

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 July 1988

relating to a proceeding under Article 86 of the EEC Treaty
(Case No IV/30.178 Napier Brown — British Sugar)

(Only the English text is authentic)

(88/518/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to the application made to the Commission pursuant to Article 3 of Regulation No 17 by, *inter alia*, Napier Brown and Company Limited, on 19 September 1980, as subsequently amended and extended, alleging infringements of competition rules by British Sugar plc,

Having regard to the Commission's Decision of 3 July 1986, to initiate proceedings in this case,

Having given the party concerned the opportunity to make known its views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17⁽²⁾,

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

Whereas :

THE FACTS

A. Introduction

- (1) This Decision arises from an application pursuant to Article 3 of Regulation No 17 by Napier Brown and Company Ltd (hereinafter 'NB') and certain other United Kingdom sugar merchants — a complaint that was extended and enlarged by NB in mid-1985. NB alleged that British Sugar plc, part of the large multinational group S. & W. Berisford had, contrary to Article 86 of the EEC Treaty, abused the dominant position which it holds in the United Kingdom granulated sugar market.

B. The parties

- (2) British Sugar plc (hereinafter 'BS'), based in Peterborough, United Kingdom, is the largest producer and seller of sugar in the United Kingdom and the only processor of sugar beet in the United Kingdom. The turnover of British Sugar in 1984/85 was £ 637 712 000, and pre-tax profit was £ 53 564 000.

BS is a subsidiary of S. & W. Berisford plc (hereinafter 'Berisford'). Berisford purchased BS in August 1982, following an investigation into the merger by the Monopolies and Mergers Commission (MMC). The latter, in its report, recommended that the merger should be allowed to proceed, and that potential adverse effects on the public interest be remedied by an undertaking which should commit Berisford :

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

- to cease trading in Tate & Lyle sugar and sugar products, save for the acquisition of sugar for incorporation in Berisford's and BS's own products, and
- to maintain BS as a separate subsidiary without major changes in its activities or purposes.

In 1981, undertakings were agreed with the United Kingdom Secretary of State, and the merger went ahead. In accordance with these undertakings, Berisford sold S. & W. Berisford (Sugar) Ltd, Berisford's United Kingdom Sugar merchanting business, to NB. Berisford's current sugar interests are confined to producing sugar through BS and buying and selling sugar on Berisford's own account on the world market through its subsidiaries J.H. Rayner Ltd in London, Lonray Inc. in New York, Etlafric SA in Paris, and Intertransazuckerhandels GmbH in Munich.

- (3) The Sugar Act of 1956 gave BS a legal monopoly in the production of beet sugar in the United Kingdom. At this time BS placed a voluntary limitation of 640 000 tonnes on the amount of refined sugar it would produce, and any surplus beet raws were sold to the cane refiners. On accession to the EEC, the United Kingdom sugar market became subject to the Common Agricultural Policy sugar regime.

As the sole United Kingdom beet sugar producer, BS is allocated the entire United Kingdom basic quantity of sugar under the EEC sugar regime, and is thus the only company involved in the production of sugar from beet origin.

- (4) NB is the largest sugar merchant in the United Kingdom. The company engages in buying and selling sugar (including import and transport operations) both as nominal and real merchant. The turnover of NB in 1985 was £300 398 479, and its pre-tax profit on ordinary activities was £1 512 817.

As a sugar merchant NB buys and re-sells sugar in two ways: *real merchanting*, where the merchant buys the sugar in bulk quantities, re-selling it to other customers at a premium, and *nominal merchanting*, where a customer places an order through a merchant so that the job of the merchant is to obtain the best conditions available for his client. The merchant receives a fee for this service. The merchant may choose to deliver the sugar to its client using its own transport facilities. In fact, NB has its own transport facilities for such purposes.

- (5) In late 1984, 39 % of the shares of NB were purchased by Whitworths Holdings Limited (hereinafter 'Whitworths'). Whitworths is a company involved in the import and sale of such products as dried fruits, rice, nuts and speciality sugars. As part of the abovementioned transaction, Whitworths agreed that all sales of sugar under the 'Whitworths' name would in future be made by NB and not by Whitworths itself. This applied to granulated, white and speciality sugars.

C. The product

- (6) The product to which this Decision relates is granulated sugar derived from sugar beet or sugar cane.

Such sugar is sold either for retail or industrial use. For industrial use the sugar is sold either in bulk (tanker) or 50-kilogram sacks. For retail use the sugar is sold jackaged, usually in one-kilogram paper bags. Granulated sugar, whether used for retail or industrial purposes, and whether of beet or cane origin, has similar properties. Retail sugar is, in fact, industrial sugar packaged for retail sale.

D. The complaint

- (7) By a formal application dated 19 September 1980 under Article 3 of Regulation No 17, NB and certain other United Kingdom sugar merchants complained to the Commission that BS was acting in breach of Article 86 of the Treaty of Rome.

The original complaint was based upon allegations that BS, by attracting clients to deal directly with them instead of through merchants, was abusing its dominant position. Part of this dispute, largely covering the original specific allegations made in the above complaint, was settled by negotiation or has been superseded through a change in circumstances. NB however still maintained that BS was engaged in a course of conduct ultimately intended to force the merchants out of the United Kingdom sugar market.

- (8) In October 1983, NB decided to attempt real merchanting in retail packet sugar, which merchants had only done before in large quantities with sugar for industrial use. NB requested 50 000 tonnes of retail sugar (Silver Spoon) from BS. After prolonged negotiations, NB decided that it would be impossible to reach agreement with BS for the purchase of such sugar. To overcome this problem, NB arranged with Whitworths to package industrial sugar under the 'Whitworths' brand for retail sale. To this end 25 000 tonnes of bulk industrial sugar were purchased by NB from BS for supply between July and December 1985⁽¹⁾, part of this sugar being intended for packing into retail packets. At the time of purchase BS was unaware of the intended use of the sugar.

NB began to sell its new brand in mid 1985, and a 'new phase' to the case arose shortly after this, when NB claimed that BS was attempting to remove it from the retail sugar market. This 'new phase' to the case effectively began on 26 July 1985, when NB first drew the attention of the Commission to problems that it was having in its packeting operations allegedly due to BS's actions. NB subsequently extended its formal complaint by alleging that BS has, with the intention of removing NB from the retail sugar market, pursued amongst other actions, those indicated below. These alleged activities of BS led NB, on

⁽¹⁾ Contracts 1/338 and 1/340 dated 21. 2. 1985.

20 December 1985, to make an application for interim measures to safeguard its position pending any final decision the Commission might adopt on the substantive issues.

E. Statement of Objections, interim measures : BS's undertaking

- (9) The Commission sent an interim measures Statement of Objections to BS on 8 July 1986. Subsequently, BS offered, by letter dated 5 August 1986, an undertaking to the Commission covering the points raised in the abovementioned Statement of Objections. The Commission accepted these undertakings by letter dated 7 August 1986. In this letter, the Commission noted that :

'The acceptance of this undertaking does not prejudice the final outcome of the case, which will, *ceteris paribus*, proceed towards the taking of a final decision.'

- (10) Subsequent to this, in October 1986, BS informed the Commission that it intended to implement a comprehensive compliance programme in order to ensure that in the future the Company fulfilled all of its obligations under Article 85 (1) and particularly Article 86 of the Treaty. This programme has subsequently been adopted⁽¹⁾. As part of this programme, BS holds an annual anti-trust compliance review meeting, following which a report is compiled, a copy of which is forwarded to the Commission. The Commission has received no indications since BS offered undertakings that BS has continued to pursue the abuses of its dominant position outlined below.

The Commission accepts that neither the giving of undertakings by BS in response to the Interim Measures Statement of Objections nor the adoption of a compliance programme amounts in any way to an admission of liability by BS as regards the allegations made against them in the Statements of Objections.

F. Matters dealt with in the present Decision

- (11) The part of NB's application dealt with in this Decision concerns the allegations of NB that,

following the extension of its activities into the retail sugar market, BS amongst other actions :

- refused to sell sugar to NB,
- engaged in pricing practices which had the objective of driving NB out of the retail sugar market,
- refused to supply sugar on an ex-factory basis,
- refused to supply sugar to NB of beet origin only,
- offered 'group commitment or loyalty bonuses' to a certain buying group, some of whose members purchased from Napier Brown, in order to persuade all of the group to purchase sugar exclusively from British Sugar.

- (12) This Decision also takes account of BS's 'de-listing policy' — a subject which Napier Brown did not raise in its complaint, but concerning which Commission officials obtained information during an inspection at BS's premises and via subsequent inquiries.

G. 'De-listing'

- (13) The Commission became aware of the facts set out in this section as a result of certain documents copied by Commission inspectors during an inspection at BS. Although the Commission does not intend to take a decision under either Article 85 (1) or Article 86 relating to the following facts, it is necessary to outline certain actions of BS in order to put into context its underlying strategy in carrying-out the actions which the Commission considers to constitute an abuse of BS's dominant position.

- (14) Whitworths package industrial sugar for NB into retail bags. NB subsequently sells this sugar under the Whitworths trade-mark.

- (15) The Commission has ascertained that, at the same time that NB entered the retail sugar market, BS introduced a policy whereby it intended to visit major outlets for retail sugar and offer to them one or more BS products at excellent prices on the condition that the customer 'de-listed' or refused to stock, Whitworths' products.

⁽¹⁾ The text of this programme may be obtained from the Commission, Brussels, telephone : 02/235 23 64.

(16) Thus, BS intended to make offers which were not necessarily conditional upon the customer agreeing to take all its requirements of one or more products from BS, but rather upon the customer agreeing not to purchase any of one or more products from Whitworths. From internal documents copied at BS during the inspection carried out at BS, it is clear that BS discussed and considered such a policy. Further documents show that BS also attempted to carry out this policy, and subsequent attempts to delist Whitworths related not only to granulated sugars, but also to speciality sugars and dried fruit in which Whitworths have a long-standing reputation.

(17) Documents obtained from BS which show that BS attempted to implement these ideas include a document, headed 'anti Whitworths drive', which concerning Whitworths Brand sugars noted the following:

'They have good distribution on Browns, Dems etc. You need to identify by account their strengths and come up with specific proposals to de-list them. You need to be aggressive. I am aware much work has already been done on this. An update please.

...

If we are to succeed in seeing-off the Whitworths threat, we MUST attack on all fronts. It is time to get nasty!

(18) Documents obtained from BS which show that BS subsequently attempted to implement this policy include the Minutes of a meeting in response to the 'anti Whitworths drive' note. These Minutes list the major purchasers of speciality sugar specifying those where Whitworths are listed or not listed. Amongst the companies considered, the following is pertinent:

[...]⁽¹⁾ — Totally de-listed.

[...] — Do have a presence. Our proposition is for solus supply (currently T & L and Whitworth). NTG to action.

Cash & Carry/Wholesale — Strong Whitworth presence. We have good listings but poor distribution. NGT/SP to take up at next negotiation meeting.

(19) It is clear from these facts that BS adopted a policy of attempting to precipitate the removal of NB from the retail sugar market by all means at its disposal. However, the Commission has not established any case in which 'de-listing' proved successful. In the light of this, the Commission

does not consider it necessary to adopt, in the present case, a decision stating that BS abused its dominant position by the adoption of this policy.

H. The alleged abuses

Refusal to supply

(20) NB alleged in its complaint that BS constructively refused to sell industrial sugar to NB, with the result that it had to purchase more expensive supplies from companies situated in other Member States, and furthermore that BS made such a refusal with a view to ensuring NB's withdrawal from the retail sugar market.

(21) The contracts between BS and NB dated 21 February 1985, for the supply of sugar between July and December 1985 expired in December 1985. Regarding supplies after December 1985, NB alerted BS on 3 October 1985 by telephone that it would be requiring sugar, which was followed by a formal written request for 30 000 tonnes of sugar made by letter dated 17 October 1985. BS subsequently informed the Commission that it would deal with the request after its meeting with Directorate General IV (DG IV) arranged for 28 November 1985. The Commission informed BS that the Commission would not accept any arguments of BS that it had sold all its A/B quota between NB's request for sugar and BS's meeting with the Commission as a justification for refusing to sell sugar to NB.

(22) At the abovementioned meeting with the Commission, BS outlined its intentions:

— under the previous contract NB had rejected various consignments of sugar on the grounds that the grain size of the sugar was excessively large compared with BS's widely available typical analysis. BS therefore offered 30 000 tonnes *per annum* of special grain size sugar at a premium above the price of standard granulated sugar of a minimum £ 26,32 per tonne (five-year contract with a performance bond), supply beginning ± July 1986 when special sorting equipment could be installed.

— BS was aware that it would have limited supplies of sugar for sale due to the EEC sugar regime, and expected to be short of sugar during the 1985/86 season, as it had experienced unusually strong demand from clients during the first few months of the new season. In order to ensure continuity of supplied to its customers, BS had set up a quota system: each customer would only be permitted to purchase amounts equivalent to those purchased (as opposed to contracted for) in the previous season. In the case of NB this quota system would result in the following offer being made

⁽¹⁾ In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

to NB by BS : from the contracts No 1/338 and No 1/340 for supply between July and December 1985, NB had taken, according to the calculations to be used for this scheme, 17 148 tonnes during the 1984/85 sugar year (1 October 1984 to 30 September 1985). Therefore, should NB not take up the 'special grain size' offer, it would be entitled to 17 148 tonnes in the 1985/86 sugar year, of which NB had already contracted to take 10 000 tonnes between October and December under the contracts 1/338 and 1/340. Thus, BS would enter into new additional contracts for standard grain size sugar for a total of 17 148 - 10 000 tonnes = 7 148 for supply to NB in the 1985/86 sugar year.

This offer was transmitted by BS to NB by letter dated 11 December 1985, with contracts No 1/872 and No 1/873 subsequently implementing this offer.

- (23) The Commission investigated NB's allegations by requesting information pursuant to Article 11 of Regulation No 17, and subsequently by an inspection at BS's premises pursuant to Article 14 (2) of Regulation No 17. Following these investigations, the Commission has concluded that BS's refusal to supply NB's requirements of industrial sugar cannot be justified by a shortage of sugar. The quota system adopted by BS was unnecessary, implemented in a manner discriminatory against NB and adopted only to justify BS's refusal to supply.

Furthermore, this refusal cannot be justified by BS's 'special grain size' offer. The Commission, after having examined this offer in the light of all available facts, has concluded that the offer was, like the quota system, unnecessary and adopted only in an attempt to justify BS's refusal to supply standard industrial sugar to NB.

The facts that have led the Commission to these conclusions are as follows :

- (a) Certain documents, discovered by the Commission during the inspection at BS show that BS considered and discussed refusing to sell sugar to NB. A note written by the Executive Marketing and Sales Director⁽¹⁾ and filed under 'Whitworths' reads as follows :

'NB/whit.

...

N.B. — continent
— charges
— cut contract
— no new contract
— T/L no new agreement'

This document was written, according to the abovementioned Director, in approximately August 1985. The document shows that at that time BS considered refusing to supply NB. It is in this context that the following facts, indicating that the quota scheme was only put forward as a reason to justify BS's refusal to supply NB, should be seen.

- (b) Despite the fact that during a meeting with the Commission in late November 1985, BS's Managing Director⁽²⁾ stated that the application of the quota system had been and was to be universal *vis-à-vis* all of BS's customers, the Commission subsequently discovered that BS had contracted to sell considerably more sugar to certain clients during the 1985/86 season than it had done during the 1984/85 season.

In certain cases the contracts regarding these increased industrial sugar supplies were concluded as late as October 1985, the month that NB requested further supplies of industrial sugar from BS.

- (c) Various documents copied during the inspection at BS show that even since the formal introduction of the quota scheme, BS had been actively offering sugar, especially retail, to other clients and particularly to clients or ex-clients of NB.

BS's interest in increasing its sales to purchasers of sugar is shown, for example, in the minutes of its Sales Production Coordinating Committee of 14 November 1985 :

'Retail

- (i) SP confirmed that in period 1 there had been a deficit of 4 000 tonnes against forecasts — it was anticipated that the deficit for period 2 would be reduced to 1 000 tonnes in spite of the overall UK market reduction of some 6 %.
- (ii) In spite of the foregoing this year's forecast of [...] t should be achieved.
- (iii) SP summarized main account activity as follows :
- (...) ((...) total usage) negotiations continue
- [...] — we have [...] of their business and every effort is being made to increase this proportion to [...]

⁽¹⁾ A new Executive Marketing and Sales Director took charge of this post in mid-1986.

⁽²⁾ A new Managing Director took charge of this post in mid-1986.

[...] — currently we have [...] of their total usage and we hope to increase this to [...]

Solus accounts — these include [...] etc and we can but hope to maintain our position with these accounts'.

- (d) Certain BS documents copied during the inspection indicate that the 'sugar shortage', which BS claims justifies the implementation of its quota system, was not in fact perceived by BS as a real one.

Although supplies to industrial clients increased compared with the previous year, the loss in the retail sector made up for this increase, such that no real shortage existed.

A document, 'sugar sales to date' (30 December 1985) notes:

'At present level of activity the annual estimate for industrial sales runs out at approx. [...] tonnes. [...] of the pre-campaign forecast has been negotiated to date. Despite this, the full year effect of the current activity cannot yet be qualified as there is still the possibility of unfavourable conclusions to account negotiations in the second half of the year.

As a result the latest annual estimate (January 86) for industrial sales is [...] which is [...] tonnes above the pre-campaign forecast of [...] tonnes.

Retail sales at [...] were [...] tonnes below forecast. This reflects the effect of the to date net loss of business. Three customers have been lost out of the precampaign forecast of [...] K tonnes with a combined annual volume of [...] tonnes. Set against this are various gains, with the net effect that annual sales are [...] short of the annual estimate (January 86) of [...] tonnes. It is anticipated by marketing that the shortfall can be made up in the later periods.'

Furthermore, a progress report for a Board Meeting of 28 February 1986 notes that:

'Sales + Marketing

(a) Retail

On current estimates, the retail volume for 1985/86 will be down some 6 % on the previous year, assuming current distribution is held. Gaining new accounts to recover some of this lost volume is restricted at this time due to the action being pursued by NB with the EEC Commission.

(b) Industrial sugar sales

Current volume trends remain strong and 1985/86 should at least achieve budget: this will represent an increase of 4 % on the previous year.

Imports continue at a low level and are further restrained by the current disparities in price between the continent and Britain.'

- (e) Evidence discovered by the Commission shows that the quota scheme was in reality only implemented *vis-à-vis* NB as BS was willing to supply customers, purchasing sugar from other sugar producers if this would be necessary to cover any sales above its quota. An internal BS note addressed to BS's Managing Director (January 1986) states that BS's objectives regarding sugar sales were to:

'optimise our consumer base and expand share beyond quota restrictions through buying in sugar; to defend the retail business against NB; to improve industrial sales margins above support price'.

- (f) A document copied at BS shows that the actual implementation of the quota scheme was carried out in a discriminatory manner; NB was not even offered the quantity of sugar that it was entitled to under the quota scheme. If the quota scheme had been correctly implemented, NB would, according to BS's own calculations, receive the same amount of sugar in the 1985/86 season as it had purchased and received during the previous season. However, an internal BS note states:

'Plus factors	
Post December 85	— [...] ...]
Minus factors	
Post December 85	— [...] ...]
	NB [...]

- (g) BS's quota arrangements could have had considerable consequences upon one of its customers who wished to purchase more sugar in the 1985/86 sugar year from BS compared to the amount they had purchased from BS during the 1984/85 sugar year, as BS would, due to the quota scheme, have been forced to refuse to supply this customer any sugar additional to its quota. One would therefore expect that any responsible company would have forewarned its traditional clients of its quota system to enable them to make appropriate arrangements.

However, in a reply to a request for information under Article 11 of Regulation No 17 regarding the clients which BS had informed that it had implemented a quota system, BS replied that it had informed three sugar merchants together with [...] (one company to which BS is selling more in the 1985/86 season than it had sold during the previous season) and [...]. In fact BS only informed these companies and sugar merchants that it was 'looking at possibly being in a limited supply position in 1986 (and so therefore) it is essential that we discuss any indications of any potential upside on these volumes'.

The fact that BS did not make any effort to inform its traditional clients of the existence of the quota scheme indicates that the quota scheme was in fact only intended to be applied to NB.

- (h) BS internal documents dated January 1986 show that BS only concerned itself with whether or not it had implemented the quota scheme *vis-à-vis* other clients than NB three months after the introduction of the quota scheme, and its interest in applying the quota scheme was motivated not by the shortage of sugar, but by the action of the Commission.

The following note, dated 23 January 1986 was sent from the Executive Marketing and Sales Director to the Managing Director and the General Sales Manager for Industrial Sales:

'Industrial sugar — new customer enquiries

I enclose two enquiries which have come to hand. We must be mindful that an attempt to 'set us up' is not impossible under the present circumstances and that these enquiries could have been put forward with this purpose. I believe it is our current practice to pass such matters to merchants and would ask you to ensure that this happens in these two cases.

We have agreed not to make a public announcement about our allocation arrangements for obvious commercial reasons. Nevertheless, it is necessary to be most careful of applications for additional supplies from customers which could be prejudicial to us if granted without consideration. I do not want to discourage the sales force at all from seeking to increase our customer base and the volume of sales we can profitably undertake and hope that we can find ways of meeting all our customers' requirements without damaging our standing; No doubt you will review enquiries for additional

supplies personally — I would appreciate if you would keep me advised on such matters.'

- (i) This refusal to supply cannot be justified by the 'special grain size' offer made by BS, because the facts show that the offer was not requested by NB and furthermore must have been made by BS in the knowledge that NB could not purchase and use the sugar in question at the prices offered by BS.

Taking account of the fact that a small difference in the price of sugar (it being a commodity) makes a considerable difference as to whether or not a merchant can either resell the sugar to an industrial client or profitably repack the sugar for retail sale and sell it in competition with other retail sugar producers — it must have been clear to BS on making this special grain size offer that NB could not accept such an offer as it would have been unable to resell the resultant sugar at a profit either in retail form or to industrial clients under real merchandising contracts.

BS' pricing policy

- (24) NB claims that BS, between early 1985 and 1986, had been undercutting NB's retail sugar prices to clients or potential clients to a level at which it was impossible for a repackager of sugar in the United Kingdom without an internal source of industrial sugar to survive in the long term, thus artificially maintaining an unrealistically low margin between its prices of industrial and retail sugar with the objective of forcing NB out of the market. NB also alleges that, until the end of 1986, BS refused to supply sugar to any customer for use on the relevant market otherwise than on a delivered basis.

Facts found by the Commission regarding BS's pricing policy

- (a) BS' pricing policy in relation to retail sugar sales
- (25) In a case such as this, where an undertaking is alleged to be dominant in the markets for the supply of both a raw material and a downstream product, and it is further alleged that the dominant undertaking maintains an artificially low margin between the price of the raw material (industrial sugar) and the price of the downstream product (retail sugar), the analysis of pricing must be centred upon the difference between the selling price of the dominant companies' raw material and its downstream product prices, in the present case on the margin between BS's price for industrial and that for its retail sugar (the repackaging margin).

- (26) The following are repackaging margins as supplied by NB and BS (price in £ per tonne) which correspond to the period under consideration :

	NB	BS
Cost of packaging (including storage and finance costs where relevant)	[...](⁽¹⁾)	[...]
Cost of transport	[...]	[...]
Cost of advertising	[...]	[...]
Profit margin	[...]	[...]
Total	[...]	[...]

(⁽¹⁾) This amount would have been reduced by [...] if NB had received only beet origin sugar for repackaging.

It is to be noted that the major difference between the two packaging margins supplied by BS and NB respectively is that of transport. This is because BS used a delivered price only system. Thus the margin calculated by BS (i.e. the margin above BS's industrial sugar price, which itself already contained a standard charge for the delivery of that industrial sugar) is simply the costs incurred by BS for delivering retail sugar in addition to its costs of delivering industrial sugar. NB on the other hand, had to pay a standard charge for the delivery of industrial sugar from BS included in the price paid (BS refused to permit NB to collect the sugar) and, in addition, bear its transport costs for retail sugar.

- (27) NB was, during the period under consideration, offered and purchased industrial sugar from BS at [...] per tonne.

[...] NB's main clients or ex-clients, were ultimately offered packet sugar by BS at a net price of [...]. [...] a traditional BS client, approached by NB, was also offered packet sugar by BS at a net price of [...] (see tables below).

In addition to the very attractive price of [...] which was accepted by a [...] Board meeting on 17 December 1985, [...] subsequently received this price backdated to [...], by way of cash rebate paid directly to [...].

[...], who received the offer of net [...] per tonne in [...] had the offer backdated to [...].

[...] explained that it is common practice, when a particular agreement for the supply of sugar expires and negotiations for future supplies have not yet been concluded, for sales of sugar to continue at

the old price on the understanding that the new price will be backdated to the end of the previous agreement.

In the present case the price paid by [...] to BS was re-arranged on [...], [...] and [...], no particular contract expiring on [...]. Thus, taking account of the fact that the price was backdated to an apparently notional date, and not to a date from which negotiations began for a new sugar supply contract, such rebates must be seen as additional price reductions given to [...] in order to regain their business from NB. In fact, during this period [...] purchased [...] tonnes of sugar over a period of approximately [...] months and received a rebate of [...]. This, assuming that [...] members purchase similar amounts during the following year, would amount to a real net price (including rebate) of [...] per tonne.

- (28) The following tables show price movements and offers made to these three particular companies [...].

Price at which [...] has been purchasing granulated retail sugar (source [...] reply to Article 11 letter; based on maximum drop size with annualized promotions):

Date of offer	Offeror	Price (£)	Accepted or not
[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]

Price at which [...] has been purchasing granulated retail sugar (source [...]):

Date of offer	Offeror	Price (£)	Accepted or not
[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]

Price at which [...] has been purchasing granulated retail sugar (source ...):

Date of offer	Offeror	Price (£)	Accepted or not
[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]

- (29) Furthermore, BS has sold one-kilogram bags of granulated sugar to the following companies below the price of [...] per tonne:

[...]

It is not necessary to investigate further in order to discover the names of all companies to which BS sold one-kilogram bags of granulated sugar at or below [...] per tonne for the purpose of this case.

- (30) Assuming the BS repackaging margin of [...] to be correct (i.e. not taking account of a profit margin on repackaging), then the minimum at which NB could sell packet sugar in order not to make a loss (using industrial sugar purchased from BS) would be, assuming that it matched BS's efficiency, [...]. Thus, with retail prices below [...] NB or any repackager as efficient as BS, had an insufficient margin to repackage and sell sugar for retail sale, even without trying to make a profit.
- (31) Certain offers made by BS to NB's clients or potential clients undercut the prices offered by NB and were not made to match offers made by NB, as was claimed by BS.

Furthermore, in a memorandum from the Executive Marketing and Sales Director to the Managing Director and other Executive Directors dated April 1985, it was stated that:

'So far Whiworths/NB have had no success in gaining distribution for their granulated sugar in any major account but it would appear as an act of some desperation they have made an offer to [...] which heavily undercuts our price. We have had no option, therefore, but to react with a new lower price than meets the competitor's offer' (emphasis added).

In the light of this, and taking into account the fact that BS has undercut NB's offers to the accounts specified above, the Commission does not accept

that BS had no knowledge that they were actually undercutting offers made by NB.

(b) Delivered pricing

- (32) Before August 1986 BS did not offer an ex-factory purchasing option.

During meetings between BS and the Commission's services which took place in November 1986, BS undertook to offer sugar at not only delivered prices, but also ex-factory prices, and agreed to undertake a study as to how such an option could most appropriately be set up.

Subsequently, British Sugar presented to the Commission, as a part of its compliance programme, a system whereby purchasers of sugar are able to choose between collecting the sugar themselves or having it delivered by British Sugar. This system has subsequently been implemented.

Beet origin: discrimination

- (33) NB has complained that although the contract covering the period September 1985 to March 1986 was for code '701' granulated sugar, which NB maintains means beet-origin only sugar, BS refused to guarantee beet origin even when such was specified in NB's orders under this contract, and often supplied cane-origin sugar purchased by it from Tate & Lyle. NB claimed that, as other clients do receive on request solely beet origin sugar, this is a case of discrimination.
- Irrespective of the disagreement as to the meaning of 'code 701', the BS-NB contracts of February 1986 (No 1/872, 1/873) stipulated that beet-origin sugar could not be guaranteed.

- (34) NB requires beet-origin sugar because it receives an EEC storage rebate for storing EEC-produced beet-origin sugar but not for the storage of preferential cane-origin sugar.
- (35) A formal request for information made in accordance with Article 11 of Regulation No 17 was sent to the beneficiaries of the EEC storage rebate in the United Kingdom. [...] maintained that they receive beet-origin sugar from BS at their request. In the case of one company, [...], it replied as follows: 'We have a long standing agreement with BS that all the sugar delivered by them should be of UK beet origin. This was at our request'. A copy of the letter from BS confirming this, dated 22 March 1983 was supplied.

NB did not wish to purchase the industrial sugar in question solely for the purpose of putting it into retail bags, but equally in order to use it to sell to its clients through its normal merchanting activities. It is clear, therefore, that NB was at least in this respect, directly competing with [...] who, during this period, had the option of placing the sugar it purchased from BS into storage and receiving the storage rebate which NB did not. It is equally clear that BS is perfectly capable of supplying large quantities of beet-origin sugar should it wish to do so — for example, to [...]. The Commission does not therefore accept that BS had insurmountable difficulties in supplying beet-origin sugar to NB.

'Loyalty' or 'group commitment' bonuses

Facts found by the Commission regarding the offering by BS of loyalty bonuses

- (36) The [...] is a group of [...] societies acting as a buying group.

Before NB's entry onto the retail sugar market, all Co-operative Societies had to purchase granulated sugar from the National Co-operative buying group, CWS, as BS and T & L did not deal with members on an individual basis.

- (37) In June 1986, two members of this group, [...] decided to begin purchasing one-kilogram bags of granulated sugar from NB, who agreed to sell directly to individual Co-operative Societies rather than uniquely to CWS.

Offers made by NB to [...], net, were as follows:

[...]

[...]

- (38) BS, on realizing that it had lost two out of seven customers within this buying group, made the following offer directly to the [...] group, to be effective from [...].

(i) Price irrespective of the number of members of the buying group purchasing from BS: [...];

(ii) Loyalty ('group commitment') bonus: [...], available only if all members of the [...] Group purchase granulated sugar from BS alone (i.e. net price [...]).

- (39) [...] subsequently agreed to recommence purchasing from BS, although [...] refused. BS agreed that under such conditions the [...] members purchasing from BS could benefit from the 'group commitment bonus'.

LEGAL ASSESSMENT

Article 86

- (40) Under Article 86 any abuse by one or more undertakings of a dominant position within the common market or a substantial part of it is prohibited as incompatible with the common market in so far as it may affect trade between Member States.

A. The relevant market

- (41) In order for the Commission to determine whether BS occupies a dominant position within the meaning of Article 86 it is necessary first to define the relevant market. This constitutes the area and product sector in which the economic power of the undertaking in question *vis-à-vis* its customers and competitors is to be judged.

The relevant product market

- (42) The relevant product market is granulated sugar. This market may be subdivided into two sub-markets of sugar for sale to retail and industrial clients.

Speciality sugars, liquid sugars and syrups, being used for different purposes than granulated sugars, do not meet the same needs and are not therefore part of the relevant product market because they are not substitutable from the customer's point of view.

Industrially produced sugar substitutes such as saccharin, cyclamates or aspartame only compete with natural sugar in limited uses such as 'diet' products, and thus do not form part of the same relevant product market as granulated sugar⁽¹⁾.

The relevant geographical market

- (43) In the Community⁽²⁾, each Member State is given a basic quantity of beet-origin sugar, which it divides up into quotas between its beet processing companies. This sugar is known as A/B sugar. BS receives all the United Kingdom basic quantity (currently

⁽¹⁾ For fuller details of the different sweeteners available, and their particular characteristics, see paragraphs 2.59-2.75 of the Monopolies and Mergers Commission report on the existing and proposed mergers between Tate & Lyle plc or Ferruzzi Finanziaria SpA and S & W Berisford (HMSO Cmd89) (hereinafter the 'second MMC report').

⁽²⁾ For a more in-depth analysis of the mechanisms and regulations constituting the EEC sugar regime, see the Monopolies and Mergers Commission report on the proposed merger between S & W Berisford and the British Sugar Corporation Limited, 25 March 1981 (ISBN 0 10 224181 3) (hereinafter the 'first MMC report'), and the second MMC report.

1 144 000 tonnes *per annum*), being the only United Kingdom beet processing company. This 'quota' is the maximum amount of sugar produced by BS that it may sell in the Community, as an intervention price system operates for sugar sold in the Community. This quota of sugar may also be sold outside the Community with an export refund. Any sugar produced above this quota must be exported outside the Community without export refund (C sugar) or carried over to the next year's A/B quota. Certain companies dealing in sugar which store sugar qualify for a Community sugar storage rebate. Such a rebate is only granted on storage of beet-origin sugar.

The United Kingdom basic quantity covers approximately half the country's total sugar requirements. The balance is largely made good by the import of cane raws from ACP countries pursuant to a Lomé protocol⁽¹⁾. This is refined by Tate & Lyle plc (hereinafter 'T & L'). Taking account of the production of both BS and T & L, enough sugar is produced in the United Kingdom to cover domestic demand.

- (44) During the previous few years, imports have made up approximately 5 to 10 % of total British sugar consumption. This amount appears to be to a large extent a structural limit to imports, which are unlikely to exceed this figure for the following reasons :

- (i) Because of the natural barrier of the English Channel, which gives rise to additional transport costs, United Kingdom producers of sugar are able to charge a premium on the price of sugar compared with Continental prices. The United Kingdom price is generally set by BS at slightly under that at which sugar may be profitably imported and sold from the Continent. This was recognized by the House of Lords Select Committee Report on Sugar Policy⁽²⁾ which states (paragraph 9) that :

'It is these (EEC) imports which set the level of market prices in the United Kingdom and mean that both beet and cane sugar are priced at just under these levels. There is a consequent lack of price competition, as Tate and Lyle's full refining margin is covered from the UK

market premium, and it cannot afford to cut prices significantly, while BS cuts prices to the extent necessary to sell its increasing throughput, but no more. Faced with this situation, industrial sugar users have been willing to import from the continent as a third source of supply.'

This conclusion was supported by the MMC in paragraph 16.25 of its second report ;

- (ii) Importation of sugar for retail sale from other Member States is even more difficult than the importation of industrial sugar, because English-language bags must be specifically printed for the operation, and because transport is even more expensive as 'drop sizes' are generally smaller for retail compared to industrial sales. This was recognized by the MMC in both of its reports ;
- (iii) In addition to the cost of freight, a further relevant factor is the strength or weakness of sterling. If sterling is strong against other Community currencies imports will be cheaper. If sterling is weak, imports will be more expensive. Currency fluctuations can affect the price by up to £ 15 per tonne either way. Although the Community's system of monetary compensatory amounts is designed to minimize the effect of currency fluctuations it does not remove all distortions. For example, in the first three months of 1986 sterling weakened against the currencies of other Member States so that imports were expensive. Thus no company, taking account of the large variations in price of imported sugar, will rely to any large extent on imports for its supply of sugar. However, during certain periods, largely as a result of currency fluctuations, the importation of sugar becomes profitable, and during these periods merchants undertake such imports ;
- (iv) Many customers who require large, frequent and rapid deliveries upon order would have to be supplied from stocks of imported sugar stored in Great Britain ; an additional cost would thereby be incurred ;
- (v) Furthermore, as the MMC pointed out in its second report, in order to secure a substantial amount of imports a considerably higher price in Britain than on the Continent would be necessary because potential exporters may require a large premium to persuade them to export large quantities of sugar to Britain for fear of retaliatory exports by the British producers.

⁽¹⁾ Protocol 3 on ACP sugar annexed to the ACP-EEC Convention of Lomé, signed on 28 February 1975, and contained in Protocol 7 of the third ACP-EEC Convention signed at Lomé on 8 December 1984.

⁽²⁾ House of Lords session 1979/1980, 44th Report Select Committee on the European Communities 'EEC Sugar Policy', 19 March 1980.

(45) Because of these features, BS has a margin between which it may set British prices, between the Community intervention price for sugar, and the price at which imports would enter Britain in large quantities. It may set these prices just below the level at which imports from the Continent are (aside from periods where currency fluctuations make imports profitable) not competitive and, in fact, during the period under consideration, has done so.

(46) Imports do, however, enter the United Kingdom each year, varying between 5 and 10 % of total sales *per annum*. These enter because many major purchasers of sugar demand a third source of supply from outside the United Kingdom, to ensure continuity of supplies should a shortage of sugar develop as happened in the 1974/75 season, and to act as a competitive threat to British producers. Furthermore, merchants import sugar when conditions are favourable.

(47) Thus, as a result of these features, the role of imports on the British market has been as a complement to domestic sugar, rather than as a fully competitive alternative.

(48) The only part of the United Kingdom in which different conditions prevail is Northern Ireland, which does not form part of the relevant geographical market for the purposes of this case. No sugar is produced in Northern Ireland and, because of transport costs, most supplies are imported from Ireland.

This conclusion is supported by the second MMC report (see paragraph 16.27).

(49) The Commission therefore concludes that for the purposes of Article 86 the relevant market is that of retail and industrial granulated sugar in Great Britain, which is a significant part of the common market.

B. Dominant position

BS holds a dominant position on the British sugar market.

(50) The factors which must be taken into account in deciding whether or not BS has a dominant position on the British market for industrial and retail granulated sugar are as follows:

(i) Market shares on the British sugar market

According to figures supplied by NB, BS held, in the 1984/85 season, 58 % of the relevant market (granulated sugars in Great Britain), Tate & Lyle

37 %, and imports 5 %. This estimated market share conforms to BS's own estimation of its market share (contained in the notification of BS's compliance programme), which BS states to be approximately 58 % in the 1984/85 season.

In the second MMC report, it was estimated that BS enjoyed a market share of between 57 and 61 % of the total white granulated sugar section of the market (see paragraph 2.66 of the report).

(ii) Ability of the other forces upon the relevant market to compete

Tate & Lyle

(51) T & L's position as a cane refiner places it at a considerable disadvantage compared to BS. Because of the Community pricing structure it has a cost disadvantage on refining cane sugar compared to the processing of beet sugar, resulting in T & L being a price follower. This was recognized by the House of Lords Select Committee on EEC Sugar Policy in 1980:

'There is already a lack of price competition in the UK market, as the Communities institutional pricing structure means that Tate & Lyle gets too small a margin to enable it to continue refining and selling cane sugar in the UK unless there is a substantial market premium above intervention price, whereas the same pricing structure allows the BSC a very handsome margin (£ 13 per tonne on the 1978-79 crop as against £ 2 per tonne for Tate & Lyle).

The Committee have noted the sugar users' complaint about the lack of price competition in the UK market as, despite claims of rigorous price competition within the market, it appears that UK market prices are dictated by the price at which Continental sugar can be landed. It also appears to them that one of the two principal sugar suppliers in the market is unable to compete effectively on cost grounds because of the inadequacy of the refining margin allowed to cane refineries in the EEC's institutional structure of support prices for sugar beet.'

(52) The Commission agrees with the opinions of the House of Lords and considers that the facts lying behind these opinions have not materially changed since 1981. The fact that BS is a price leader and T & L, due to the relatively low cane refining margin, is a price follower, was also noted by the MMC in its second report (see paragraphs 16.37 and 16.59).

- (53) Thus the Commission concludes that BS acts as a price leader on the relevant market, and T & L as a price follower. The Commission accepts, as the MMC pointed out, that T & L — with sales of sugar similar in quantity to those of BS — provides BS with competition for individual accounts; but considers that this marginal competition, taking account of the fact that T & L 'is unable to implement price increases on its own and is unwilling because of its financial position to initiate general price reductions' ⁽¹⁾, does not prevent BS from enjoying a dominant position on the relevant market.

Imports

- (54) Imported sugar acts as a limit to the price that BS may charge for its domestically produced sugar, thus giving BS a margin within which it may set United Kingdom sugar prices. During the period under consideration, BS has set British prices just under that at which it would be consistently profitable to undertake imports. The role of imports on the British market has therefore been as a complement to domestic sugar, rather than as a fully competitive alternative. In the light of this, the Commission considers that competition afforded by imported sugar did not, during the period in question, prevent BS from enjoying a dominant position within the meaning of Article 86.

(iii) Ability of BS unilaterally to increase prices, which the market follows

- (55) On 1 July 1986 BS increased its retail sugar price to all its clients by £ 10 per tonne. BS subsequently made a further increase in its retail sugar price by £ 10 per tonne on 20 October 1986. BS has been able to maintain these price rises, and the other producers of retail sugar have also increased their price by similar amounts.

This indicates that BS has 'the power to determine prices [...] for a significant part of the products in question' ⁽²⁾, and furthermore has 'the power to behave to an appreciable extent independently of its competitors, customers and ultimately of the consumers' ⁽³⁾.

(iv) Barriers to entry

Beet-origin sugar

Under Council Regulations (EEC) No 1785/81 ⁽⁴⁾, as last amended by Regulation (EEC) No 1107/88 ⁽⁵⁾, and (EEC) No 193/82 ⁽⁶⁾, the United

Kingdom Government has the ability but not the obligation to reallocate the basic quantity of sugar received by United Kingdom producers amongst varying producers. At present BS receives all the United Kingdom basic quantity. It appears unlikely that the United Kingdom Government would give part of the allocation to a new producer, taking account of the fact that BS already has sufficient modern and efficient capacity to produce all the United Kingdom basic quantity of sugar.

- (56) BS has a well-developed integrated production system and is responsible for all stages of production, from the provision of seed to the growers to the sale of the finished product. Such established, advanced and integrated operations make it difficult for a new producer, which produces on only one level of production, to operate.
- (57) Thus considerable barriers to entry exist regarding the production of beet-origin sugar. Indeed, the fact that no new producer of sugar from beet origin has set up in the United Kingdom since 1936 despite the fact that BS has consistently been profitable, indicates that these barriers to entry are real and appreciable.

Cane-origin sugar

- (58) It appears unlikely that any new company will enter the market importing and refining cane-origin sugar due to the cost disadvantage presently suffered by cane-sugar producers compared to beet-sugar producers.

Imports

- (59) As explained above, imports act as a complement to British domestic sugar rather than as a fully competitive alternative.

Conclusion

- (60) The Commission concludes that, taking account of BS's high market share on the relevant market, the inability of its main competitors to compete fully and effectively with it, the barriers to entry existing on the British sugar market, and BS's proven ability to influence the price at which sugar is sold in Britain by unilateral action, BS holds a dominant position within the meaning of Article 86 on the relevant market — white granulated sugar for both retail and industrial sale in Great Britain.

C. Abuse of a dominant position

Refusal to supply

- (61) BS refused to supply NB with industrial sugar. NB requested 30 000 tonnes of industrial sugar during

⁽¹⁾ The Second MMC report, paragraph 16.6.

⁽²⁾ See the European Court of Justice's definition of a dominant position in the case of *Continental Can*, Case 6/72 ECR (1973), 215.

⁽³⁾ See the European Court's decision in *United Brands*, ECR (1978), 207.

⁽⁴⁾ OJ No L 177, 1. 7. 1981, p. 4.

⁽⁵⁾ OJ No L 110, 29. 4. 1988, p. 20.

⁽⁶⁾ OJ No L 21, 29. 1. 1982, p. 3.

the 1985/86 sugar year, and BS was only prepared to offer NB 7 148 tonnes or to offer NB 30 000 tonnes of 'special grain' sugar at a price so high that NB would be unable to use the sugar. BS claims that its refusal to meet NB's request is justified by the necessity of it implementing a quota scheme.

- (62) However, the evidence outlined above shows that the quota scheme implemented by BS was not necessary and was put forward only in order to justify BS's refusal to supply.

BS refused to supply NB with the objective of removing NB as a producer of retail sugar; it is clear that the natural and foreseeable consequence of the refusal to supply NB would be to precipitate NB's withdrawal from the retail sugar market. Indeed, the handwritten document of BS's executive marketing director, proposing to refuse to supply NB, and the documents found at BS relating to BS's 'de-listing' policy, indicate that BS's refusal to supply was made with just such an intention.

- (63) NB cannot be considered to be a new client of BS in relation to this refusal to supply. BS had supplied NB with industrial sugar before, e.g. 30 000 tonnes in 1984/85, a similar amount and type of sugar that NB was requesting in the present case. The fact that NB intended to package a part of this into retail bags, selling the rest to industrial clients as it had done in the past, cannot result in NB being considered as a new client for the purposes of this case.
- (64) The Commission considers that BS has abused its dominant position by refusing to supply industrial sugar to NB without objective necessity, the intention or foreseeable result of which would have been to precipitate the removal of NB from the United Kingdom retail sugar market, thereby reducing competition on that market.

This conclusion is supported by the judgment of the European Court in Joined Cases 6 and 7/73: *ICI and CSC v. Commission* ('Commercial Solvents')⁽¹⁾. In this case the European Court held that:

'... an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to

eliminate their competition which in the case in question, would amount to eliminating one of the principal manufacturers of ethambutol in the common market.

Since such conduct is contrary to the objectives expressed in Article 3 (f) of the Treaty and set out in greater detail in Articles 85 and 86, it follows that an undertaking which has a dominant position in the market in raw materials and *which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing his dominant position within the meaning of Article 86*. (Emphasis added.)

BS's pricing policy

- (i) The pricing policy of BS regarding its sales of retail sugar since NB's entry onto the retail sugar market
- (65) The pricing information indicated above shows that BS has engaged in a price cutting campaign leaving an insufficient margin for a packager and seller of retail sugar, as efficient as BS itself in its packaging and selling operations, to survive in the long term.
- (66) The maintaining, by a dominant company, which is dominant in the markets for both a raw material and a corresponding derived product, of a margin between the price which it charges for a raw material to the companies which compete with the dominant company in the production of the derived product and the price which it charges for the derived product, which is insufficient to reflect that dominant company's own costs of transformation (in this case the margin maintained by BS between its industrial and retail sugar prices compared to its own repackaging costs) with the result that competition in the derived product is restricted, is an abuse of dominant position⁽²⁾.

In the present case, BS's action of reducing the margin between its industrial and retail sugar prices such that it sold retail sugar at a price which no longer reflected its own transformation costs resulted in an abuse of a dominant position and a restriction of competition within the meaning of Article 86. It is clear from the facts as set out above that should BS have maintained this margin in the long term, NB, or any company equally efficient in repackaging as BS without a self-produced source of industrial sugar, would have been obliged to

⁽¹⁾ 6 March 1974, ECR [1974], 223, at point 25 (also *United Brands v. Commission*, Case 22/76; 14 February 1978, ECR [1978], 207).

⁽²⁾ For a similar case under the ECSC Treaty, see *National Carbonylising Company v. Commission*, Case 109/75, 22 October 1975, ECR [1975], p. 1193.

leave the United Kingdom retail sugar market. Thus, taken in the context of the other abuses as outlined above, and of the fact that the intention or natural and foreseeable consequence of the maintenance of this pricing policy by BS would be the removal of NB from the British retail sugar market, the Commission considers that BS's pricing policy constitutes an abuse of a dominant position within the meaning of Article 86.

(67) In its written reply to the Statement of Objections, BS states that certain documents were disclosed to BS's lawyers alone, and not to BS. These documents show in fine detail NB's costs of repackaging industrial sugar into retail bags. BS argues that these documents can only be meaningfully dealt with by BS and not its lawyers, and therefore that the Commission cannot rely on these figures.

(68) In relation to the disclosure of documents, the Commission makes the observations that:

- the documents in question clearly constitute business secrets within the meaning of Article 20 of Regulation No 17 (which NB has insisted upon maintaining secret *vis-à-vis* BS) which it would be unreasonable for BS to have access to,
- NB's costs, grouped into general headings, were given to BS in the Statement of Objections. The finely detailed information in question has been made available to BS's lawyers subject to their undertaking not to reveal the detailed figures to BS themselves. It was therefore open to BS's lawyers to confirm to BS that the Commission is in possession of documents that accurately reflect the general grouped figures given in the Statement of Objections. BS could therefore, clearly comment on the global figures provided in the Statement of Objections.

In the light of these facts, and also taking account of the fact that the figures are only quoted in the Statement of Objections and this Decision in order to achieve the limited objective of showing that the result of BS's actions in maintaining the abovementioned pricing margin would have had the logical result of eventually obliging NB to leave the United Kingdom retail sugar market, the Commission considers that BS's rights of defence were safeguarded in the present case.

(ii) Ex factory pricing

(69) BS has accepted that, before the end of 1986, it refused to supply sugar to its customers unless the customer also accepted that BS itself (whether BS delivered the sugar itself or did so through third parties acting under contract for BS being irrelevant) supplied the service of delivery of the sugar. It

was thus reserving for itself the separate but ancillary activity of delivering the sugar which could, under normal circumstances be undertaken by an individual contractor acting alone (e.g. acting as a real merchant delivering the sugar to a third party customer using his own transport facilities). As the MMC stated in paragraph 2.104 of its second report '... merchants also sell on their own account sugar purchased from the two United Kingdom producers. This form of competition can be expected to restrain the United Kingdom producers from charging excessively for distribution (although not if they refuse to supply sugar on an ex-factory basis).'

(70) The Commission is not aware of any objective necessity requiring BS to reserve such an activity to itself, and the fact that following BS's undertaking it has offered a choice to its clients between ex factory or delivered sugar, indicates that no such objective necessity exists.

(71) The Commission considers that BS has abused its dominant position on the sugar market by refusing to grant to its customers an option between purchasing sugar on an ex factory or delivered price basis, thereby reserving for itself the ancillary activity of the delivery of that sugar, thus eliminating all competition in relation to the delivery of the products.

(72) This conclusion is supported by the judgment of the European Court in the Case Centre Belge d'Études de Marché — Télémarketing SA v. Compagnie Luxembourgeoise de Télédiffusion SA and Information Publicité Benelux SA.

In this case, the Court held that:

'... an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group, an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.'

Beet origin: discrimination

(73) The Commission considers that BS has applied 'discriminatory conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage' ⁽¹⁾, and has thus abused its dominant position, by denying exclusively beet-origin sugar to NB, while supplying it to others.

⁽¹⁾ Article 86 (c) EEC.

Group commitment, or loyalty bonuses

- (74) BS made an offer to the [...] which involved the granting by BS of a rebate on the price it was willing to offer the members of the buying group at that time purchasing exclusively from BS if, in future, all the members of [...] agreed to purchase exclusively from BS.

Such an offer, which has the effect of requiring certain existing BS customers to 'tie-in' other companies to purchase exclusively from BS in order to receive a reduced price for retail sugar, is, in a manner similar to the operation of a loyalty rebate, designed to deprive the purchasers in question of, or restrict their possible choices of, sources of supply and furthermore to deny other producers, and in this case specifically NB, access to the market.

Due to the commitment bonus, pressure was put upon the members of [...] not purchasing from BS to recommence purchasing from BS, not only because they would benefit from the bonus themselves but also because, should they wish to purchase elsewhere for price or quality reasons, the remaining members of the group would thereafter be obliged to pay a higher price for their sugar. As a result of BS's offer, one member of the group, [...] which was previously purchasing from NB, switched to purchasing sugar from BS.

- (75) The Commission considers that BS has abused its dominant position by offering to conclude, and subsequently concluding, a contract which included a provision for a group commitment bonus.
- (76) This conclusion is confirmed by the judgment of the European Court in the case *Hoffman-La-Roche v. Commission*⁽¹⁾, in which the European Court of Justice considered the application of Article 86 to exclusive purchasing contracts and fidelity rebates involving a dominant undertaking.

D. Effect on trade between Member States

- (77) The Commission considers that the facts as outlined above establish that BS engaged in practices which had the foreseeable result that NB would have been forced to withdraw from the retail sugar market. Indeed, in this case, evidence (e.g. the documents regarding 'de-listing') shows that the alleged abuses were carried out with the intention of removing NB from that market.

The removal of NB from the British retail sugar market would have had clear effects upon trade between Member States, and furthermore, would

have affected the structure of competition and trade within the common market.

- (78) A United Kingdom sugar merchant such as NB has two sources of sugar, domestic and imports, and will import sugar for resale whenever, for example, currency fluctuations make such imports profitable. Thus, NB has purchased in the past, and intends to purchase in the future, sugar from other Member States for both its retail and industrial operations whenever conditions are favourable. Contrary to BS's arguments, these imports cannot be considered to be abnormal and artificial but are part of the normal pattern of trade.

Imports of sugar into the United Kingdom have in the past been almost exclusively of industrial sugar (imports of retail sugar are difficult not only because English language bags must be specifically printed for such an operation, but furthermore because drop sizes are generally smaller for retail than for industrial sugar)⁽²⁾.

NB entered the market using, and intending to continue using, both domestic and imported industrial sugar for its repackaging operations. As a result of NB's entry onto the market, an avenue was opened whereby imported industrial sugar would for the first time be used for retail repackaging whenever conditions favoured the use of such sugar — NB, being the only British repackager without its own domestically produced source of sugar, is thus the only repackager free to choose to source its sugar for repackaging from either domestic or imported sugar, whichever is cheaper at any moment in time. Should NB have been removed from the market, this avenue through which imported sugar could freely and easily be sold upon the British retail market, would have been effectively closed.

NB entered the British retail sugar market because it believed that the differential between the selling price of packet sugar and that of bulk sugar greatly exceeded the cost of an efficient packaging operation⁽³⁾. This large differential occurred because although, as recognized above, imported sugar effectively limits the price that may be charged for industrial sugar in Britain, such imported sugar could not effectively limit retail prices due to the difficulties in importing retail sugar which are outlined above. NB's entry onto the retail market established the first link, independent from domestically produced industrial sugar, between the price of industrial sugar which is limited by the price of imports, and retail sugar, the price of which has not, to the same extent, been limited by the price of imported sugar. Should NB have been removed

⁽¹⁾ BCR [1979] 461, paragraph 89. Also *United Brands v. Commission*, ECR [1978] 207.

⁽²⁾ See, for example, paragraph 5.8 of the first MMC report.

⁽³⁾ See paragraph 2.104 of the first MMC report.

from the retail sugar market, this independent link between British retail and industrial sugar prices, and thus between imported industrial and British, retail sugar prices, would have been effectively closed.

Thus, the Commission concludes that an effect on trade between Member States would have resulted from NB's removal from the market. This is confirmed by the following argument put forward by BS before the MMC in 1981, in which BS recognizes the importance of sugar imported by merchants as a real restraint to the maximum prices that BS may charge on the British market:

'Since BS was the price leader in the UK and Tate & Lyle (because of its low margins) was a price follower, imported continental sugar was the key to price competition. As long as there was a substantial surplus of sugar in the EEC, the continental price could effectively set a ceiling on the price in this country and it was the merchants commercial interest in selling imports (on which they earned a margin and not merely a handling allowance) which provided competition between merchants and BS.'

- (79) As the Court of Justice held in Case 27/62 United Brands (at ground 201), where the occupier of a dominant position established in the common market aims at eliminating a competitor also established in the common market, it is immaterial whether this behaviour relates directly to trade between Member States once it has been shown that such elimination will have repercussions on the patterns of competition within the common market.

This is particularly the case when a dominant company attempts, as in the present case, to remove a competitor whose activities include the import, transformation and resale of a product.

As shown above, BS's actions, having the intention or foreseeable result of precipitating NB's removal from the retail sugar market, had a potential effect on the structure of competition and trade within the common market, and thus on trade between Member States within the meaning of Article 86.

- (80) The refusal of BS to sell industrial sugar to NB had direct and appreciable effects on inter-State trade. Because NB could not purchase beet-origin sugar from BS, it purchased such sugar (under 1986 market conditions more expensively) from other Community producers in France, Denmark and the Netherlands. Until 5 June 1986, NB was unable to use T & L industrial sugar for repackaging because

[...]. Even if NB had been able to purchase T & L sugar for repackaging, it would still have been unwilling to use such sugar for this purpose, because it cannot receive the Community sugar storage rebate for the storage of cane-origin sugar. In this respect, it is notable that NB ordered more than twice as much Continental sugar for import between October 1985 and June 1986 compared with the amounts purchased between October 1984 and September 1985.

Thus an artificial pattern of trade between Member States was created because, had it not been for BS's refusal to supply, NB would not have undertaken a large part of these imports, rather purchasing cheaper sugar from BS. The fact that BS's refusal to supply effectively increased the level of trade between Member States does not prevent BS's action from affecting trade within the meaning of Article 86. As the European Court stated in *Consten and Grundig v. Commission* (1):

'... what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between states. Thus, the fact that an agreement encourages an increase, even a large one, in the volume of trade between states, is not sufficient to exclude the possibility that the agreement may "affect" such trade in the abovementioned manner.'

BS's refusal to supply industrial sugar to NB therefore had an effect on trade between Member States within the meaning of Article 86.

The Commission therefore concludes that BS's abovementioned behaviour had an effect on trade within the meaning of Article 86 of the Treaty of Rome.

E. Conclusion

- (81) On the basis of the considerations set out above, the Commission considers that BS infringed Article 86 of the EEC Treaty in the following ways:

1. By refusing to supply industrial granulated sugar to NB;
2. By reducing its prices for retail sugar to the extent that an insufficient margin existed between its prices for retail and industrial sugar;

(1) ECR [1966] 299.

3. By refusing to sell sugar unless it was on a delivered-price basis;
4. By discriminating against NB in refusing to supply exclusively beet-origin sugar to NB whereas it supplied exclusively beet-origin sugar to other purchasers at their request;
5. By offering 'group commitment' bonuses.

king, a competitor could have been irreversibly removed from the market.

TERMINATION OF THE INFRINGEMENT — REMEDY

- (82) The Commission considers that, taking account of the comprehensive compliance programme adopted by BS and of BS's exemplary behaviour since its receipt of the interim measures Statement of Objections, it is unnecessary to make an order pursuant to Article 3 of Regulation No 17, requiring BS to bring the abovementioned infringements to an end because, in the eyes of the Commission, BS has on its own initiative brought the infringements to an end. NB, the Complainant, concurs with this view.

However, it must be noted that the gravity of the abuses in question were such as to warrant fines regarding BS's actions in the past. The levying of such fines necessitate a formal decision of the Commission.

REMEDIES

(a) Fines

- (83) Under Article 15 of Regulation No 17, infringements of Article 86 may be sanctioned by fines of up to 1 million ECU or 10 % of the turnover of the undertaking in the preceding business year, whichever is the greater. Regard must be had to both the gravity and the duration of the infringement.
- (84) The evidence demonstrates that BS abused its dominant position in several important ways. These several abuses were all designed to have the same effects; namely, to severely damage the position of, or even eliminate, a newly established competitor on the market.

BS sought, as a result of this behaviour, to maintain or reinforce its dominant position.

In fact, the infringements in question were designed to have an adverse effect on the structure of competition in a substantial part of the common market. Moreover, had the Commission not issued a Statement of Objections that led to BS's underta-

- (85) In the light of this, the Commission takes the view that it should impose a fine on BS. In setting the level of this fine, the Commission takes account not only of BS's abusive behaviour, as outlined above, but also of the exemplary manner in which BS has conducted itself following its receipt of the interim measures Statement of Objections.

- (86) As the present Decision relates solely to BS's actions in the past, the fine is set taking account of the fact that the abuses in question occurred in the period between the events leading up to NB's packaging of sugar for retail sale and the adoption by BS of its undertaking and subsequent Community compliance programme — between approximately April 1985 and early August 1986.

- (87) It is the practice of the Commission, in setting a fine, to take account of whether or not the rules of competition of the EEC Treaty have been sufficiently developed by the Decisions of the Commission in any particular area⁽¹⁾. As stated above, the Commission has decided that BS, in selling sugar exclusively on a delivered price basis, abused its dominant position under Article 86. Such a decision constitutes the first time that the Commission has stated that the maintenance of a delivered-price-only system by a dominant company may constitute an abuse of a dominant position within the meaning of Article 86. In the light of this, the Commission has not fined BS in relation to this particular abuse.

In relation to BS's retail-sugar pricing practices, BS argues that the competition rules have been insufficiently developed when the abuse occurred to justify the imposition of a fine. The Commission considers that such pricing practices, adopted with the intention or foreseeable result of removing NB from the retail sugar market, are types of predatory practices clearly envisaged by Article 86, and thus considers that BS intentionally or at least negligently abused its dominant position in this respect. The imposition of a fine for this abuse is therefore justified. The Commission does, however, accept that the law relating to such an abuse has been less fully clarified by Commission Decision and Court ruling than in respect to the other abuses committed by BS, and has taken this into account in fixing the level of the fine.

⁽¹⁾ See, for example, Commission Decision 78/252/EEC (IV/29.176 — Vegetable Parchment, OJ No L 70, 13. 3. 1978, p. 54, paragraph 83).

- (88) However, the Commission considers that, as regards the other abuses outlined above, BS undertook these abuses intentionally or at least negligently. Furthermore, the rules of competition of the EEC Treaty have been sufficiently developed by previous Decisions of the Commission and the European Court of Justice, or are sufficiently clear from the provisions of the Treaty of Rome in the areas covered by those abuses, in order to justify the imposition of a fine in relation thereto,

HAS ADOPTED THIS DECISION:

Article 1

British Sugar plc infringed Article 86 of the EEC Treaty by pursuing against Napier Brown a course of conduct intended to damage Napier Brown's business or to secure its withdrawal from the British retail sugar market, or both, the essential features of which consisted of:

1. Constructively refusing to supply industrial granulated sugar to Napier Brown;
2. Reducing its prices for retail sugar to the extent that an insufficient margin existed between its prices for retail and industrial sugar;
3. Offering sugar on a delivered price-only basis;
4. Discriminating against Napier Brown by refusing to supply exclusively beet-origin sugar to Napier Brown whereas it supplied exclusively beet-origin sugar to other purchases at their request;
5. Offering 'group commitment' bonuses.

Article 2

For the infringements described in Article 1, a fine of 3 million ECU is hereby imposed on British Sugar plc.

The fine shall be paid into:

- (a) Account No 59000204, Commission of the European Communities (for payment in ECU), Lloyds Bank plc,

The Manager, Payments Section, Overseas Centre, PO Box 63, 38a Paradise Street, UK-Birmingham B1 2AB;

- (b) Account No 108.63.41, Commission of the European Communities (for payment in pounds sterling), Lloyds Bank plc, Overseas Department, PO Box 19, 6 Eastcheap, UK-London EC3P 3AB,

within three months from the date of notification of this Decision. After three months, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ECU operations on the first working day of the month in which this Decision was adopted plus 3,5 % (percentage points), i.e. 9,75 %.

Should payments be made in pounds sterling, the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 3

This Decision is addressed to British Sugar plc, PO Box 26, Oundle Road, Petersborough PE2 9QV, United Kingdom.

This Decision shall be enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 18 October 1988.

For the Commission

Peter SUTHERLAND

Member of the Commission