In Case 77/77

1. BENZINE EN PETROLEUM HANDELSMAATSCHAPPIJ BV, Amsterdam,
2. BRITISH PETROLEUM RAFFINADERIJ NEDERLAND NV, Rozenburg,
3. BRITISH PETROLEUM MAATSCHAPPIJ NEDERLAND BV, Amsterdam,

represented and assisted by G. van Hecke, Advocate at the Cour de Cassation, Brussels, L. P. van den Blink, Advocate, Amsterdam, I. van Bael, Advocate, Brussels, and D. J. Gijlstra, Advocate, Amsterdam, with an address for service in Luxembourg at the Chambers of J. C. Wolter, 2 Rue Goethe,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, B. van der Esch, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, M. Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the Commission of the European Communities of 19 April 1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.841 — ABG oil companies operating in the Netherlands; Official Journal 1977 L 1/17),

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts and the arguments of the parties put forward in the course of the written procedure may be summarized as follows:

I — Facts and written procedure

1. This is an action against an individual decision of the Commission of 19 April 1977 (Official Journal 1977 L 117) adopted in pursuance of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87) and of Regulation No 99/63 of the Commission of 25 July 1963 (Official Journal, English Special Edition 1963-1964, p. 47) upon the termination of a proceeding for the application of Articles 85 and 86 of the EEC Treaty, commenced in January 1974 with regard to several companies — including the applicants — who were engaged in the production and distribution of petroleum products in the Netherlands.

According to information contained in that decision under I. B. 3., of the three applicant companies the first two are wholly-owned subsidiaries of the third company, the first being responsible in particular for the marketing of motor spirit in the Netherlands and the second specializing above all in the refining of petroleum products. The group formed by these three companies is one of the seven undertakings which in November 1973 were directly producing premium- and standard-grade motor spirit in the Netherlands.

Article 1 of the decision states that these three companies committed an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty by reducing their deliveries of motor spirit intended for a customer established in the Netherlands during a period of shortage by a percentage significantly greater than that aplied to other customers.

The period of shortage under consideration extended from November 1973 to March 1974: its cause was the limitation of production which took place in November 1973 in a great number of countries producing petroleum.

The customer in respect of whom the applicants are stated to have infringed Article 86 of the Treaty is the Netherlands company Aardolie Belangen Gemeenschap BV (hereinafter referred to as "ABG"). This is a company set up in 1953 for the purpose of importing, exporting and dealing at wholesale in petroleum products in the Netherlands. It acts as a purchasing co-operative of its 19 members who are all Netherlands wholesalers in petroleum products and have always operated on the Netherlands market. ABG's purchases are distributed partly through the intermediary of the AVIA network of filling stations or the "white pump" network, and partly by delivery to large- scale consumers.

By a telex message of 6 April 1977 the Commission sent to the applicants a message informing them that a decision had been adopted with regard to them. That decision consisted in two articles subsequently reproduced by Articles 1 and 2 of the decision of 19 April 1977, which is disputed in these proceedings. That latter decision, which was notified

to the addressees on 25 April 1977, did not impose any fines on them. The addressees on 1 July 1977 commenced the present proceedings based on the second paragraph of Article 173 of the EEC Treaty.

2. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure after putting written questions to the parties and reserving any decision with regard to a possible subsequent preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

"Annul the decision of the Commission of the European Communities of 19 April 1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/ 28.841 — ABG oil companies operating in the Netherlands) for infringement of an essential procedural requirement and infringement of the EEC Treaty or of any rule of law relating to its application and order the Commission of the European Communities to pay the costs."

The *defendant* contends that the application should be rejected and that the applicants should be ordered to pay the costs.

III — Submissions and arguments of the parties

The *Applicant companies* (hereinafter referred to as "BP") first of all describe the economic and legal framework to BP's course of conduct during the period under consideration (November 1973 to March 1974) and the criticisms made of it in the decision in dispute. They give information *inter alia:*

(a) on the market in question, that is to say the Netherlands motorspirit market (Decision: I. D, E);

(b) on the legal rules in force in the Netherlands during the period under consideration, namely:

(i) the rules and functioning of the Rijksbureau voor Aardolie Produkten (National Office for Petroleum Products, hereinafter referred to as "the National Office") set up by decree of the Minister for Economic Afairs dated 13 November 1973, and the Olie Contact Commissie (Liaison Committee for the Oil Industry, hereinafter referred to as "the Liaison Committee"), set up in 1950 in the Netherlands to facilitate contacts between the Government and the oil companies (Decision: I. C);

(ii) the system of maximum prices governed in the Netherlands by the Law of 24 March 1961, as it was applied during the crisis period (Decision: I. F);

(iii) the rationing scheme (12 January to 4 February 1974).

In addition they give information regarding ABG's sales structure and the volume of motor-spirit supplies before and during the crisis (Decision: I. G, H).

Further, they draw the Court's attention to certain parts of the decision in dispute which, in their opinion, reflects a wrong or incomplete interpretation of the facts given by the Commission. As an annex to their reply they submit to the Court a list of substantial inaccuracies which they claim are contained in the Commission's defence.

Having thus described the factual and legal situation underlying the action, the applicants contest the legal foundation of the said decision. They also criticize

the three heads on which the complaint made against them is founded, making *inter alia* the following points:

(a) *The dominant position* (Decision: II. A):

— As the share of the Netherlands petrol market held by BP does not represent more than 9 % and as, on that market, BP's economic power is entirely comparable to that of a number of other oil companies it is incontestable that BP does not occupy a significant economic position there or, *a fortiori*, a dominant position;

— The decision in dispute takes as its basis for deducing the existence of a dominant position on the part of BP a relationship of vertical dependence within a given market between a seller (BP) and a purchaser (ABG). Such an approach to the problem of dominant positions is contrary to the system of Article 86 of the Treaty. The simple fact that one undertaking depends on another for its supplies is not sufficient to consider that the second undertaking has a position which permits it to operate on the market without taking any particular account of competitors. A dominant position and dependence are two clearly separate concepts. The wording of Article 86 implies in fact that a dominant position extends over a certain territorial market representing in itself at least a "substantial part" of the Common Market. Dependence on the other hand is a vertical relationship which is by its nature unconnected with any geographical delimitation. To this may be added the fact that the criterion of dependence is similarly unsatisfying from the point of view of legal certainty because the dominant position of one undertaking happens to be linked to an accidental factual situation, which is not temporally fixed, and to facts subject to changes which the undertaking which is regarded as holding a dominant position is not in a position to know or *a fortiori* to control. Moreover the application of the criterion of dependence obliges that undertaking to treat certain purchasers differently from its other purchasers ending up thus by means of a sort of "inverse discrimination" in a situation which is unjust with regard to those of its purchasers who have for their part preserved their independence because they took steps in time.

— Irrespective of these considerations the Commission based its position on a wrong application of the facts when it concluded that, during the crisis, the Netherlands purchasers from BP had become entirely dependent on BP so that the oil companies were "in no way in competition with each other to supply each other's customers". This conclusion is irreconcilable with the fact that during the above-mentioned period a number of sales points for petrol passed to other suppliers. Moreover, the Commission ought to have taken into consideration, by reason precisely of the short duration of the crisis, the aspect of potential competition.

Moreover the Commission cannot deny that as appears from Annex I to its decision ABG throughout the period under consideration received considerable quantities through the intermediary of the National Office and of "13 other companies". Finally it is incontestable that BP's purchasers, including ABG, were always able to have recourse during this period to a sufficient number of other sources of supply.

(b) *Abuse of a dominant position* (Decision: II. B):

— On 1 June 1973, that is to say long before the crisis, ABG had ceased to be a "regular" purchaser of BP petrol, as BP had notified ABG as long ago as November 1972 that it would have ceased its deliveries to it as from 31 May 1973. As from that date, on which it was impossible to foresee that

the crisis would occur, the relationship of supplier and purchaser thus ceased to exist by reason not of a subjective appreciation by BP but of an effective material and legal situation. As a result, ABG no longer figured after 1 June 1973 in BP's planning, which had been prepared on the basis of "reasonable" forecasts well before the crisis arose. Planning constitutes an important means of evaluation in the problem of any abuse of a dominant position.

In this state of affairs it is not possible for the Commission to complain that BP did not apply to ABG during the crisis the same treatment as it reserved for its contractual customers. Identical treatment of all purchasers would be tantamount to placing contractual customers at a disadvantage in competition between purchasers and this in its turn would amount to discrimination. Contractual customers would not receive their entitlement and customers who had preferred not to cover themselves against certain risks would actually be protected at the expense of the contractual customers. Moreover, if the latter had commenced an action against BP for not complying with its obligations, BP would probably not have been able to rely with success on *force majeure* as the Commission had not at the time of this failure to fulfil contractual obligations made the least declaration capable of indicating that it required from BP anything more than simply to carry out the obligations imposed by the Netherlands Government.

— The contested decision does not attach any importance to the part played in this case by the National Office in allocating certain quantities to ABG from November 1973 to March 1974. The powers enjoyed and the part played by the Netherlands authorities in the distribution of petroleum products in the Netherlands during the crisis were on the contrary decisive for the purposes of an assessment of BP's conduct in these circumstances, the Court itself having recognized that measures adopted by private traders in execution of instructions emanating from the public authorities do not come within the purview of Articles 85 and 86 of the Treaty.

— In reality, from the time when the introduction of maximum prices in the petroleum products sector (decrees of 28 September 1973, 22 January and 28 February 1974) had excluded the price factor as a distribution mechanism, another mechanism became necessary to mitigate the difficulties due to an insufficient availability of these products. This was precisely the rôle of the National Office which, from the beginning of the crisis, was the authority which shared out the reserves. The Commission's argument that the National Office did not have the power to intervene in the mater of petrol deliveries in such a way as to bind the oil companies moreover finds no support in the declarations of the representative of the Netherlands Government which are reproduced on page 3 of the decision (cf. also the statements of the Netherlands member of the Advisory Committee on Restrictive Practices and Dominant Positions at the meeting on 18 February 1975).

The documents available show that the National Office instructed the oil companies to deliver certain quantities of petrol to ABG and to other specified purchasers. Instructions emanating from an official organ of the Netherlands Government were understood by the oil companies as mandatory. Consequently none of the companies failed to carry out those instructions.

— The quantities delivered to ABG during the crisis through the intermediary of the National Office were sufficient to allow it to satisfy entirely the needs of the AVIA distri-

bution network and of its contractual customers, account being taken of course of the reduction of 20 % prescribed by the Netherlands Government. The Commission's argument to the effect that the conduct of BP might well encourage ABG to conclude long-term contracts and thus in its opinion sacrifice its commercial independence does not take into acount the effects of the policy adopted by the National Office and carried out by the oil companies, which was precisely of such a nature as to persuade ABG not to conclude such contracts since in case of danger the Netherlands Government would once more come to its aid.

(c) *The effect on trade between Member States* (Decision: II. C):

— ABG never represented in the Netherlands a live factor with regard to competition in the matter of prices. Moreover, even on the supposition that the existence of ABG is a factor capable of influencing trade between Member States, the concerted practices between the members of ABG would be subject to Article 85 of the Treaty and would necessitate an exemption within the meaning of paragraph (3) of that article. If such an exemption was not thought necesary because the influence of ABG's concerted practices on competition were too small it follows that the possible disappearance of ABG must itself be considered as insignificant.

— With regard to AVIA's membership of ABG, that trade-mark is used under licence in several countries, in particular by ABG in the Netherlands, and there are no other links between ABG and the undertakings operating under that trade-mark on other countries. There is therefore no ground for stating that the supply difficulties which one of those undertakings may have to face present more than a purely national character. Furthermore, the quantities placed at the disposal of ABG through the intermediary of the National Office were always sufficient to supply ABG's sales points to the extent to which they use the AVIA mark.

— In these circumstances there can be no question in the present case of any sort of real risk of affecting the structure of the Netherlands market, account being taken also of the fact that the share of the Netherlands market in motor spirit held by ABG is 5 %, 2 % of which is attributable to AVIA, and that, during the whole of the crisis, ABG received sufficient products to cover its structural needs.

The *defendant* states first of all that this action relates to the precise scope of a duty under public law which Community law imposes on traders who find themselves in a position to benefit temporarily from a dominant position by reason of a shortage of any goods. As is normally the case in the matter of competition rules this duty profoundly affects the competitive freedom of undertakings. According to the defendant BP should have sold, at the relevant time, more petrol to ABG and possibly less to other purchasers. The policy which should have been followed in law thus clearly differs on this point from that adopted by the undertaking considered from the point of view of its own interests.

Having thus formulated these preliminary remarks the defendant proceeds to give a detailed analysis of the facts underlying the action, in the course of which it explains a number of points set out in the contested decision and takes up again certain information supplied by the applicants (on the structure of the market in question and the legal rules applied to it during the crisis, on the relationship existing during that period between the oil companies acting through the channel of the Liaison Committee and the National Office, on the position and the structure of ABG etc.) with a view either to

supplementing or correcting it or to giving an interpretation of it which in its view is more correct. It also expresses its opinion on the criticisms put forward by the applicants with regard to the so-called material inaccuracies in the defence as well as on the recapitulation of the facts contained in the reply.

At the end of this account the defendant gives further details regarding its complaint of abuse of a dominant position within the meaning of Article 86 of the Treaty, making *inter alia* the following points on the subject of the three essential heads of this complaint:

(a) The dominant position

— Article 86 is based on the idea that dominant positions may give rise to abuses in vertical relationships between traders belonging to different industrial or commercial stages on the market.

— In periods of shortage it is only logical to put the accent on the dependence of traders who are buying and selling the commodity in short supply as against producers. The Commission is by no means confusing dominant position with dependence but sees in these two concepts two aspects of the same phenomenon.

— In this case the dominant position has its origin in the factual monopoly of the principal who is offering goods which are in short supply as respects his traditional customers, who, in view of the shortage, do not have at their disposal normal means of resupplying themselves. Although such a monopoly differs in origin from exclusive rights such as trade-marks or patents of which the Court has recognized on several occasions that they may confer a dominant position on their owners, its potential effect nevertheless remains the same. The parallelism between this factual monopoly and legal monopolies created by such rights is incontestable.

— It is moreover a mistake to think that Article 86 of the Treaty requires every vertical dominant position to cover in itself a substantial part of the market: a modest share of the market would not *ipso facto* exclude the existence of a dominant position. It is not in fact a matter of the specific quantity of goods sold by an undertaking in a dominant position to dependent undertakings but of the point at which general demand and the supply of the goods in question meet. The relationship between BP and ABG, which the oil crisis transported into the field of a dominant position, are an integral part of the petrol market in the Netherlands, on which ABG was everywhere active and which manifestly covers more than the quantities sold by BP to ABG and to other clients.

— The statement that during the oil crisis "BP's purchasers were always able to turn to a sufficient number of other sources of supply" is true only in a sense which is as literal as it is unreal. Certainly they could have turned to them but they would not have obtained, as ABG discovered, anything but negative answers or price offers not permitting them any profit.

— The essential cause of the absence of alternative supplies for ABG was the shortage. The steps taken by the Netherlands Government as regards prices reinforced that cause and consolidated the dominant position. Moreover, even if that position had been imposed on BP against its will this would change nothing with regard to the applicability of Article 86 in case of abuse since that provision is not applicable solely to dominant positions which undertakings have created for themselves.

Furthermore, the fact that ABG succeeded in carrying on its undertaking through the intermediary of the National Office and thanks to the

understanding of other producers by no means proves that BP did not have a dominant position allowing it to create difficulties for ABG or that its behaviour did not bring about consequences contrary to Article 86 of the Treaty.

— The Commission has examined potential competition after the crisis taking into account the foreseeable negative effect of BP's conduct on the independence of trade. This effect would of course become more important as the shortage continued. However, even a brief shortage and the preference for dependent trade exhibited during this shortage by the undertakings dominating the market had a definite effect.

(b) Abuse of a dominant position

— BP's statement with regard to the part played by the National Office during the period in question are in contradiction with the declarations of the Netherlands Government which are reproduced in the sixth paragraph of section C (b) of the decision. The National Office had only a supplementary part to play which consisted of intervening in order to resolve difficulties which arose "after" the undertakings concerned had taken action in accordance with the rules in force: its requests were not mandatory and could not reasonably have been regarded as such. This is confirmed by several facts such as the letters from the Netherlands Government of 8 November and 24 December 1973 stressing the need to preserve the existing channels of distribution, the letter from the President of the Liaison Committee (who was at the same time an unpaid employee of the National Office) of 15 January 1974 addressed to the Ministry for Economic Affairs and the reservation at the end of the rules governing the margins between the industrial and commercial sectors where there is reference to a "point of view" as regards deliveries to independent distributors. Moreover, ABG's shortfalls were by no means made good and the "authority" of the National Committee was used only for the allocation of the quantities placed at its disposal by the industry. If indeed there was any "obedience" the reason must be sought rather in the fact that the requests of the National Committee corresponded to the policy adopted by BP and others. The existence and the workings of the National Committee thus by no means discharged the oil companies from the legal duties which were imposed upon traders as a matter of European law.

Moreover, the legal duty flowing from Article 86 which is in question here had nothing to do with any preoccupations of the public authorities as regards the institution of a distribution system in the formal sense of the term. These preoccupations do not release the undertakings from the duties imposed upon them by Article 86. The position is the same as regards Council Directive No 73/238 of 24 July 1973 giving these preoccupations a Community context.

— The fact that ABG was no longer a "contractual customer" of BP at the time when the crisis began has no importance in this case. First of all it cannot be denied that during the 12 months preceding November 1973 BP regularly supplied ABG with considerable quantities which covered on the average 80% of ABG's needs. The fact that BP's last large deliveries were considered by the latter as an advance on a contract for the refining of crude oil changes none of the essentials of the matter. For an assessment of the legal position of traders in case of a sudden shortage the intrinsic quality of a "purchaser" is to be found in the historical reference, that is to say in deliveries "actually" carried out and not in the commercial considerations which led to those

deliveries within the contractual limits to which they were subjected. Secondly, whilst it is of course true that "normally" an undertaking is entitled to treat its purchasers differently according to whether or not they are bound to it by contracts, and that undertakings in a dominant position are not bound to mete out strict equality of treatment to the two categories of purchasers, this does not justify allowing undertakings in a dominant position the right "in a period of shortage" to treat purchasers bound by long-term contracts considerably better than regular purchasers not bound by contracts. Although a certain price differentiation between contractual purchasers and non-contractual purchasers may be possible the difference of treatment must not put at stake the very existence or the independence of other traders on the market. If, in a period of shortage, producers who have a dominant position were entitled to supply traders who have concluded long-term contracts in greater quantities than traders who are not bound in this way this would mean in the long run the end of any truly independent trading for the producers and thanks to this enslavement of trade the disappearance of an important motive force as regards price competition.

— Moreover it would be too simplistic to state that an abuse ceases to be an abuse when a trader has neglected in normal circumstances to provide for reserves of liquidity and stock. Undertakings have a right to expect that dominant positions should not be abused. Moreover, although it is true that account must be taken of the confidence which traders place in contract law, the position nevertheless remains that traders must also be able to count on the observance of Article 86 of the Treaty. Nor could BP's internal plans hinder the application of that article which, as it is a matter of public policy, prevails not only over obligations arising under private law but also over the commercial interests of undertakings which have a dominant position and over their "planning".

(c) Effect on trade between Member States

— ABG's disappearance from the market in question would not have failed, by reason of the position which it occupies there as a competition factor, to affect the structure of that very market. Moreover, BP is not taking account of the fact that a competitive structure is not affected solely by the total "disappearance" of a trader but also by the diminution of its commercial independence.

— When a limited number of small traders form a purchasing co-operative which is active in a market which is in any case already oligopolistic, competition between the members of the co-operative is of course reduced but the co- operative is in a stronger position with regard to the other stages. At the same time competition between the members of the oligopoly to supply the buying co-operative presumably becomes more lively. An assessment of the legality of such a co-operative in terms of Article 85 thus has reasonable chances of resulting in a negative clearance or an exemption in terms of Article 85 (3). However, such a clearance or exemption cannot be interpreted as the conferment of full powers allowing the undertakings dominating the market to eliminate the traders concerned as competition factors.

IV — Oral procedure

The parties submitted oral argument at the hearing on 16 March 1978.

The Advocate General delivered his opinion at the hearing on 23 May 1978.

Decision

1 By an application lodged at the Court Registry on 1 July 1977, the Netherlands companies Benzine en Petroleum Handelsmaatschappij BV, British Petroleum Raffinaderij Nederland NV and British Petroleum Maatschappij Nederland BV (hereinafter referred to as "BP") applied for the annulment of Decision No 77/327/EEC, adopted by the Commission on 19 April 1977 after receiving the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions relating to a proceeding under Article 86 of the EEC Treaty undertaken on an application made to the Commission on 4 January 1974 by the Netherlands companies Aardolie Belangen Gemeenschap BV (ABG) and AVIA Nederland CV (AVIA).

2 That decision was notified to the addressees, who carry on production and marketing of petroleum products in the Netherlands, on 25 April 1977 and was published in the Official Journal of the European Communities L 117 of 9 May 1977, p. 1.

3 In the contested decision the Commission accuses those companies of having, during the crisis from November 1973 to March 1974, abused a dominant position with regard to ABG which acts as a purchasing co-operative on behalf of the 19 members of the AVIA group.

4 The period referred to in the contested decision is that of the crisis in the supply of petroleum products which, originating in the limitation of production which took place in November 1973 in a large number of producing countries, was particularly felt in the Netherlands because of the embargo applied to that State from December 1973, which resulted in a considerable diminution of imports of crude oil.

5 Whilst accusing BP of infringing the provisions of Article 86 of the Treaty, the Commission nevertheless took the view that the intervention of the Rijksbureau voor Aardolie Produkten (National Office for Petroleum Products) set up by Ministerial Decision No 573/814 of 13 November 1973 might have created doubts in the minds of the oil companies with regard to their obligations to their customers and that BP might have thought that the advances of petrol against crude oil might have freed it in part from its duty to make deliveries to ABG during the crisis.

6 More generally, the Commission took the view that the confusion which prevailed on the Netherlands market in petroleum products because of uncertainty as to how the crisis might develop made it difficult to assess the reductions in deliveries which were needed.

7 In view of these factors the contested decision concluded that it would not be appropriate in this case to impose a fine on BP under Article 15 (2) of Regulation No 17.

8 The applicants on the other hand maintain that in this case the Commission based its views on a concept of a dominant position which proceeds from an incorrect analysis of Article 86 of the Treaty and accused BP of having abused that position on the basis of an inadequate appreciation of the facts and law affecting the market.

9 They point out further that action by the Commission under Article 86 of the Treaty is all the more inappropriate in this case "when reference is made to Council Directive No 73/238/EEC of 24 July 1973 on measures to mitigate the effects of difficulties in the supply of crude oil and petroleum products" (Official Journal 1973 L 228, p. 1), which made governments and not the oil companies responsible for sharing the available quantities of crude oil and petroleum products.

10 They claim that the period of scarcity in 1973 and 1974 did in fact highlight the necessity for a clearer definition of the responsibilities and of the directives to be issued under Article 103 of the Treaty and to be addressed at one and the same time to the large oil companies dealing with supplies and to governments.

11 Finally, the applicants state that the fact that no fine was imposed by the contested decision does not negate the existence of their interest in obtaining an acknowledgement from the Court of the unfounded nature of the criticism made of them by that decision which, if it were maintained, might in addition be a basis for the commencement of an action for damages against BP before the national courts.

12 Articles 15 (1) and 16 (1) of Regulation No 17 provide that the Commission "may", by decision, impose on undertakings or associations of undertakings fines or periodic penalty payments.

13 The absence of pecuniary sanctions in a decision applying Articles 85 und 86 of the Treaty does not preclude the addressee from having an interest in obtaining a review by the Court of Justice of the legality of that decision and thus commencing an action for annulment under Article 173 of the Treaty.

14 Furthermore, Article 103 of the Treaty, which lays down that "Member States shall regard their conjunctural policies as a matter of common concern", whilst providing the Community with the opportunity to meet conjunctural difficulties by appropriate measures subject to the observance of Community objectives, is to be found amongst the provisions relating to the common economic policy and this in a field other than that of the provisions of the Treaty relating to the competition rules, such as Articles 85 and 86.

15 Hence, the absence of appropriate rules, based in particular on Article 103 of the Treaty, which would make it possible to adopt suitable conjunctural measures, whilst revealing a neglect of the principle of Community solidarity which is one of the foundations of the Community, and a failure to act which is all the more serious since Article 103 (4) provides in terms that "the procedures provided for in this article shall also apply if any difficulty should arise in the supply of certain products", still cannot release the Commission from its duty to ensure in all circumstances, both in normal and special market conditions, when the competitive position of traders is particularly threatened, that the prohibition in Article 86 of the Treaty is scrupulously observed.

16 The contested decision states that in this matter there existed a dominant position not only on the part of BP relative to its customers but also on that of each of the large international oil companies refining or having refining done for them in the Netherlands relative each to its own customers.

17 The reasons given for this conclusion are based essentially on considerations of a general nature relating to the conditions of the whole of the Netherlands market during the crisis as regards the supply of petroleum products and the state of commercial relations, which, in a market such as this one, inevitably arise between "suppliers who have a substantial share of the market and quantities available and their customers".

18 The first question to be examined is whether, on the supposition that special market conditions such as those in this case did in fact ensure a dominant position in the Netherlands for the large oil companies established there as against their respective customers, the factual and legal circumstances on which the Commission relies to characterize in particular the individual conduct of BP during the crisis make it possible to consider that conduct as an abuse within the meaning of Article 86 of the Treaty.

19 The contested decision accuses BP of having abused its dominant position on the market in question by reducing its supplies to ABG substantially and proportionately to a much greater extent than in relation to all its other customers and of having been unable to provide any objective reasons for its behaviour.

20 It thus accuses the company of having imposed on ABG an obvious, immediate and substantial competitive disadvantage and states that this behaviour might have jeopardized ABG's continued existence.

21 Whilst admitting that undertakings holding a dominant position may take into consideration certain peculiarities and differences in the situation of their customers the decision states that, to avoid abusing a dominant position within the meaning of Article 86 of the Treaty an undertaking in such a position must distribute "fairly" the quantities available amongst all its customers.

22 For the purposes of this distribution it is stated that in the event of a generalized supply crisis all the independent companies are bound to deal in the first place with their habitual suppliers and that reductions in the supplies to purchasers in a period of shortage must be carried out on the basis of a reference period fixed in the year before the crisis.

23 The decision concludes that having regard to all these factors BP discriminated against ABG, and the advances on crude oil made with motor spirit agreed by BP with ABG did not justify in this case a "different" treatment of ABG in comparison with other customers.

24 It is common ground that on 21 November 1972 BP terminated the agreement which had been in existence since 1968 with ABG and thus put an end to its commercial relationship with that company as regards its supply of motor spirit.

25 Following the termination of that agreement which was confirmed by an exchange of letters between BP and ABG on 17 January 1973, the latter company sought, on the advice in particular of the Netherlands Government, to buy crude oil on the international market and have it refined.

26 It was furthermore agreed between BP and ABG that the latter might use the refining capacities of BP to obtain motor spirit from its own crude oil.

27 Having regard to that agreement and since ABG had been experiencing, even before the crisis, difficulties in supplying itself with crude oil, BP agreed to make it advances of petrol up to a level of 250 000 cubic metres of crude oil belonging to it, which ABG was to return before 1 January 1974.

28 It emerges from the contested decision that the fact that BP in November 1972 terminated its commercial relations with ABG was connected with the regrouping of BP's operational activities which was made necessary by the nationalization of a large part of that company's interests in the production sector and by the participation of the producer countries in its extracting activities and is thus explained by considerations which have nothing to do with its relations with ABG.

29 It therefore follows that at the time of the crisis and even from November 1972, ABG's position in relation to BP was no longer, as regards the supply of motor spirit, that of a contractual customer but that of an occasional customer.

30 The principle laid down by the contested decision that reductions in supplies ought to have been carried out on the basis of a reference period fixed in the year before the crisis, although it may be explicable in cases in which a continued supply relationship has been maintained, during that period, between seller and purchaser, cannot be applied when the supplier ceased during the course of that same period to carry on such relations with its customer, regard being had in particular to the fact that the plans of any undertaking are normally based on reasonable forecasts.

31 Moreover, the advances in petrol against crude oil agreed to by BP in pursuance of the processing agreement, as they occur within the context of

an agreement whose purpose was solely the refining of crude oil supplied by ABG and not the supplying of ABG with motor spirit, cannot serve as a valid argument to compare ABG's position in this case in relation to BP with that of a traditional customer of BP during the above-mentioned reference period.

32 For all these reasons, since ABG's position in relation to BP had been, for several months before the crisis occurred, that of an occasional customer, BP cannot be accused of having applied to it during the crisis less favourable treatment than that which it reserved for its traditional customers.

33 Having regard to the general shortage of petroleum products during the period under review and the difficult position in which the whole of the Netherlands market was placed, the application to ABG by BP of a rate of reduction identical or very close to that applied to its traditional customers would have resulted in a considerable diminution of the deliveries which those customers expected.

34 A duty on the part of the supplier to apply a similar rate of reduction in deliveries to all its customers in a period of shortage without having regard to obligations contracted towards its traditional customers could only flow from measures adopted within the framework of the Treaty, in particular Article 103, or, in default of that, by the national authorities.

35 In the absence of such Community measures the Netherlands national authorities, within the framework of the Distributiewet (Law on Distribution), 1939, on 13 November 1973 set up the National Office for Petroleum Products mentioned above in order to face the difficulties met with by purchasers of petroleum products during the crisis.

36 According to an official communication published in the Netherlands Staatscourant of 14 November 1973, the task of the National Office was to control the supply of petroleum products and, if the development of the situation so required, to prepare for possible distribution of those products and to carry it out at the appropriate time.

37 It appears from the description furnished by the Netherlands authorities and reproduced in the contested decision that, both during the period from

12 January to 4 February 1974 and outside that period, the National Office supported consumers or traders who were in difficulty.

38 For this purpose the National Office brought into force from the beginning a special distribution programme for supplying the needs of ABG without however compelling the large oil companies, including BP, to apply a similar rate of reduction in deliveries to all customers.

39 Through the intermediary of the National Office ABG was able, during the period of shortage, to have access for its motor spirit supplies, to other large oil companies grouped together in the Olie Contact Commissie (Liaison Committee for the Oil Industry).

40 Moreover although the intervention of the National Office was not of a mandatory nature but was rather limited to an appeal for voluntary contributions from the oil companies, the position nevertheless remains that ABG found with the national authorities, acting first through the National Office and later directly through the Minister for Economic Affairs, a constant support which, as its difficulties grew, was transformed into a more and more marked intervention, involving the taking of responsibility by the National Office for the needs of ABG's non-contractual customers in motor spirit, the setting up of a pool intended for the exclusive supply of ABG and, when ABG's position became critical, mandatory supply decisions addressed to the large oil companies.

41 Annex I to the decision moreover shows that during the period of shortage, except for the month of February 1974, ABG was able to receive motor spirit not only from the oil companies grouped together in the Liaison Committee but also from the 13 other companies in quantities which represented during the first three months of the crisis 32.5 to 37% of its normal supplies.

42 Finally it is clear that, thanks to that support and to the supply opportunities offered by the market apart from supplies coming from BP, ABG was able during the crisis to find supplies which, although limited by reason in particular of the general scarcity of products, nevertheless did put it in a position to overcome the difficulties engendered by the crisis.

43 Hence, in view of these circumstances, it does not appear that BP in this case abused a dominant position in relation to ABG within the meaning of Article 86 of the Treaty.

44 In these circumstances the contested decision must be annulled.

Costs

45 Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

46 The defendant has failed in its submissions and must therefore be ordered to pay the costs.

On those grounds,

THE COURT

hereby

1. **Annuls Commission Decision No 77/327/EEC of 19 April 1977, published in the Official Journal of the European Communities L 117 of 9 May 1977, p. 1;**

2. **Orders the defendant to pay the costs.**

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 29 June 1978.

A. Van Houtte
Registrar

H. Kutscher
President