers in the frontier regions would be politely refused, notwithstanding the favourable conditions from the point of view of transport. This is what in fact happened.

I am of the opinion that in these circumstances the existence of a concerted practice has also been established so far as deliveries of raw sugar are concerned.

2. In addition to the complaint that it engaged, with the Raffinerie tirlemontoise, in a concerted practice having as its object the protection of its market against imports from Belgium, Pfeifer & Langen is blamed for having protected this market by entering into a concerted practice with its agents.

Since the establishment of the common organization, the Westdeutsche Zuckervertriebsgesellschaft marketing organization has used for the sale of sugar produced in this area four regional commission agents with which it entered into 'commission contracts', while Pfeifer & Langen used for the sale of its own production twelve commercial representatives, with whom it entered into 'agency agreements' and of whom some were also commission agents of the Westdeutsche Zuckervertriebsgesellschaft. The operations of these agents were restricted to certain territories and could only cover sugar from other common market producers if the Westdeutsche Zuckervertriebsgesellschaft or Pfeifer & Langen gave its consent in writing.

The answers to the questions put by the Court confirmed that all the agreements entered into by Pfeifer & Langen with its representatives contained a clause delimiting the territory within the Federal Republic of Germany (a plan annexed to the agreements determines in each case the sales area) and prohibiting

the sale of sugar from other producers of the common market. These restrictions have also been applied to one if not three dealers who are not tied to Pfeifer & Langen by any agreement.

The Commission deduces from this that the setting up of this marketing system results from a concerted action between all the German producers of the Western part of the Federal Republic of Germany and that its effect is that 'free' trade, under which sugar is sold in the name of the vendor and for his own account, has been excluded from this type of sale in the case of sugar produced in this part of Germany, as was moreover the case in the other marketing organizations. Independently of the concerted practice between producers aiming at the protection of the markets of the Western part of the Federal Republic of Germany, it considered that this system restricts competition at the commercial level and contravenes Article 85 (1): the Commission agents and representatives of the Westdeutsche Zuckervertriebsgesellschaft and of Pfeifer & Langen could only sell their principal's sugar — they were forbidden to sell sugar from other producers — and again could only do so in a specific territory.

Pfeifer & Langen which alone lodged an application against this part of the decision replies that its representatives are agents who have no independence and are an integral part of their own sales organization. Now, under German law such agents are forbidden to compete with their principal; this arises out of their duty to their principal to act in good faith.

Further in its communication of 24 December 1962 relating to the exclusive representative agreements entered into with commercial representatives the Commission itself has stated that Article 85 was not directed against commercial representatives to the extent to which they were integrated as auxiliary employees in their principal's undertaking.

My Lords, under German commercial law it is possible for a commercial representative to hold himself out as acting in the name and for the account of his principal.

But as the Commission rightly says, it is necessary to ascertain, whether the Commission agent is in fact simply an auxiliary employee integrated in the undertaking of the principal and, in order to do this, it is necessary to pay more attention to the actual function of the 'commercial representative' than to his designation.

According to the Commission a dealer cannot be regarded as an auxiliary employee if, in addition to operating as a representative, he acts on quite a large scale on his own account as an independent dealer.

Moreover, according to the Commission, this is the position in the case of the applicant's representatives. It relies on the fact — which appears to me to be correct — that some of the applicant's representatives are described in the trade directories as wholesale dealers or importers. It appears to me that these firms must be put on the same footing as the other dealers whose names are known to you as a result of the cases referring to the denaturing or export of sugar.

In answer to the questions put by the Court the applicant confirms that its representatives acted as independent dealers as well as operating on its account. The 'regional commission agents' who were appointed after the establishment of the common organization are large undertakings carrying on business as wholesale provision merchants, which have a large turnover not only because they sell sugar in the area assigned to them from members of the marketing association, but in particular because they export to third countries or import sugar intended for denaturing, a field which we know

moreover has been surrendered in other countries such as Belgium and the Netherlands to the 'long established traders'.

If these dealers engaged in such operations to third countries and for denaturing, they could easily have carried out similar operations for the purpose of selling sugar intended for human consumption and coming from producers other than the members of the marketing organization in other sales areas. They abandoned this idea under the terms of an agreement with their principal.

What is more, and the Commission is right to emphasize this point, so far as internal law is concerned, paragraph No 18 of the Gesetz gegen Wettbewerbsbeschränkungen (GWB) of the Federal Republic of Germany provides that clauses granting exclusive rights may be declared to be void to the extent to which they restrict competition. The authors cannot agree whether the restrictions imposed on trade representatives fall within the field of application of paragraph 18 or not. There seems to be no point in getting involved in this controversy; it is sufficient to state that these restrictions fall within Article 85 of the Treaty of Rome.

You have yourselves held in connexion with 'vertical contracts' (it seems to me that the disputed clauses fall within this class):

'even if it does not involve an abuse of a dominant position, an exclusive dealing agreement may affect trade between Member States and at the same time have as its object or effect intervention, restriction or distortion of competition, and thus falls within the prohibition of Article 85 (1)' (13 July 1966, Case 32/65, *Italy* v *Commission* [1966] ECR 390);

and again that 'the wording of Article 85 causes the prohibitions to apply, provided that the other conditions are met, to an agreement between several undertakings. Thus it does not apply where a sole undertaking integrates its own distribution network into its business organization. It does not thereby follow, however, that the contractual situation based on an agreement between a manufacturing and a distributing undertaking is rendered legally acceptable by a simple process of economic analogy — which is in any case incomplete and in contradiction with the said article' (13 July 1966, Cases 56 and 58/64, *Grundig* [1966] ECR 340).

I find moreover some confirmation of the Commission's argument in the fact that — and this is no mere coincidence, — the Westdeutsche Zuckervertriebsgesellschaft modified the agreements which it had entered into with its commission agents after the contested decision was taken and that Pfeifer & Langen informed the representatives with which it had only entered into oral agreements (at the latest from the beginning of January 1973) that they were no longer required to work exclusively for it and that, on 2 January 1973, a new trade representatives contract was entered into between the applicant and its twelve commission agents, which no longer contained any clause granting them exclusive rights.

It is indeed possible that these 'commission agents' did not accept with any great enthusiasm the reduction of the part they play in the sale of sugar for human consumption (which was restricted to sugar produced by the Westdeutsche Zuckervertriebsgesellschaft and its members in the agreed territory), but this is very nearly tantamount to saying that it is because of an abuse of a dominant position (Article 86) that they agreed to this restriction (as in the case of the Raffinerie tirlemontoise / in relation to the Belgian trade and Suiker Unie, Centrale Suiker / in relation to the Netherlands trade). Moreover the position of Pfeifer & Langen so far as either its own production or the extent of

its participation in its marketing organization is concerned is not comparable to that of Süddeutsche Zucker AG. Even if this was the case you have held that 'the distortion of competition which is prohibited if it is the result of behaviour falling under Article 85, cannot become permissible by reason of the fact that such behaviour succeeds under the influence of a dominant undertaking and results in the merger of the undertakings concerned' (21 February 1973, Case 6/72, *Continental Can* [1973] ECR 244).

Consequently the clauses granting exclusive rights entered into between the Westdeutsche Zuckervertriebsgesellschaft and Pfeifer & Langen and their commission agents are contrary to Article 85 (1); the applicants cannot claim the benefit of their 'provisional validity' on the ground that there was no need for the parties to notify these contracts, because the Commission's communication simply indicated its view and did not have the effect that it was no longer in the interest of undertakings to obtain a negative clearance or to cause the legal situation to be clarified by an individual decision. The fact is that this situation suited them very well.

3. The main feature of the Southern sugar market in Germany, as in the Western part of this country, is a grouping of producers within a marketing organization, the Südzucker-Verkauf, subdivided into clearly demarcated zones. The five undertakings grouped together in this marketing organization account for 38 % of the total German production, of about 800 000 metric tons per year. The marketing organization has a 90 % share of the market in its sales area.

The two leading protagonists of the alleged concerted action are the two 'giants' among the sugar producers:

— Béghin, on the one hand, which, since its merger with Say during the proceedings, has become with the subsidiaries of both companies, the leading French producer in France, is now the second largest producer in the Community after the British firm Tate and Lyle;

— Süddeutsche Zucker AG on the other hand, which has a 51·5 % interest in the marketing organization; having eight sugar factories this company accounts for 70 % of the production of this marketing organization, which amounts to 29 % of the whole of German production; this undertaking has a dominant position in various regions of the Southern part of the Federal Republic.

Two other undertakings have been implicated in the concerted practices found to have been existing on this market:

— On the French side the Sucre-Union company, a marketing organization created in 1966 by 23 French sugar factories;

— On the German side the Zuckerfabrik Franken which, with four factories, is responsible for more than 8 % of the whole of German production. Süddeutsche Zucker AG owns 25 % of the shares of this undertaking.

It must however be noted that neither Sucre-Union nor Franken have been fined. They have not lodged an application against the contested decision.

A particular question arises in the context of this complaint in connexion with the marketing organization Südzucker-Verkauf. It is a fact that in the operative part of the contested decision (paragraph 4 of the first part of Article 1) the marketing organization is not mentioned among the undertakings which engaged in this concerted action.

On the other hand it is blamed for having committed infringements of Article 86 of the Treaty in paragraph 3 of the second part of this decision.

However during the procedure the Commission made it clear that the complaint that there was a concerted action on the market of the Southern part of Germany was also directed against Südzucker-Verkauf and that a fine was imposed on this company only because it had participated in the infringement of Article 85 (1). This emerges in the view of the Commission from the statement of the reasons on which the decision was based and from the introductory paragraphs to the second part of Article 1 of the operative part which read 'it is held that the following measures which have been found to exist *in the context of the concerted practices* constitute in themselves infringements of Article 86 or Article 85 of the Treaty'.

If I correctly understand this argument, the Commission is establishing a link between the concerted practice and the abuse of the dominant position, as the second infringement helped to secure the efficacy of the first.

I am inclined to follow this line of argument and to admit that the two complaints are not wholly severable to the extent to which the organization of the marketing organization has certainly helped to limit the imports of white sugar into the area which it has been assigned. However I will wait until I examine the complaint directed against Südzucker-Verkauf that it has abused its dominant position before I mention the consequences which flow from this fact.

Having made these observations I now turn to the concerted action between producers. The practices to which the Commission takes exception are similar to those which have been found to exist on the market of the Western part of Germany.

In the first place the concerted action consists of direct deliveries from producer to producer. Süddeutsche Zucker AG and Franken have, since the 1970/71 marketing year, bought increasing quantities of raw sugar from Béghin and of white sugar both from Béghin and Sucre-Union. They marketed this product, after the raw sugar had been processed, at the same prices and subject to the same conditions of sale as the sugar which they manufacture under their own trade mark.

These deliveries covered relatively large amounts, particularly of the raw sugar delivered from Béghin to Süddeutsche Zucker AG, 11 200 metric tons in the 1970/71 marketing year, 13 900 metric tons in the following marketing year and to Franken, 9 200 metric tons in 1971/72. Deliveries of white sugar were not so large; very small deliveries by Béghin, which sold 286 metric tons to Süddeutsche Zucker AG, whereas Sucre-Union sold 4 500 metric tons to this undertaking and 4 000 metric tons to Franken.

But it must above all be borne in mind that apart from these direct deliveries imports intended for industrial consumers or German dealers established in the sales territory of Südzucker-Verkauf were very limited, with the exception of sugar for denaturing or export to third countries.

The Commission concludes from this that the two French undertakings avoided bringing any competitive pressure on the market of the Southern part of Germany. By means of a concerted action with their competitors they helped to partition this market.

As is to be expected the applicants proceed to justify their conduct on rational economic grounds.

In the case of the French undertakings deliveries from producer to producer enabled variations in production from one marketing year to another to be made good and the available refining capacity to be utilized to the best advantage by the supply of raw and white sugar of inferior quality for processing into liquid sugar. These operations were

all the more advantageous because the freight charges for raw sugar are relatively low. On the other hand it was not in the interest of the suppliers to bear the costs of the distributive network in the South of Germany and to lay themselves open to the risks associated with holding stocks.

German purchasers found that the advantage of this system of deliveries to them was that they avoided loss of customers and of shares of the market.

Finally direct deliveries from producer to producer did not prevent some development of other intra-Community trade in the region under consideration.

It is true, my Lords, that Sucre-Union supplied its independent agents with by no means inconsiderable quantities of sugar at least during the marketing year 1970/71, and this is moreover why the Commission did not impose a fine on it.

It is not denied that Béghin, on the other hand, did not carry out such operations.

But the applicant makes use of the fact that its direct deliveries to Süddeutsche AG and to Franken consisted almost exclusively of raw sugar from its factory at Sillery in the region of Rheims. Now the raw sugar produced in this factory has always been sold to French or foreign refiners, because it is said that it would not have made economic sense to have this product processed by Béghin's refinery at Thumeries, near Lille, that is to say to arrange in the first place to transport the raw sugar from the Marne to the North of France in order to obtain white sugar which it would then have to despatch later to the Southern part of Germany.

Further, whereas the production of raw sugar at Sillery had practically doubled between 1967-1968 and 1970/1971, the Thumeries refinery, operating at full capacity, could not in any case cope with additional amounts of raw sugar from Sillery.

Süddeutsche Zucker AG maintains that in 1970-1971 it was short of stock and that, in order to perform its contracts for long-term provision of supplies, it had therefore to import raw sugar, which moreover it had already done on several occasions even before 1968. The object of purchasing from Béghin and also Sucre-Union was to solve this problem after moreover it had endeavoured to obtain supplies from other producers in particular in Lower Saxony.

The applicants take the view therefore that the disputed operations are justified because they are essential requirements of an industrial and commercial nature which in themselves preclude any idea of a concerted action.

I am not, my Lords, entirely convinced by this argument. The main complaint against Béghin is not so much that it delivered raw sugar direct to producers in the Southern part of Germany but that, by not supplying dealers or industrial consumers in this region with any white sugar, it helped to partition this market. And, in this connexion, I must mention the one subject never discussed during the argument between the parties concerning this complaint. I refer of course to the Saar.

The absence of any identifiable corresponding advantage would indeed be likely to weaken the complaint of engaging in a concerted practice, and if it were shown that the French producers in question obtained no benefit by keeping out of the market in the Southern part of Germany, it would be questionable whether they in fact engaged in a concerted action with their competitors.

But it seems to me that there is definitely such a corresponding advantage in this case and indeed a very important one: it is the 'surrender' of the Saar to the French sugar manufacturers.

Let us be quite clear what we mean by these expressions 'corresponding

advantage' and 'surrender': there was never any need for this 'exchange' to be recorded in an express agreement since it arose as it were out of the basic situation and it was sufficient for the persons concerned to continue tacitly to carry on as before. This does not mean that this exchange was not a decisive factor in the concerted practice.

Since the end of the second war (before the Saar referendum) the Saar was supplied with sugar from France. Later on this situation was regularized by the Franco-Saar Treaty which provided until 31 December 1959 for a monetary and customs union between France and the Saar and which, even after this date, included the import to the Saar, free of customs duty, of certain products originating in and coming from the free zone, within the quotas set out in a list entitled 'List A' which mentioned sugar. This explains why year in year out 35 000 metric tons of white sugar were sold in the Saar.

At the time of the abolition of the last customs duties (1 July 1968) and of the entry into force of Regulation No 1009/67 (the same date) there was no longer any legal ground for the continuance of this situation; the Saar is a key region of the Federal Republic of Germany and the European Community and it is difficult to understand why the rules of the common market should not apply in this territory, unless this is laid down by an express provision to that effect.

However, this situation has not been altered to any great extent since the entry into force of the Community organization; although all customs duties and quotas between Member States were abolished (Article 35 of the Regulation) and there is no such agreement as that which regulates trade between West Berlin and the German Democratic Republic, about the same amount of white French sugar continues to be sent to the Saar, approximately 30 000 metric tons.

However that something is left over from this situation is shown by the fact that the Saar has never been included in any of the sales areas established by German producers, although this is only a special circumstance arising under a contractual agreement: the division into sales areas before the signature of the Franco-Saar Treaty, an essential part of the national organization of the market in the Federal Republic of Germany, certainly had to take into account the particularism of the Saar. Moreover it appears that there is no sugar factory or refinery in the Saar.

Yet there could have been a change after 1 July 1968: on the one hand the nearest German factories (those of Süddeutsche Zucker AG in Worms, which was about 100 km away, and in Obrigheim and Waghäusel; of Pfeifer & Langen in Euskirchen) were admirably situated to 'recapture the market in the Saar' (the principal undertakings of the area having the largest surplus in the Community are situated in some cases nearly 350 km away: Rheims, Soissons, Lille), except for the fact that they did not have the same degree of control over the commercial network in the Saar as in the rest of the Southern part of Germany.

On the other hand the French factories, having regard to their surpluses and the favourable conditions relating to freight rates, were not prevented either from being able to enlarge their market in the Southern part of Germany.

Thus it emerges from an exchange of letters on 27 June 1968 between a trader in the Saar and a German customer residing near the Saar that this trader was in the first instance disposed — since the entry into force of Community regulations was imminent — to sell to this customer. But, as early as 6 August 1968 he let this customer know that 'the German sugar industry insisted during the negotiations which take place regularly in Paris, that French suppliers hold back in the case of deliveries to the German market through the Saar to the rest of the Federal Republic of Germany'.

The Commission evidently does not blame Béghin and Süddeutsche Zucker AG for having engaged in a concerted action to maintain the *status quo ante* in the Saar, for the very good reason that this ensured that intra-Community trade went just in the direction desired by the organization of the market.

I think that this fact, which moreover appears between the lines of the decision, cannot be disregarded.

It seems however that there were some developments: a slow penetration of French undertakings beyond the Saar into the Southern part of Germany followed a gradual 'recapture' of the market in the Saar by the nearest German undertakings. The German and French undertakings at least intended that this readjustment should be carried out smoothly by means of deliveries from producer to producer and by limiting the damage in the manner in which similar arrangements were made between the Raffinerie tirlemontoise and Pfeifer & Langen: if French sugar was to come into the Southern part of Germany, it was at least only to arrive there by means of deliveries from producer to producer, in the form of raw sugar, at a price which undoubtedly attracted German purchasers by letting them have the refining profit, and, above all, this sugar represented so much white sugar which would not be marketed outside the networks under the control of the importer. It would not have been contrary to economic common sense for Béghin to have the Sillery (Rheims) sugar refined in Thumeries (Lille) and collect the refining margin, as the refineries of the Southern part of Germany were themselves quite far away and the crossing of a frontier never makes transport operations easier. Was this not moreover the position so far as the white sugar delivered to the Saar or to Italy was concerned? A distance of 100 km or more could hardly be regarded as an insuperable obstacle for French producers.

The undertakings which were principally interested in this concerted action were, on the one hand, Süddeutsche Zucker AG (and its subsidiary Franken), which is the largest German undertaking and on the other hand, Béghin, which is one of the largest French producers. However it is precisely between these two companies and, to a lesser extent, with the participation of the marketing company Sucre-Union, that the disputed deliveries of raw sugar were effected. On the other hand these are the undertakings which had the greatest interest in the Saar by reason both of their geographical situation and their production potential.

Now if the French sales on the 'free' market of this region where prices keep up approximately with the target price — disregarding the amounts delivered to the Saar and for denaturing — are compared with the total requirement of this region, it is found that they were not very large, whereas the export of white and raw sugar to Süddeutsche Zucker AG and to its subsidiary Franken (deliveries from producer to producer) went on increasing. It is this aspect of the matter which the Commission criticizes.

Apart from the fact that, outside the Saar, the largest volume of imports in the Southern part of the Federal Republic of Germany consisted only of deliveries from producer to producer, the protection of this region was effectively completed, at the other end of the chain if I may put it this way, by the system of loyalty rebates and by the trade representatives contracts applied by Südzucker-Verkauf, which was assigned the task of selling the sugar of Süddeutsche Zucker AG and Franken.

There is a good deal of illuminating evidence in this connexion.

A letter from a wholesaler in the south of the Federal Republic of Germany dated 18 April 1972,

'We write to let you know that we have unfortunately been informed by a letter from the Süddeutsche Zucker AG that

we shall not get the loyalty bonus for the marketing year which has just come to an end.'

A telex message from one of the few independent traders of the Southern part of the Federal Republic of Germany to Sucre-Union of 23 August 1971, which quotes the provision in question of the contract of Südzucker-Verkauf and a letter from the same importer Sucre-Union of 29 September 1971:

'The firm (a business house in the Southern part of the Federal Republic) has informed me that Süddeutsche Zucker AG made reservations following the purchases of white sugar in France. The firm ran the risk of not getting the annual loyalty bonus. When the contract with Süddeutsche Zucker AG was renewed, the said firm received the annual loyalty bonus, on condition that it stopped in future buying sugar from other vendors and from France.'

Although this trader had a bone to pick with his suppliers, it appears to me that his correspondence together with these different facts amount to evidence of a concerted practice which cannot be disregarded.

The concerted practice appears to me therefore to have been proved.

It now remains for me to examine in connexion with this 'complaint' certain formal submissions put forward by the applicants.

In the first place they allege an infringement of Article 4 of Regulation No 99/63. According to Süddeutsche Zucker AG, the notification of objections does not refer to the advantage which accrued from imports of Community sugar in the Southern part of Germany. It appears to me, on the other hand, that this notion goes to the root of the notification of objections and of the decision.

In the second place this particular applicant states that the operative part finds that it has engaged in a concerted practice with Sucre-Union for the marketing years 1970/71 and 1971/72, even though in the grounds upon which the decision is based no mention is made of any purchases by Süddeutsche Zucker AG from Sucre-Union during the first of these marketing years: only the statement of defence mentions a delivery of 4 600 metric tons of white sugar from Sucre-Union to a subsidiary of Süddeutsche Zucker AG for this marketing year.

I think that this criticism hardly leads anywhere: the German applicant is mainly blamed for engaging in a concerted practice with Béghin and moreover, the Commission decided not to punish Sucre-Union. There is no need to carry out a further examination of the conduct of this latter undertaking which has not been punished with a fine and which has not lodged an application. Moreover Sucre-Union is not a producer which explains why its strategy has at times been different from that of Béghin.

According to Süddeutsche Zucker AG and Béghin the notification of objections did not specify the producer against whom the complaint of not having sold white sugar in the Southern part of Germany was directed or the undertakings with which Süddeutsche Zucker AG engaged in a concerted action. It was only the decision which indicates the deliveries and the producers to which exception is taken.

As I said in connexion with the examination of the general formal submissions it appears to me that neither Beghin nor Süddeutsche Zucker AG could be under any misapprehension as to the scope of the complaint which the Commission intended to make against them; moreover they defined their position on this point during the administrative procedure.

4. I now have to give my view on the complaint that Südzucker-Verkauf abused a dominant position from the beginning of the marketing years 1968/69, by preventing its agents from reselling sugar which did not come from its members and by tying its customers through the grant of loyalty rebates.

It must be recalled that on 24 March 1969 the Bundeskartellamt (the Federal Cartel Office) sent the applicant Südzucker-Verkauf a questionnaire relating in particular to a 'loyalty rebate' which it granted its customers and the contracts which it entered into with its commercial representatives. On 8 July 1971 the Bundeskartellamt informed this marketing organization that it had discontinued the procedure relating to it.

According to the report of the operations of this Federal Cartel Office in 1969 business circles in the sugar processing and food industry complained that after the entry into force of the Community organization of the market in sugar, and in particular following the consequent adoption of ex-works prices, certain undertakings which produce sugar held a dominant position in certain regions owing to freight rates. 'Even in the regions having a surplus where the cultivation of beet is concentrated and where there are factories likely to compete with each other, the creation of common organizations of the market in sugar has substantially reduced competition. This trend has entailed exorbitant sugar prices, restrictions on the production of cheaper sugar in category II and in particular no sugar in category III being produced. The suspicion thereby created that certain undertakings which produce sugar had, locally, a dominant position and have abused it gave rise to a thorough investigation which *partly confirmed and partly strengthened* the presumed existence of dominant positions in various regions. However the suspicion that the price of sugar had been fixed at a level which must be regarded as an abuse was not confirmed. No facts have come to light which show that there is a premeditated reduction of the production of sugar of the cheaper grade in category II.'

'The Federal Cartel Office', the report goes on, 'has on the basis of information supplied by the retail trade, initiated against sugar wholesalers in certain regions of the Federal Republic the procedure specified in paragraph 22 of the German law relating to competition. These undertakings are said to occupy a dominant position in their sales areas. The retailers complained that the wholesalers only deliver cheaper sugar of basic quality if they purchase from the latter at the same time refined sugar which is more expensive. The investigation showed that, as a result of mistakes in estimating requirements and because of difficulties in obtaining supplies, some manufacturers found that their available stocks of basic quality sugar had become scarcer and that only reduced amounts of sugar had been delivered. Therefore the wholesalers concerned had to resort to a system of quotas'. However in this case also the procedures which had been initiated were discontinued.

The Commission takes the view that the obligation imposed by this marketing organization on its 17 trade representatives not to sell without its consent sugar coming from producers other than its members has restricted freedom of trade between Member States because it prevented independent dealers from furnishing industrial consumers with supplies of sugar and in particular with imported Community sugar. This obligation was also accompanied by the grant of loyalty rebates to its customers, a collective system of discounts, the rate of which depends exclusively on the total number of purchases made from producers who are members of the organization. In order not to lose the benefit of the discounts purchasers had therefore to place their orders exclusively

with German producers; the loss of the loyalty discount entailed a disadvantage which more than outweighed the advantage which would have resulted from the purchase of sugar from abroad.

It seems to me in fact that Südzucker-Verkauf made use of its dominant position in the region to impose these distribution contracts on its resellers and to tie its customers by means of these loyalty discounts, and that this practice comes within the definition of Article 86: 'imposing unfair purchase or selling prices', 'applying dissimilar conditions to equivalent transactions with other trading partners' and amounts therefore to an infringement of this provision.

The applicant maintains that, in themselves, considered separately, these distribution contracts and contractual discounts did not have to be notified to the Commission, since only undertakings from one Member State were parties thereto and they did not relate either to imports or exports between Member States (Article 4 (2) (1) of Regulation No 17).

It is doubtful whether this argument is correct in the light of your judgment LTM of 30 June 1966 delivered in connexion with exclusive dealing agreements.

But it is quite a different matter to conclude that a fine cannot be imposed for actions relating to these contracts or their provisions. The abuse which the Commission found to exist and punished relates to the system which the applicant adopted in order to market the production of its members, including sugar bought by them from French producers, together with the concerted practice of Süddeutsche Zucker AG connected with deliveries of French sugar.

This practice 'has adversely affected an effective system of competition', as mentioned in Article 3 (f) of the Treaty, according to your judgment in the *Europemballage* Case of 21 February 1973 (Case 6/72 [1973] ECR 244) and comes within the concept of 'abuse' ('exploitation abusive').

It not only 'may affect trade between Member States' or according to the wording of your judgment in the *Grundig* Case of 13 July 1966, (Cases 56 and 58/64 [1966] ECR 341) 'is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States', but actually had these effects, as the documents prove which I mentioned in connexion with the complaint of a concerted action on the market of the Southern part of Germany.

Nevertheless as I have said in connexion with this complaint the question arises to which undertaking the infringement should be imputed and which article has been infringed.

In its notification of objections, the Commission indicated that it intended to evaluate the measures imposed by Südzucker-Verkauf and Süddeutsche Zucker AG on their customers under both Article 85 and Article 86:

- it intended to consider whether the obligation contained in the various distribution agreements of Südzucker-Verkauf not to market sugar other than that delivered by the marketing organization or by its members without its consent fell within Article 85;
- it intended also to consider whether the system of commercial representation adopted by Süddeutsche Zucker AG and Südzucker-Verkauf disclosed any abuse of a dominant position (Article 86). Finally it intended to consider whether the grant by Südzucker-Verkauf to its customers of

an annual quantitative rebate was also an abuse of the dominant position of Süddeutsche Zucker AG under Article 86.

The decision itself states in its operative part that during the 1970/71 marketing year Süddeutsche Zucker AG (which exerts a preponderant influence within the Südzucker-Verkauf) and Franken, on the one hand and Béghin and Sucre-Union on the other hand engaged in a concerted practice within the meaning of Article 85 (1).

It also states that since the 1968/69 marketing year Südzucker-Verkauf which was responsible for the marketing of sugar from Süddeutsche Zucker AG had engaged in an abuse within the meaning of Article 86.

Bearing in mind that this abuse had been found to exist within the context of the concerted practice and that, in order to determine the amount of the fine, the two infringements, which is what these practices amounted to, had to be evaluated as a whole, the decision punishes the first of these infringements with a fine of 700 000 u.a. and the second with a fine of 200 000 u.a. the first being imposed upon Süddeutsche Zucker AG and the second on Südzucker-Verkauf. It appears to me therefore that in any event the Commission at least intended to punish the Südzucker company under Article 86, even if it cannot be ruled out that it intended also to punish it under Article 85. At least this is how this company interprets the Commission's action in its application.

The disparity between the two fines is scarcely surprising: the boundary between the fields of application of Article 85 and Article 86 is not clearly delimited; often there are similar situations which it is desirable to deal with as far as possible in the same way; in many cases moreover these two Articles, which are in the same section of the Treaty (the common rules on competition applying to undertakings) may both be applied at the same time.

Article 86 of the Treaty applies to 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it'. It is clear that this provision presupposes that some kind of link exists between undertakings which abuse a dominant position.

In the first place this link may consist of an agreement; it could even be said that the most dangerous cartels are those which are designed to create a monopoly or a dominant position. In such a situation which is extremely common a problem arises. Must not the most stringent of the two applicable provisions, namely, Article 85 or 86, be applied and, if so, which is the most stringent provision, or, on the contrary, can they be applied cumulatively? Since we are not dealing with criminal law I think the last solution is the one which must be upheld.

This link can also take the form of connexions of a permanent nature and gives rise to the problems created by subsidiaries, holding companies and financial stakes, which are typical examples of recent trends.

Then there are personal links (interlocking directorships) which have a lesser degree of cohesion. It is thought in some countries that a common course of conduct adopted by a certain number of undertakings may justify the view that they have a dominant position, at least so far as the practices are concerned for which they are blamed.

It appears to me to serve no useful purpose to ascertain whether the Commission intended to punish Südzucker-Verkauf solely for having engaged in a concerted practice or for an abuse of a dominant position, to

ascertain whether it is a concerted practice which led to the abuse of a dominant position or whether it is this dominant position which enabled a partitioning of the market to continue and to invoke one minute the operative part and next the grounds of the contested decision in favour of the applicant so that in the end it avoids paying any fine at all.

It is a fallacy to say that, since Südzucker-Verkauf is not mentioned in the operative part in connexion with the concerted practice, whereas the grounds upon which the decision was based in fact refer to this marketing organization together with this practice and the Commission said in its rejoinder that Südzucker-Verkauf does not appreciate that the fine was imposed on it, not for the abuse referred to in the operative part but because of the concerted practice, these variations should lead to the finding that in fact the Commission did not intend to punish the infringement under Article 86: the operative part appears to me to be perfectly clear and does not need to be interpreted in the light of subsequent explanations.

There is all the more reason to take this view, because in any case an opinion has to be given on Article 2 of the decision which calls upon Südzucker Verkauf to bring to an end immediately the infringement which it has been found to have committed (Article 1) and which it asks your Court to annul.

It would be paradoxical to interpret Articles 85 and 86 in a conflicting way, when these provisions implement the same objective (Judgment 21 February 1973, Case 6/72 [1973] ECR 247) and the undertakings might as it were benefit from a 'no-man's land' or take refuge in the argument that another article has been infringed or that the infringement must be imputed to another undertaking in order to frustrate the objectives of the Treaty; in fact Süddeutsche Zucker AG and Südzucker-Verkauf are jointly responsible for the infringement.

It would frustrate the purpose of unlimited jurisdiction which implies that the Court has the power and the duty to extend its investigations beyond mere questions of law: you not only review the decision but all the facts surrounding the case.

What must be prevented is not only that an undertaking is punished twice for the same infringement, but also that, because of a dispute about words, an infringement in the end escapes any punishment because it has been committed by several undertakings.

IX – Concerted action relating to the invitations to tender for refunds on exports of Community sugar to third countries

My Lords I have completed my examination of all the complaints of concerted practice having as their object the partitioning and protection of national or regional markets within the Community and also of the abuse of dominant positions in which some of the applicant undertakings engaged.

Before submitting to you the conclusions which I have drawn from this examination so far as the fines which have been imposed are concerned, I must first ascertain whether and, where appropriate, to what extent there were valid reasons for the Commission making a final complaint against the Raffinerie tirlemontoise on the one hand, the three French producers, Générale sucrière, Say and Béghin and the trading undertaking Sucres et Denrées on the other hand relating to the export of sugar to third countries. I should add that two other French firms: Lebaudy-Suc and Sucre-Union, against which this complaint has also been made, have not brought an application in your Court.

In order to allow part of the surplus Community production to be exported to

third countries at world prices, which at the time were much lower than Community prices and with a view to maintaining certain traditional patterns of trade Regulation No 1009/67 provided aid to exports in the form of the grant of export refunds. The general provisions governing this system have been adopted by Council Regulation No 766/68.

This text, which entered into force on the same date as Regulation No 1009/67, provided for two distinct systems for fixing export refunds; the system of the periodic fixing of refunds every two weeks under Article 2, which was applied forthwith and the system of fixing the refund by means of invitations to tender which was only used from the beginning of the second sugar marketing year 1969/70.

The procedure of invitations to tender, provided for by Article 4 of Regulation No 766/68, turned out in the end to be, as it were, the common law method of granting export refunds, even though periodic fixing went on concurrently, the amounts of the refund granted by this system generally being however lower.

The invitations to tender cover the amount of the refund to be granted which is fixed in the following way. The undertakings which are in competition with each other have to submit their tenders within a fixed time-limit and then an award is made to those tenderers who offered the lowest rate of refund in relation to the maximum amount fixed by the Commission after consulting the Management Committee.

It is within the framework of this system that, according to the contested decision, the undertakings in question during the year 1970 engaged in a concerted action relating to the submission of tenders both for the amounts of sugar which they intended to export and also for the amounts of sugar which they intended to export and also for the amount of the export refund. They thereby distorted the competition, which in normal conditions should have been generated by the individual and independent tenders of each undertaking participating in the invitations to tender.

Although the concerted action related to the export of sugar to third countries, it was likely to affect trade between Member States, because on the one hand it covered sugar produced in the common market and on the other hand its effect was to enable the originators of the concerted practices to modify in this way the amounts of sugar which each of them would have sold on the common market if there had been no such concerted action.

As the undertakings were naturally producers having large surpluses or their agents, they had to dispose of these surpluses outside their home market in the other Member States.

Thus, as the concerted action between tenderers answering the invitations to tender removes all doubt as to the possibility of exporting on specific terms, it is linked to the common plan of action of the producers aiming at the protection of certain national markets.

This, my Lords, is the essence of the Commission's argument. A discussion of this argument implies the examination in turn of the evidence of the existence of the concerted action which is alleged and, if it is found that it does in fact exist, of its effect on intra-Community trade and competition, taking into account the conditions under which invitations to tender for export refunds were organized and the powers which the Commission enjoys in this field both to check and restrict the amounts of sugar to be exported and also to determine the financial conditions for export by fixing the maximum amount of the refund.

My reply to the first question can only be in the affirmative.

The evidence of the concerted action is found first of all in documents of a general nature which help to make the Court acquainted with the objectives of the producers; secondly in letters or telex messages between some of the applicants and their agents, in particular between Raffinerie tirlemontoise and Export concerning the invitations to tender; finally in the facts put forward by the Commission from which it emerges that the tenders submitted by the applicants relating to the proposed amount of the refund were identical or very similar indeed.

Looking at the problem from the general point of view it must be borne in mind that, as soon as the common organization of the market was established, European producers concluded after examining the Community regulations that two markets had to be distinguished: the market for human consumption within the Community and the one for sugar surpluses intended to be denatured or exported to third countries, and took the view that it was fair that each of them should obtain the same average return from the weighting of the amounts to be sold on the market for consumption and the amount for export or denaturing.

From that moment the concerted practice relating to exports was in its embryonic stage:

It is confirmed in particular by a memorandum of the firm Export of 17 February 1970. This document refers specifically to periodic meetings before the invitations to tender attended by representatives of the French producers, who are blamed and also by the Sucres et Denrées company, during which the Raffinerie tirlemontoise, because it was so far away, kept in telephonic communication with its partners. The purpose of these meetings is stated: it is to discuss 'the general level of refunds' 'and the amount for which each member will tender, any reconciliation of these figures which may be necessary being arrived at during the multilateral discussions'.

Although this is an internal memorandum it is all the more relevant because Export, after it had, like the Hottlet company and certain French commission agents, submitted in answer to the first invitations to tender of the year 1970 tenders for refunds at a particularly low level and had in this way obtained export licences for large amounts, conformed to the policy adopted by the producers.

This policy is expressly described in a telex message of the Raffinerie tirlemontoise to Export of 23 July as being designed: 'to eliminate competition for refunds so that each producer shall be guaranteed at least the intervention price' and consequently 'to ending of the struggle to sell quantities on the home market where the price is more certain rather than having to export'.

Export, under pressure brought to bear on it by the Raffinerie tirlemontoise, had already assessed the effects of this concerted action by producers and engaged in it as is shown by the note of its President of 25 March 1970 referring to the Paris meetings.

The other documents produced by the Commission confirm the existence of the concerted action, which moreover the applicants do not seriously challenge. They endeavour to minimize its scope, some of them arguing that it amounted merely to a straightforward exchange of information, others that it consisted of getting in touch with each other at each adjudication.

In the light of the documents produced for the Court's file this reasoning cannot be upheld.

Not only does the common intention of the applicants to eliminate all competition between them at the invitations to tender clearly emerge from these documents but they can be said to establish that there was in fact a common plan of action, the execution of which is

confirmed by the results of the invitations to tender opened in 1970 or at least most of them.

If it is true that for the first six months of these operations the applicants' attempts to obtain refunds of a relatively high amount were defeated by the lower offers of the Belgian firms Export and Hottlet and by French commission agents, it is no less true that the tenders of the group of producers had been carefully coordinated and were in practice for almost the same amount.

Then from April 1970 the documents show that these producers were awarded large quantities in conditions which clearly show that they made every effort to divide between them the amounts for export by adjusting their respective tenders, frequently to within a few centimes.

As the facts have been substantially proved it is now necessary to ascertain whether the cartel was likely to affect trade between Member States and whether it had as its object and effect the distortion of competition within the common market.

Although you have not until now had the opportunity of deciding whether, under Article 85 (1), cartels dealing solely with the export of products to third countries are compatible with the common market, you have acknowledged that the agreements or concerted practices do not have to relate strictly to trade between Member States in order that the prohibitions specified in this provision may apply. Moreover, according to the case-law of the Court, the sole purpose of this concept is to delimit the boundary between the powers of Community institutions and those of national authorities. It is therefore sufficient in any event to show that the cartel or the concerted practices have been such as to affect trade between Member States, even if the effect is indirect.

Let me add that in the field covered by Article 86, the implementation of which implies that the same condition be fulfilled, you have expressly held in the *Commercial Solvents* v *Commission* case (judgment of 6 March 1974, Joined Cases 6 and 7/63 [1974] ECR 223 *et seq.)* that the concept that the prohibition on abuse of a dominant position, in so far as it may affect trade between Member States cannot be interpreted 'as limiting the field of application of this provision only to industrial and commercial operations supplying Member States' and that it is therefore necessary 'to consider all the effects which the conduct complained of has on the *pattern of competition* in the common market without making any distinction between production intended for sale within this market and that intended for export'.

This reasoning applies, *mutatis mutandis,* for the application of Article 85 (1). Moreover what the Commission complains of is not the fact that the total volume of exports to third countries has been able to be increased by the concerted action of the producers and that the amounts available for intra-Community sales have as a result been reduced, but the fact that the concerted action has adversely affected the *pattern of competition* within the common market.

The defendant takes the view that there is a causal connexion, at least an indirect one, between the concerted practices and competition to the extent to which these practices have as their object and effect the removal, for the benefit of undertakings, of all doubt concerning their exports outside the Community and thus enable them to avoid having to sell or endeavour to sell part at least of their surpluses on the Community home market under competitive conditions, which would have been necessary had it not been for this concerted action.

This is how the present issue arises and it will enable me to dispose of two of the

submissions put forward by the applicants.

The first is based on the fact that, in order to show that competition in the common market has been impeded, the Commission relied on the ground that the invitations to tender allowed sugar *produced on the territory of the common market,* to be exported.

The applicants maintain that this ground is insufficient and, what is more, wrong in law, as the place where the sugar is produced has as a rule no effect on the application of Article 85.

The Raffinerie tirlemontoise, for its part, puts forward a second submission namely that the concerted action covered the invitations to tender for refunds and not the sugar market, that is to say, only the conditions for the grant of export licences.

These two submissions must be rejected for the same reasons.

First, although the contested decision in fact states that, since the invitations to tender are concerned with exports of sugar to third countries, 'it is necessary to bear in mind that they permit the export of sugar produced within the Community' this is actually no more than a finding of fact intended to show that invitations to tender were only the method and the procedure which had to be adopted in order to obtain a licence to export the product in question.

The answer to the submissions put forward by the Raffinerie tirlemontoise is that the concerted action in connexion with the invitations to tender undoubtedly had, indirectly, an effect on the sugar market itself.

The applicants then endeavour to show that in any case the Commission enjoys in relation to the procedure for the invitations to tender such wide and stringent powers that in the end, it had such a complete control of exports that it was able to ensure that their volume does not disturb competition within the common market and cannot affect trade between Member States.

The applicants propose to infer from these premises that by admitting the existence and the object of the concerted action, for which they are blamed, it was for the Commission to see to it that these practices cannot have the slightest adverse effect on competition.

This argument, my Lords, is superficially appealing, because it is true that Community regulations give the Commission prerogatives which enable it, after taking into account the situation on the home market, to influence both the total volume of exports outside the Community and also the amount of the refunds, and after considering the methods of getting rid of the net surpluses of Community sugar production other than by exports to dispose of them by denaturing.

Nevertheless, I do not think that this reasoning is sound because the powers conferred upon the Commission do not enable it either to frustrate the type of concerted action used by the applicants or to defeat its object, which was to make sure that certain undertakings rather than others would obtain export licences for all or part of the amounts put up to tender.

The justification of the concerted practices was, as has already been mentioned, to allow the substitution of undertakings according to the volume of their available surpluses, so that the national markets or some of them are not exposed to competition which the producers intended, under the formula 'chacun chez soi' ('each in his own home') to reduce as much as possible, if not to eliminate completely.

What in fact is the nature of the legal steps which the Commission can take in

this field? Of the two systems provided for by Regulation No 766/68 the system of advance-fixing of the refund does not give it the power to control effectively the amounts to be exported. The Commission has had therefore to neutralize as it were this system by fixing the amount of the predetermined refunds at an especially low level.

The Commission has preferred to resort to the procedure of standing or partial invitations to tender, because it considered that advance-fixing was too difficult a task for the European Agricultural Guidance and Guarantee Fund and that this system had an unfavourable effect on world prices.

On the other hand under the system of invitations to tender the Commission can take certain steps on its own initiative:

— it decides the frequency and the rhythm of the invitations to tender;
— it can fix the maximum amount of the sugar to be exported at each invitation to tender;
— it fixes the maximum amount of the refund;
— it may also discontinue a particular invitation to tender, if such a step is justified by economic considerations affecting the intended exports;
— finally it has the power to suspend standing invitations to tender.

So far as undertakings are concerned they must, if they want to tender, submit within a specific time-limit tenders covering the amounts which they undertake to export as well as the amount of the refund offered. However in this respect the powers of the Commission are limited to the extent to which an award must be made to every tenderer whose tender does not exceed the maximum amount of the refund fixed by the Commission, since it is specifically stated that an award shall confer the right to the issue of an export licence showing the amount of the refund specified in the tender.

In addition a system of sharing out amoung tenderers the quantity of sugar covered by the award, according to the amount of the refund for which tenders where submitted and beginning with the lowest rate, makes it possible for the said quantity of sugar in the end to be used up.

Finally, when, as was often the case, several tenderers submitted tenders for refunds lower than the ceiling fixed for a particular invitation to tender, each of them found that it was granted an export licence for the amount which it had tendered beginning with the lowest tender, so that the maximum quota of sugar for export put up to tender was exhausted.

If several tenders offering the same amount of the refund represent in the aggregate an amount exceeding the maximum quantity they can only be taken into consideration after a proportional reduction of the amount submitted by each tenderer.

It emerges, my Lords, from these complex regulations, that the powers, which are by no means negligible, conferred upon the Commission undoubtedly enable it to control and, if necessary, to restrict, according to the situation on the Community market, on the one hand, the conditions on the world market, on the other hand, the total amount of sugar produced within the Community which is exported to third countries. Similarly, by influencing the maximum amount of the refund, it can also to a certain extent restrict exports. Finally it can also discontinue an invitation to tender to the extent to which the tenders for refunds appear to it to be too high.

But although these various methods allowed the Commission to adopt a general policy for exports and to control them for the whole of a marketing year, they did not enable it to prevent the concerted action of the tenderers because

at each invitation to tender it was legally obliged, in the circumstances which I have described, to make an award to those tenderers who submitted a tender for an amount equal to or lower than the maximum amount which it had itself fixed. The only course open to the Commission in these circumstances would have been simply to suspend the invitations to tender. It must be conceded that such a drastic step would have stopped the flow of exports if it had been implemented systematically.

It is also reasonable to suppose that the Commission was only able to uncover the concerted action after having examined and compared the results of a relatively large number of invitations to tender. It could only therefore react with some delay. It is significant in this connexion that it was only during the year 1970 that the concerted policies were implemented.

I must also answer the argument of the Raffinerie tirlemontoise directed against the system of invitations to tender, the aim of which was to lower the amount of the refund and the effect of which, according to the applicant, was to force undertakings to sell at a price below the intervention price. My Lords, to the extent to which the Raffinerie tirlemontoise intended in the first place to call in question the legality of the provisions laying down the procedure for the invitations to tender with reference to the principles of the basic regulation, I need only remind you that Article 17 of this regulation (Regulation No 1009/67), after providing that the difference between quotations on the world market and prices within the Community may be covered by an export refund, expressly provided in paragraph 3 thereof that these refunds could be awarded under the procedure of invitations to tender and gave the Council very wide discretionary powers in this field to adopt general rules applicable to these refunds. The concept of an invitation to tender implied that under its procedure there is competition between tenderers according to the amounts of the refund which are tendered.

In the second place the intervention price is only a guaranteed price to the extent to which producers in fact make use of the intervention agencies, which they were able to do. However, as we have seen, in general the producers, and in particular the Raffinerie tirlemontoise, did not do so.

None of the principles of the basic regulation therefore laid down that the amount of the refund awarded enabled the sugar to be exported in every case at a level at least equal to that of the intervention price.

It now remains, my Lords, for me to give my opinion on the question whether the concerted practice, to which exception is taken, might affect to an appreciable extent competition within the common market, a view which the applicants, and in particular the Béghin, Say and Générale Sucrière companies, challenge expressly and by implication.

You have moreover invited the parties to give their views on this point and requested the undertakings to supply particulars of the amounts of white and raw sugar which each of them exported to third countries during 1970 and asked the Commission to give the total amounts of these products exported by other undertakings or organs of the Community.

At your bar, by a brilliant performance borrowing from the theory of sets ('la théorie des ensembles'), an attempt was made to convince you, on the one hand, that intra-Community trade is in practice limited in volume to the aggregate of the deficits of Member States which import sugar, and on the other hand, that the amount exported by the applicants following the invitations to tender only represented less than 3 % of the total production of Community sugar, valued for 1970 at 7 million metric tons.

I do not intend to question the figures put forward and to ascertain whether exports in fact amount to approximately 175 000 metric tons as the applicants claim or 30 000 metric tons if the Commission's figures are accepted. But what I challenge is the relevance of the comparison between the amounts exported pursuant to the concerted action and total Community production.

It appears to me to be more relevant, on the one hand, to compare in the first instance the amounts of sugar which the applicants have been able to export owing to their concerted actions outside the Community in 1970, and, on the other hand, to compare these quantities to the volume of intra-Community trade.

The first comparison is sufficient to gauge the extent of the concerted action, since — according to the divergent estimates of the applicants and the Commission — 25 % to 45 % of the amount of approximately 700 000 metric tons of sugar exported in that year was supplied by undertakings engaging in the concerted practices. It would therefore only be necessary to take into account the amounts of sugar exported as a result of the invitations to tender, that is to say about 450 000 metric tons. The adoption of this comparison shows that the applicants' share is more than one third of this amount, if the lower estimate is taken, or even two thirds on the basis of the figures put forward by the Commission.

The second comparison shows that compared with the volume of trade between Member States — that is to say a little under 800 000 metric tons — the quantities exported to third countries pursuant to the concerted action were far from being negligible.

Account must be taken of the fact that this intra-Community market was a residual market, which should have been very sensitive to competition between producers having surplus sugar, had it not been for the policy of partitioning national markets.

By acting in concert for the purpose of exporting abroad the applicants have knowingly substituted practical cooperation between themselves for the risks of competition and consolidated situations which they have established to the detriment of the free movement of sugar in the common market.

In my opinion the Commission was justified in finding that they had infringed Article 85 (1).

X — The pecuniary sanctions which have been imposed

I can now, my Lords, deal with the problems relating to the pecuniary sanctions imposed by the Commission.

In this connexion it appears to me to be useful to recall the principles laid down in Article 15 (2) of Regulation No 17 and with which the Commission must comply when exercising the power conferred upon it by this provision to impose fines on undertakings which have committed infringements of Articles 85 and 86 of the Treaty.

This reference back will give me the opportunity of replying to the argument put forward by some of the applicants.

As I have already had the opportunity of stating, the pecuniary sanctions provided for by Regulation No 17 are not of a criminal law nature. Even if the provision had not expressly said so, it would be necessary to acknowledge that this is in fact the position, as Mr Advocate-General Gand stated in his conclusions relating to the international quinine cartel: 'because Member States have not transferred to the Community any criminal jurisdiction'.

According to Mr Advocate-General Roemer Community fines are similar to

the administrative fines provided for by the German law on restrictions on competition, which come within the purview of administrative infringements.

In the second place the aim of these sanctions is to 'punish unlawful conduct as well as to prevent its repetition'.

Bearing in mind this aim you have inferred that 'the Commission's power to impose fines is in no way affected by the fact that the conduct constituting the infringement has ceased and that it can no longer have detrimental effects' (Judgments of 15 July 1970, the quinine cases, Rec. 1970, p. 704). Therefore the argument based on the view that the fines which have been imposed were illegal because they had retroactive effect can only be rejected.

Article 15 of Regulation No 17 makes the imposition of a fine subject to the condition that the infringement found to have existed was committed intentionally or negligently.

The first of these expressions must be understood to mean that undertakings and their agents were aware that the concerted practices implemented between them or the abuse which they made of their dominant position restricted competition and therefore fell within Article 85 (1) or of Article 86. But that is not an indispensalbe condition. Mere negligence is sufficient to justify the imposition of a fine since undertakings ought not to have been unaware of the unlawful nature of their conduct.

You have moreover held that the existence of a deliberate intention is an aggravating circumstance which the Commission may legitimately take into account in order to determine the amount of the fine (Judgment of 15 July 1970, *Böhringer* v *Commission*, Case 45/69, Rec. 1970, p. 810).

The Commission has to state in this connexion the reasons upon which its decision is based. This is what it did in this case without however giving the specific reasons relating to each of its complaints. I do not think that the general form of words which it used can be regarded as an insufficient statement of reasons because it is clear that this wording is explained, for each of the undertakings affected, by the detailed and reasoned statement of the context in which the infringements have been committed.

So far as the principal issue is concerned there is no doubt that the conduct of the undertakings was in fact intentional. Among the documents produced for the Court file we have found that a great many of them not only prove the substance of the infringements but throw light on the intentions of the applicants and their common intention to eliminate competition between producers on their respective markets and share out between them exports to third countries.

In the third place Article 15 (2) of Regulation No 17 in no way imposes upon the Commission, as Say, Béghin, Générale sucrière and Sucres et Denrées in particular claim, the obligation to apportion the fine among the different infringements found to have existed.

The argument arising out of the wording of this provision, which is exclusively based on the use of the word 'infringement' in the singular, is not enough to justify such a conclusion.

Infringements of Community rules on competition cannot be treated in the same way as criminal offences and the Commission, so far as the fixing of the amount of the fine is concerned, is only bound by the double ceiling laid down by Regulation No 17, in absolute figures, the sum of 1 million u.a. or, where appropriate, a sum equal to 10 % of the turnover in the preceding financial year of the undertaking affected.

The Commission therefore has, subject to review by the Court, a wide

discretionary power and does not have, in the case of cumulative infringements, to determine separately the proportion of the fine relating to each of the infringements which have been found to have existed.

What is more the principle of fixing individual fines does not preclude the prior determination of a lump sum to be apportioned between the various undertakings who are members of a cartel or which have engaged in concerted practices, as you held in the judgment of 15 July 1970, *Böhringer* v *Commission* (Case 45/69, ECR [1970] 812).

On the other hand the Commission in fixing the amount of the fine must have regard to the gravity and the duration of the infringements which have been found to exist.

You stated, in the same judgment, that the fine must be determined after taking into account, in particular, the way in which competition was restricted, the number and the size of the undertakings concerned, the respective proportion of the market which they control in the Community, and also the situation on this market at the time when the infringement was committed.

The Commission has not failed to undertake such an evaluation by giving its general views on the gravity of the infringements. It held against the applicants the fact that sugar is a basic foodstuff which has a special importance for the consumer; also the fact that the practices found to exist are clearly contrary to the objective of the establishment of a single market since they are essentially designed to partition the national or regional markets and to maintain positions previously established by producers.

The applicants make the general submission that the amount of the fines is clearly excessively high compared in particular with the pecuniary sanctions imposed previously by the Commission for infringements of the rules on competition. They regard them as an example of the systematically punitive spirit in which the procedure was carried out and which is illustrated by the information made available to the public by the Commission before the decision had even been finally taken.

It is true, my Lords, that, judged by the actual figures, the fines imposed may appear to be particularly heavy. The Commission does not, moreover, conceal the fact that it intended to punish more severely than in the past, practices which are against competition.

But it calls attention to the fact that in any event these sanctions are well below the maximum threshold for fines fixed by Article 16 (2) of Regulation No 17 according to the turnover of the undertakings in the last financial year preceding its decision. In fact the amount of the fines varies according to each of the applicants and after taking into account their degree of liability, from 0·5 % to 2 % at the most of their respective turnover. With the exception of the specific case of commercial undertakings such as the Sucres et Denrées company and the Südzucker-Verkauf marketing organization, I do not think, for my part, that the fines which have been imposed are excessive having regard to the gravity of the infringements found to have been committed by the contested decision and their effects on intra-Community trade.

It is certainly advisable to take into account the facts peculiar to the system established by Regulation No 1009/67 about which I have said that the systems of prices and in particular the national quotas in themselves contained some incentive to restrict trade in sugar between Member States and to continue some degree of partitioning of the national markets.

But, my Lords, it appears to me that the Commission has itself taken into

consideration these facts which are likely to reduce to a certain extent the liability of the undertakings.

It has offered a clear explanation by mentioning:

— on the one hand, the fact that 'producers had become used to practices arising out of the national organizations of the market existing before 1 July 1968 has not made it easier for them to adapt themselves to the new situation created by the common organization of the market'

— and on the other hand, the fact that the said common organization included certain restrictions without nevertheless eliminating opportunities for competition.

Consequently if I had not myself submitted that certain complaints should be dismissed for the reasons which I have already given, I would be inclined to ask you to confirm the fines which have been imposed with the exception of those relating to undertakings which are not producers.

But I must accept the consequences of the solutions which I have thought it right to adopt concerning, on the one hand, the complaint of concerted practices for the protection of the Italian market, and on the other hand, the failure to implement the concerted action on the market in the Netherlands between the Netherlands producers and the Pfeifer & Langen firm.

If you share my view you will annual part of the contested decision to the extent to which it holds that infringements of Article 85 (1) have been committed by the undertakings concerned. Consequently you will also have to annual Article 3 of this decision to the extent to which it refers to those undertakings which have been fined by reason only of their participation in the concerted action relating to the deliveries of sugar in Italy. This is the position in the case of the six producers of this country:

'Eridania' zuccherifici nazionali,

Società italiana per l'industria degli zuccheri,

Cavarzere produzioni industriali,

Società agricola industriale Emiliana,

Zuccherificio del Volano,

and finally SADAM.

On the other hand with regard to the other undertakings concerned, namely the companies Béghin, Say, Générale sucrière, Sucres et Denrées as well as the Raffinerie tirlemontoise, and finally the firm Süddeutsche Zucker AG, it will only be necessary to rectifiy Article 3 of the contested decision by reducing the amount of the fine imposed upon each of them.

This reduction should take into account the relative seriousness of the infringement of Article 85 (1) which was designed to protect the Italian market, compared with the gravity of the other infringements which have respectively been found to have been committed.

In this connexion I do not believe that I have to state by how much, according to each individual case, the amount of the fines must be reduced, but it appears to me reasonable to take into account the fact that the Commission regards the complaint relating to deliveries on the Italian market as being exceptionally serious. In fact Italy — the area having the highest surplus in the Common Market — is or should be, as the defendant has asserted, the country to select for competition in intra-Community trade; it is also true that the amounts of sugar imported into this country from France, Belgium or even Germany has increased during the four marketing years under consideration, to a total of about 650 000 metric tons within the context of the alleged concerted action.

In these circumstances there is little doubt that in fixing the amount of the

fines special importance was attached to this complaint. It is at least certain that owing to its gravity and duration it justified in the mind of the Commission a much heavier punishment than the complaint of engaging in a concerted action covering the invitations to tender for exports to third countries.

With regard to the protection of the Netherlands market much less importance appears to me to have been attached to the complaint made — in my opinion wrongly — against Suiker Unie and Centrale Suiker on the one hand, and Pfeifer & Langen on the other hand, if only by reason of the situation of the respective markets of the Netherlands and the western part of Germany, which in any event, could hardly have allowed imports of German sugar on to the Netherlands market except on a limited basis.

Moreover we have seen that the one delivery of sugar from Pfeifer & Langen to Limako which is contested only covered a relatively small amount. While I recommend that you dismiss this complaint I suggest that you only reduce the amount of the fines imposed on these three undertakings to a strictly limited extent.

Finally the specific question raised by the Sucres et Denrées company has to be decided. The Commission has admitted that it established a certain ratio between the amount of the fines imposed and the turnover of the undertakings in question. Now, although this factor in the calculation appears to me to be justified so far as the producers are concerned, it cannot be applied in the case of a commercial undertaking which is an intermediary and carries on business either as broker or by becoming the owner of sugar which it undertakes to export for the account of the producers. But it only becomes the owner of the product during the time required to despatch the sugar and to complete the transaction. Sucres et Denrées often did business in this way, in particular in the case of exports of sugar to Italy, and when it did so it assumed responsibility for guaranteeing the quality of the product exported and the financial aspects of the transaction.

Therefore it is fair to say that when the Commission fixed the amount of the fine which it imposed on Sucres et Denrées, it assessed as it were the same turnover twice, that of the French producers who trade with this undertaking and its own apparent turnover, although it is in fact paid on a commission basis.

When it fixed the amount of the fine imposed on this undertaking the Commission proceeded on the basis of a false evaluation. In order to make allowance for this mistake and for the fact that Sucres et Denrées is only held to be liable for engaging in concerted practices relating to exports to countries outside the Community, I am of the opinion therefore that it is advisable to reduce the amount of the fine to a very much greater extent than in the case of the companies Say, Générale sucrière and Béghin.

It would be appropriate, in my opinion, to proceed in the same way in the case of the marketing organization Südzucker-Verkauf, in respect of which the infringement of Article 86, found by the Commission to have existed, must be upheld, although, in order to determine the amount of the fine, account must be taken of the fact that we are dealing here not with a producer but with a marketing organization.

For these reasons my final conclusions are:

(1) that the contested decision (subparagraph 1 of Article 1 (1)) should be annulled to the extent to which it refers to infringements of Article 85 (1)

based on a concerted practice having as its object and effect the control of deliveries of sugar on the Italian market and the protection of that market;

that consequently Article 2 of the contested decision should be annulled to the extent to which it concerns undertakings referred to in the said subparagraph of Article 1 (1) and that Article 3 of the said decision should be annulled to the extent to which, under this provision, fines are imposed upon the following undertakings:

- 'Eridania' zuccherifici nazionali (paragraph (1), subparagraph (f))
- Società italiana per l'industria degli zuccheri (paragraph (1), subparagraph (g))
- Cavarzere produzioni industriali (paragraph (1), subparagraph (h))
- Società agricola industriale Emiliana (paragraph (1), subparagraph (i))
- Zuccherificio del Volano (paragraph (1), subparagraph (j))
- SADAM (paragraph (1), subparagraph (k));

(2) that the costs relating to Cases Nos 45, 46, 50, 111, 113 and 114/73 should be borne by the Commission;

(3) that the conclusions arising out of the intervention of l'Unione nazionale consumatori should be rejected and that the costs relating to the said intervention should be borne by the intervener;

(4) that the contested decision (subparagraph 2 of Article 1 (1)) should be annulled to the extent to which it refers to infringements committed by Suiker Unie and Centrale Suiker Maatschappij on the one hand, and Pfeifer & Langen on the other hand, based on a concerted practice having as its object and effect the control of deliveries of sugar on the Netherlands market from the Western part of Germany and consequently the protection of that market;

that Article 2 of the said decision should accordingly be annulled to the extent to which it relates to these undertakings in connexion with the said concerted practice;

(5) that Article 3 relating to the determination of the amount of the fines imposed should be rectified in the way which I have indicated;

(6) in addition that the conclusions of the applications in Cases 40 to 44/73, 47 and 48/73, 54 to 56/73 should be dismissed;

(7) that the costs should be borne, in so far as the said cases are concerned, by the applicants and by the Commission respectively according to the reduction of the amount of the fines imposed upon each of the applicants.