In Joined Cases

(1) 40/73: COÖPERATIEVE VERENIGING 'SUIKER UNIE' UA, having its registered office at Rotterdam, represented by its Board of Directors, assisted by F. Salomonson, Advocate of the Dordrecht Bar, and P. Vogelenzang, Advocate at the Rotterdam Bar,

(2) 41/73: SOCIÉTÉ ANONYME GÉNÉRALE SUCRIÈRE, having its registered office at Paris, represented by its Chairman and Managing Director, Antoine Bouchon, assisted by Henri Rambaud, Loyrette, Voillemot and Demoyen, Advocates at the Cour d'Appel, Paris,

(3) 42/73: NV CENTRALE SUIKER MAATSCHAPPIJ, having its registered office at Amsterdam, represented by its Managers, W. G. A. Lammers and G. M. L. van Loon, assisted by R. A. Mörzer Bruyns, Advocate at the Gerechtshof, Amsterdam and R. C. Gisolf, Advocate at the Arrondissementsrechtbank, Amsterdam,

(4) 43/73: SOCIÉTÉ DES RAFFINERIES ET SUCRERIES SAY, which in the course of the proceedings became Société Béghin-Say, a company limited by shares having its registered office at Paris, represented by its General Manager, Jean Bernard, assisted by Bernard Du Granrut, Advocate at the Cour d'Appel, Paris,

(5) 44/73: SOCIÉTÉ F. BÉGHIN, a company limited by shares, having its registered office at Thumeries (Nord), France, represented by its Chairman and Managing Director, Ferdinand Béghin, assisted by René Bondoux, Advocate at the Cour d'Appel, Paris,

the last two applicants merged during these proceedings and became the Béghin-Say company, represented by its Chairman and Managing Director, Ferdinand Béghin, assisted by the Advocates mentioned in 4) and 5) above;

(6) 45/73: ZUCCHERIFICIO DEL VOLANO SPA, having its registered office at Genoa, represented by its Legal Representative, Commendatore Mario Maraldi, assisted by Massimo Severo Giannini and Rosario Nicolò, Professors, Advocates of the Rome Bar,

(7) 46/73: SOCIETÀ AGRICOLA INDUSTRIALE EMILIANA — AIE, having its registered office at Bologna, represented by its Legal Representative, Commendatore Mario Maraldi, assisted by Massimo Severo Giannini and Rosario Nicolò, Professors, Advocates at the Rome Bar,

(8) 47/73: RAFFINERIE TIRLEMONTOISE, a company limited by shares, having its registered office at Brussels, represented by its Board of Directors, assisted by G. van Hecke, Professor, Advocate at the Cour de Cassation of Belgium, and A. Deringer, Advocate at the Oberlandesgericht, Cologne,

(9) 48/73: SOCIÉTÉ ANONYME SUCRES ET DENRÉES, having its registered office at Paris, represented by Varsano, Roboh and Coriat, members of its Board of Directors, assisted by Jacques Lassier, Advocate of the Cour de Paris, and Jean-Denis Bredin, Advocate at the Cour d'Appel, Paris,

(10) 50/73: SOCIETÀ SADAM SPA having its registered office at Bologna, represented by its Chairman, Dr. Angelo Maccaferri, assisted by Giorgio Bernini, Professor, Advocate at the Bologna Bar,

(11) 54/73: SÜDDEUTSCHE ZUCKER-AKTIENGESELLSCHAFT, having its registered office at Mannheim, represented by its Board of Directors, assisted by Gleiss, Lutz, Hootz and Hirsch, Doctors of Law, Advocates at the Landgericht, Stuttgart and their partners,

(12) 55/73: SÜDZUCKER-VERKAUF GmbH, having its registered office at Oberursel (Germany), represented by its Managers, Heinz Brick and Horstmar Stauber, Doctors of Law, assisted by Gleiss, Lutz, Hootz and Hirsch, Doctors of Law, Advocates at the Landgericht, Stuttgart, and their partners,

(13) 56/73: FIRMA PFEIFER & LANGEN, having its registered office at Cologne, represented by its partners, Dr Helmut Börner and Joachim Pfeifer, assisted by Dr Werner von Simson, Professor at the University of Fribourg-en-Brisgau, and Dr Ferdinand Hermanns, Advocate at the Amtsgericht and Landgericht, Cologne,

(14) 111/73: CAVARZERE PRODUZIONI INDUSTRIALI SPA, having its registered office at Padua, represented by its General Manager, Dr Leonardo Montesi, assisted by Giuseppe Celona, Advocate at the Corte d'Appello, Milan and at the Corte di Cassazione, Italy,

(15) 113/73: SOCIETÀ ITALIANA PER L'INDUSTRIA DEGLI ZUCCHERI SPA, having its registered office at Rome, represented by its Managers, Dr Aldo Durante and Attilio Lercari, assisted by Massimo Medina and Corrado Medina, Professor, Advocates at the Cour d'Appel, Genoa and the Corte di Cassazione, Italy,

(16) 114/73: 'ERIDANIA' ZUCCHERIFICI NAZIONALI SPA, having its registered office at Genoa, represented by its Managing Director and Legal Representative, Professor Giuseppe de Andrè, assisted by Antonio Sorrentino, Advocate at the Rome Bar and Mauro de Andrè, Advocate at the Chiavari Bar,

with the following addresses for service in Luxembourg:

— the applicants in Cases 40/73, 43/73, 44/73, 47/73, 48/73, 50/73 and 114/73: at the chambers of Ernest Arendt, case postale 39;

— the applicants in Cases 41/73, 54/73 and 55/73: at the chambers of Georges Reuter, 1 avenue de l'Arsenal;

— the applicants in Cases 42/73, 45/73 and 46/73: at the chambers of Alex Bonn, 22 côte d'Eich;

— the applicant in Case 56/73: at the office of André Robert, Doctor of Law, 13 rue Joseph Tockert;

— the applicant in Case 111/73: at the chambers of Georges Margue, 20 rue Philippe-II;

— the applicant in Case 113/73: at the chambers of Loulou Beissel-Heyard, 47 rue des Glacis;

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, in Brussels, represented by its Legal Advisers, Doctors Bastiaan van der Esch, Erich Zimmermann, Antonio Marchini Camia and Jean-Pierre Dubois, acting as Agents, with an address for service in Luxembourg at the offices of Pierre Lamoureux, Legal Adviser to the Commission, 4 boulevard Royal,

defendant,

supported in Cases 41/73, 43 to 48/73, 50/73, 111/73 and 114/73, to the extent to which they relate to the complaint of concerted practices having as their object the protection of the Italian market, by:

UNIONE NAZIONALE CONSUMATORI, having its registered office at Rome, represented by its Chairman, Oddone Fantini, and its Secretary-General, Vincenzo Dona, assisted by Giovanni Maria Ubertazzi and Fausto Capelli, Advocates at the Milan Bar, with an address for service at the offices of Louis Schiltz, 83 boulevard Grande-Duchesse Charlotte,

intervener,

Applications for the annulment — and in certain cases applications in the alternative for rectification — of the Decision of the Commission No COM (72) 1600 'relating to proceedings under Articles 85 and 86 of the EEC Treaty (IV/26.918 — European sugar industry)', of 2 January 1973 (OJ L 140, p. 17 *et seq.*),

THE COURT

composed of: R. Lecourt, President, R. Monaco and H. Kutscher, Presidents of Chamber, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen, A. J. Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts, procedure and the arguments of the parties may be resumed as follows:

I — Facts and procedure

1. General Community regulations

A — On 18 December 1967 the Council adopted Regulation No 1009/67 which became applicable with effect from 1 July 1968; the regulation applies in particular to white and raw beet sugar and cane sugar and also to sugar beet and sugar cane (Article 1). The ninth recital states that, since there have often been surpluses of sugar in the Community, it appears to be advisable, for a transitional period, to make provision for measures to limit production.

Articles 2 and 3 provide respectively for the fixing each year for the Community area having the largest surplus a target price and an intervention price for white sugar, and for the fixing of a derived intervention price for other areas. The implementing regulations (cf. for example the first Article and the fourth recital of Regulation No 430/68; Article 2 of Regulation No 432/68):

- state that certain departments in the north of France comprise the area having the largest surplus;
- have fixed for this area an intervention price which is 5 % below the target price;
- have fixed derived intervention prices for the other areas of the Community, which do not differ from the intervention price mentioned above except in the case of Italy and the French overseas departments.

Under Article 9 (1) the intervention agencies must, in principle, buy the sugar

offered to them at the intervention price. Article 10 provides that they may only resell their sugar at a price which is higher than the intervention price, except in certain circumstances provided for by this article.

By virtue of the combined effect of Articles 4 and 5 a minimum price for beet is fixed each year for each beet-sugar-producing area for which an intervention price is fixed, the sugar manufacturers having to pay at least this price.

Article 12 provides that each year a threshold price shall be fixed. Under Article 14 a levy shall be charged on imports of sugar equal to the threshold price less the cif price; this latter price is based on the most favourable world price (Article 13 (1)).

Articles 23 and 24, which apply until 1 July 1975, fix basic quantities for each Member State and provide that each of the Member States shall fix, on the basis of the quantities allocated to it in this way for each factory or undertaking producing sugar in its territory, a basic quota and a maximum quota, which varies according to the basic quota. Member States shall impose a production levy on manufacturers of sugar which is outside the basic quota but within the maximum quota (Article 27). The quantity of sugar produced in any given marketing year in excess of the maximum quota shall not be disposed of on the internal market (Article 25).

Article 9 (2) provides that intervention agencies may grant denaturing premiums for sugar rendered unfit for human consumption.

In conformity with Article 17 in the event of sugar being exported to third countries, the difference between quotations or prices on the world market and prices within the Community may be covered by an export refund (cf. C below for the measures adopted to implement the decision). However no refund is granted for the sale of quantities exceeding the maximum quota (Article 25 (2)).

In order to prevent the chemical industry in the Community, a consumer of sugar, from being placed at a disadvantage compared with its competitors in third countries or giving preference to sugar imported from these countries (cf. recital five), Article 9 (6) provides that a 'production refund' shall be granted on sugar used by the said industry; this provision has been implemented in such a way that the chemical industry receives a premium bringing the sugar it purchased in line with world prices (cf. Regulation (EEC) No 765/68 of the Council, OJ L 143, p. 15; OJ (English Special Edition) 1968, p. 150).

Article 35 (1) prohibits in the internal trade of the Community the levying of any customs duty and the application of any quantitative restrictions, the adoption of measures having equivalent effect and recourse to Article 44 of the Treaty. Article 36 provides that, save as otherwise provided in this regulation, Articles 92 to 94 of the Treaty, which prohibit Member States from granting certain aids, shall apply.

B — (a) In application of Article 17 of Regulation No 1009/67, Regulation No 766/68 which also became applicable on 1 July 1968, laid down the general rules for the grant of export refunds.

This regulation provides for two systems for determining refunds, the periodic fixing every two weeks (Article 2) and fixing by tender (Article 4); the first system was applied immediately whereas the second was only used, and moreover concurrently with the first, from the beginning of the 1969/70 marketing year. The refunds resulting from the application of the first system have generally been lower.

Under the provisions of Article 4 the purpose of the tender is to determine the

amount of the refund. The national authorities shall invite tenders 'in accordance with an instrument binding in law in all Member States' which shall lay down the terms of the invitation to tender. These terms must guarantee equal access for all persons established within the Community; they shall include a time-limit for the submission of tenders. Within three working days following the expiry of the time-limit and in the light of the tenders received the maximum amount of the refund shall be fixed by the Commission after consulting the Management Committee. If the amount of the refund shown in a tender exceeds the maximum, it is not accepted by the national authorities. When the maximum amount is being calculated, account shall be taken of the supply situation and prices within the Community, prices and potential outlets on the world markets and costs incurred in exporting sugar.

(b) By virtue of Article 5 of Regulation No 839/68, adopted on the basis of Regulation Nos 1009/67 and 766/68, and which entered into force on the same date as these two regulations, an award is made to any tenderer whose tender does not exceed the maximum amount, nevertheless a different system is applied if a maximum quantity has been fixed for the invitation to tender. Under the provisions of Article 6 of this regulation the award shall confer the right to the issue of an export licence showing the quantity awarded and the amount of the refund.

From the beginning of the 1969/70 marketing year under regulations made by the Commission standing invitations to tender were opened, in particular for white sugar. Under this system of invitations to tender undertakings could submit tenders each week mentioning the amount of the refund and the quantity desired; partial awards were made once a week.

From 5 March 1970 Regulation No 394/70 replaced Regulation No 839/68. Article 6 (1) of this regulation provides that instead of fixing a maximum amount a decision may be taken to discontinue an invitation to tender (cf. recital eight). The other provisions of the said article repeat in their essence the provisions of Article 5 of Regulation No 839/68.

2. Specific Community and national regulations relating to the Italian sugar market

A — Content of the Community regulations

In application of Article 3 of Regulation No 1009/67 derived intervention prices were fixed for Italy, which were higher by approximately 5 % than the intervention prices applicable in the other Member States (Regulation No 432/68).

Article 34 of Regulation No 1009/67, an article derogating from Article 36, authorizes Italy to grant, until the 1974/75 marketing year, 'adaptation subsidies to its beet growers and to its beet processing industry [that is to say to the sugar industry]'. These subsidies must not exceed a specific amount per metric ton of beet or per 100 kg of white sugar; they may only be granted for quantities of beet produced within the basic quota. The fourteenth recital of the said regulation states on this point 'that... beet and sugar production in Italy is rendered difficult by climatic conditions and, in the case of beet production, by the additional problems presented by the application of modern production methods', and 'provision should be made for granting temporary subsidies to both these activities'.

Regulation No 457/68 EEC of the Commission of 11 April 1968 (OJ L 91, p. 23) relating to the amount of the sugar surplus in Italy provides in its first article that Italy should export before 1 July 1969 a specific quantity of sugar to third

countries without export subsidies and that for this purpose it could grant a subsidy in accordance with national provisions.

B — Content of the Italian regulations

(a) Before 1 July 1968, the date when Regulation No 1009/67 came into force, the 'Comitato interministeriale dei prezzi' (The Inter-departmental Committee on Prices, hereinafter called 'CIP'):
- had on many occasions and finally by Order ('provvedimento') No 1119 of 6 August 1965 (Gazzetta Ufficiale No 197 of 7 August 1965, p. 3762), fixed, for sugar intended for food, maximum prices for sales ex-works by the producer and also for sales for consumption;
- had established by measures in 1948, 1957 and 1963 three 'Casse conguaglio' ('equalization funds') relating to the transport of sugar, 'interest payable on sugar' and the price of sugar imports respectively.

(b) On 22 June 1968 CIP issued Order No 1195 (Gazzetta Ufficiale No 162 of 27 June 1968, p. 4057), which:
- refers, *inter alia*, to Regulations Nos 1009/67 and 432/68 of the Council;
- recites in particular:
  - that the first two of the three equalization funds mentioned above under (a) should be closed on 30 June 1968, whereas the third — which had been established to maintain sugar prices in Italy at the same level for the benefit of consumers — showed a deficit which must be made good by the latter;
  - that the ex-works prices fixed previously by CIP were higher than the prices fixed by Community regulations; that in order to meet the higher cost of Italian sugar and to permit the necessary adjustments, Article 34 of Regulation No 1009/67 authorized Italy to grant certain subsidies; that the manufacturing costs of Italian sugar included the 'imposta generale sull'entrata' (IGE) relating to the purchase of beet and the tax on its transportation, which had not been included in the prices fixed by Community regulations;
  - that all the 'equalizations' which had therefore become necessary could be dealt with 'by applying to sugar a levy (sovrapprezzo) equivalent to the difference between the current quotations (quotazioni) in Italy and the new Community quotations'; that under Italian legislation CIP is authorized 'to implement these equalization operations by means of an equalization fund'; that 'these equalization measures are indispensable for the progressive integration of the Italian sugar economy into that of the Community';
- repeals Order No 1119 and specifies the intervention prices fixed by the Community (Article No 1 of the operative part);
- establishes the 'Cassa conguaglio zucchero' (The Sugar Equalization Fund, hereinafter called 'Ccz') and assigns to it the task of implementing the equalization operations referred to below (Article 3 of the operative part);
- provides that this fund shall be financed primarily by a 'sovrapprezzo' of lit. 23 per kg imposed upon white national imported sugar whatever the grade and type may be; with regard to national sugar this surcharge 'must be applied by sugar producers... at the point of delivery of the products for consumption...' (also in the event of a sale to the intervention agency) and must be paid by the producers; with regard to imported sugar the 'sovrapprezzo' is levied by the customs authorities (Articles 4 (a) and (b) of the operative part);
- states (Article 6 of the operative part) that the revenue of the fund is intended for the following purposes;

- aid ('integrazione') to producers of beet and the beet processing industry 'on the basis of Article 34 of Regulation No 1009/67';
- aid to all beet processing undertakings against repayment of the IGE on the purchase of beet and the tax charged on its transportation;
- aid relating to storage charges of the surplus production of the 1967/68 marketing year and to 'export losses [arising out of the surplus production of white sugar during the 1967/68 marketing year] which shall be granted until 1 July 1969 (Regulation No 457/68 of 11 April 1968)';
- aid to sugar producers by way of compensation for a payment which the latter had to make to beet producers under a previous Italian regulation;
- aid for the financial rationalization (ripianamento) of operations carried out by the equalization fund concerning the price of imported sugar (cf. (a) above);
- aid to exporters of an amount corresponding to the beforementioned 'sovrapprezzo' ('surcharge');
- interest payable on delayed payments of aid relating to surplus production (cf. see third dash above);
- payment of Ccz's charges.

(c) On 20 February 1969 CIP issued Order No 1210 (Gazzetta Ufficiale No 56 of 1 March 1969, p. 1381) which:

- states in particular in its recitals that:
  - in 1968/69 Italian sugar production has fallen short of the Italian quota by more than 400 000 quintals but consumption has nevertheless increased and the deficit of granulated sugar used by the sugar industry should be estimated at 650 000 quintals;
  - it is necessary to deal with this situation by means of imports from other Member States;
  - however, 'the introduction of imported granulated sugar for use by industry can at the moment only be carried out at prices higher than the national price' which would be contrary to the objectives of Order No 1195;
  - the conditions of equalization referred to in Regulation No 1195 may be achieved if Ccz uses part of the sovrapprezzo payable on the importation of granulated sugar to cover the higher costs of imported sugar';
  - 'because of the exceptional importance and urgent need of imports of granulated sugar, it is necessary to impose taxes... provisionally on a flat rate basis, subject to the right to extend the period during which they are charged';
- and provides that until 30 June 1969 'with regard to agreements to purchase notified to Ccz up to 30 April 1969, relating to sugar imported from the EEC, subject to any extensions of time being granted by Ccz, the sovrapprezzo [referred to in Order No 1195] will be applied up to an amount reduced by a flat rate (nella misura forfettariamente ridotta) amounting to Lit. 8 per kg net; this reduction shall only apply to granulated sugar, which is not classified in category I, intended solely for industrial use (Article 1 of the operative part).

(d) On 21 May 1969 CIP issued Order No 1215 (Gazzetta Ufficiale No 130 of 23 May 1969, p. 3080). This order, in particular:

- contains recitals similar to those in Order No 1210 and in addition recites that the taxes intended to finance Ccz must be fixed, on the one hand, at an amount as high as the current regulations permit and, on the other hand, 'with due regard to the actual conditions of the market in the EEC countries';
- provides that Ccz 'is authorized to organize open invitations to tender

for import quotas open to all the operators affected, giving them the opportunity to tender for the amount of the sovrapprezzo referred to in Article 4 (b) [of Order No 1195], relating in the first instance to an amount of 500 000 net quintals of white castor sugar and/or raw sugar for refining, to be imported ultimately from EEC countries by operators who are successful...'; 'the invitation to tender is concerned with the amount of the sovrapprezzo which the person interested agrees is payable by him to the Fund...' (Article 1 of the operative part);

— states that each tender must refer to a quantity not less than 10 000 quintals and contain certain undertakings including the undertakings 'to market the sugar for the purpose of consumption (immettere al consumo lo zucchero) in every part of the national territory at prices no higher [than those mentioned in the regulation]' and 'with regard to the destination of the imported sugar to comply with the rules which... may be issued by the Ministry of Agriculture' (Article 2 of the operative part);

— authorizes Ccz, in particular, to fix the amount (quota parte) of the sovrapprezzo at an appropriate figure ('prezzo congruo') and to award import quotas 'according to the quantity and the amount which has been tendered' (Article 3 of the operative part);

— provides that if the person concerned does not comply with the beforementioned conditions the imported sugar will have to bear the whole of the sovrapprezzo (Article 7 of the operative part; the later regulations include the same article).

(e) By Order No 1234 of 24 October 1969 (Gazzetta Ufficiale No 273 of 27 October 1969, p. 6722) CIP made similar provisions for white sugar in Categories 2 and 3 intended for industrial use. The invitations to tender provided for could cover a total quantity of 1 250 000 quintals and were open to the industries concerned and any operator who intended to supply the sugar awarded solely to consumer industries; each tender had to refer to an amount not less than 11 000 quintals (Articles 1 and 2 of the operative part).

Since 'all commercial operators do not have an organization which enables them to take part in open tenders' the regulation authorized Ccz to permit each of the operators, who had not participated in the invitation to tender to import not more than 10 000 quintals up to a total aggregate of 100 000 quintals. To the extent to which the total amount for which applications were made in this way exceeded 100 000 quintals the quantities for which each applicant applied were reduced in proportion. The amounts for which permission was granted had to be subject to 'the same treatment as the tenders showing the lowest sovrapprezzo in respect of which an award was made'. Cf. Article 4 of the operative part.

(f) On 13 November 1969 CIP issued Order No 1236 (Gazzetta Ufficiale of 17 November 1969, p. 7106) which:

— recites, in particular, that Community legislation does not contain any principles relating to the fixing of price differentials for certain special kinds of sugar, for packing the product and for trading margins which must be taken into account in sales of sugar for consumption; that in order to protect Italian consumers from price increases which are not caused by changes in Community prices it was necessary to confirm the ceiling fixed previously for the said price differentials;

— provides that this ceiling is determined by the alignment of the prices fixed by Order No 1119, which has been repealed, (cf. (a) and (b) above) for sales by the producer and sales for immediate consumption.

By Circular No 1237 of 14 November 1969 CIP supplied the particulars required to complete Order No 1236 by giving the figures (for the beforementioned price differentials and the consumer prices) based on Order No 1119).

Order No 1236 and Circular No 1237 have been annulled at the request of the Italian sugar industry and for formal reasons by the Conseil d'État (Judgment of 29 February 1972); this court however confirmed the legality of the Italian measures notwithstanding the existing Community rules.

(g) The later orders made by CIP (No 5/1970 of 23 March 1970, No 10/1970 of 30 June 1970, No 19/70 of 22 October 1970, No 21/1971 of 23 July 1971, published respectively in the 'Gazzetta Ufficiale' No 78 of 27 March 1970, p. 1980; No 171 of 9 July 1970, p. 4502; No 270 of 24 October 1970; No 188 of 26 July 1971, p. 4697), which all mention the need to promote imports from other Member States, contain provisions similar to those in Orders Nos 1215 and 1234, the total amounts which may be awarded varying from case to case.

For the first time Order No 10/1970 (Article 6 of the operative part) provides for security (fidejussione) to be given. This security must be for an amount equal to the 'sovrapprezzo' payable plus 5 %. The operator concerned must provide the security as soon as he is notified that his tender has been successful. The security will be released as soon as he has paid the 'sovrapprezzo'.

The said Order No 10/1970 again authorized (cf. (e) above) Ccz to award import quotas outside the procedure of invitations to tender, and stated that the quantities awarded in this way must be intended solely for industrial use and that 'they must not exceed 10 000 quintals... for each undertaking consuming sugar and, in the aggregate, 20 % of the maximum amount of the import quotas which Ccz shall award from time to time at the different invitations to tender' (Article 4 of the operative part).

Order No 21/1971 states, with regard to 'authorized' imports outside the procedure of invitations to tender, that they are reserved for 'commercial operators who are direct consumers'. It provides that 'these operations must neither exceed 60 000 quintals... for each industrial user, nor, in the aggregate, 25 % of the total amount which Ccz shall determine for each specific invitation to tender...'.

3. History of the present applications

A — Facts leading to the adoption of the decision

On 31 May 1972 the Commission decided, in application of Article 3 of Regulation No 17, to initiate the procedure therein specified against a certain number of undertakings including in particular the applicants.

In application of Article 19 (1) of Regulation No 17 and Regulation No 99/63 the Commission in a letter of 24 July 1972 addressed to the beforementioned undertakings headed 'Notification of Objections',

- found that these undertakings had infringed Articles 85 and 86 of the Treaty;
- gave notice that it intended to compel them, by means of a decision, to bring these infringements to an end and to impose fines upon them;
- gave the undertakings concerned the opportunity of being heard on the matters to which the Commission had taken objection within a period of two months.

The undertakings made use of this opportunity.

B — The decision

The decision was taken on 2 January 1973. It is addressed under Article 4 thereof to the sixteen applicants and also to Franken, Lebaudy-Sommier, Romana, Sermide, Société générale de sucreries, Sucre-Union, WZV and Lebaudy-SUC.

(a) Summary of the operative part of the decision

The first Article of the decision makes the following new complaints:

(1) Eridania, Société générale de sucreries, Cavarzere, Industria degli zuccheri, Romana, Volano, Emiliana, SADAM and Sermide on the one hand and Sucres et Denrées, Béghin, Sucre-Union, Say, Générale sucrière, Lebaudy-SUC, RT and SZAG on the other hand 'have since the end of the 1968/69 marketing year committed infringements of Article 85 (1) by engaging in a concerted practice having as its object and effect the control of deliveries of sugar on the Italian market and consequently the protection of that market';

(2) SU and CSM, on the one hand, and RT and Pfeifer & Langen on the other hand, 'have since the 1968/69 marketing year (Pfeifer & Langen only since the 1970/71 marketing year) committed infringements of Article 85 (1) by engaging in a concerted practice having as its object and effect the control of deliveries of sugar on the Netherlands market from Belgium and the Western part of Germany and consequently the protection of that market';

(3) Pfeifer & Langen, on the one hand, and RT on the other hand, 'have from the 1968/69 marketing year onwards committed infringements of Article 85 (1) by engaging in a concerted practice having as its object and effect the control of deliveries of Belgian sugar on the market of the Western part of Germany and consequently the protection of that market';

(4) SZAG and Franken, on the one hand, and Béghin and Sucre-Union, on the other hand, 'have, from the 1970/71 marketing year onwards, committed infringements of Article 85 (1) by engaging in a concerted practice having as its object and effect the control of deliveries of French sugar on the market of the Southern part of Germany and consequently the protection of that market';

(5) RT 'has from the 1968/69 marketing year committed infringements of Article 86 by bringing economic pressure to bear on Belgian exporters with the object of compelling them to restrict their exports';

(6) SU and CSM 'have during the 1969/70 marketing year committed infringements of Article 86 by bringing economic pressure to bear on Netherlands importers with the object of compelling them to restrict their imports';

(7) SZV 'has from the beginning of the 1968/69 marketing year committed infringements of Article 85 (1) by preventing its agents from reselling sugar obtained from other sources and by tying its customers by granting loyalty rebates';

(8) WZV and Pfeifer & Langen 'have from the 1968/69 marketing year onwards committed infringements of Article 85 (1) by entering into agreements with their agents which restrict their opportunities for importing and exporting within the Community';

(9) RT, Say, Béghin, Générale sucrière, Lebaudy-SUC, Sucre-Union and Sucres et Denrées 'have committed infringements of Article 85 (1) by engaging in concerted actions, at the time of the invitations to tender for refunds on exports to third countries, in connexion with the amount of the refunds for which application were made and also the quantities for which tenders were submitted'.

Article 2 states that 'the beforementioned undertakings are required to

put an end immediately to the infringements found as aforesaid'.

Under Article 3 the following fines are imposed:

— on RT:	1 500 000	u. a.
— on Sucres et Denrées:	1 000 000	u. a.
— on Say:	500 000	u. a.
— on Béghin:	700 000	u. a.
— on Générale sucrière:	400 000	u. a.
— on Eridania:	1 000 000	u. a.
— on Industria degli zuccheri:	300 000	u. a.
— on Cavarzere:	200 000	u. a.
— on Emiliana:	100 000	u. a.
— on Volano:	100 000	u. a.
— on SADAM:	100 000	u. a.
— on SU:	800 000	u. a.
— on CSM:	600 000	u. a.
— on Pfeifer & Langen:	800 000	u. a.
— on SZAG:	700 000	u. a.
— on SZV:	200 000	u. a.

(b) Summary of the grounds of the Decision

The Commission:
- finds that the undertakings concerned are the principal producers and sellers of sugar in the Community;
- states in particular that the sugars to which the decision relates are raw sugar and white sugar falling within heading No 17.01 of the Customs Nomenclature of the EEC, the first being produced at an intermediate stage of production and not fit for human consumption and the second being a finished product;
- states, with supporting figures that there was a surplus of sugar produced in the Community during the 1968/69 and 1971/72 marketing years with which the decision is concerned;
- analyses the French, Belgian, Italian, Netherlands and German sugar markets and in particular refers to the economic situation of the undertakings mentioned in its decision, their respective shares of production or marketing which each had acquired and also to the relation between them or between some of them and third countries;
- states 'that there is a special situation on the Italian market caused not only by Community regulations but also by special measures taken by the national authorities' and describes this situation (cf. 2 above);
- states 'that the Community regulations do not determine the actual way in which prices are established on the markets of the various Member States. The possibility of selling to the intervention agencies, at the intervention price, quantities of sugar within the maximum quotas only prevents selling prices within the Community falling during a fairly considerable period and to an appreciable extent below the intervention price'; that these selling prices, which where generally below the target price, were occasionally close to this latter price in the Netherlands and Germany, whereas in the other Member States they were on the whole closer to the intervention price.

The Commission then gives a general description of the endeavours made by commercial operators of the EEC to arrive at a general agreement on the sale of sugar on the markets of Member States and third countries; it mentions *inter alia:*
- that the main sugar producers and the representatives of the chief sales organizations met in Munich on 30 May 1968 for the purpose of allocating the available quantities both on the market for surpluses and on the market for human consumption;
- in July 1968 the French producers entered into an agreement (which only came into operation during the 1968/69 marketing year — which was notified to the Commission and the evaluation of which in relation to

Article 85 will be the subject of a separate procedure — under which all sales by French producers of sugar for export to third countries, for denaturing or for use by the chemical industry were made subject to the condition that the sugar delivered was in fact to be used for the purposes envisaged, except in those cases where a specified price supplement was paid;

— that during the 1969/70 marketing year cooperation between the sugar producers in the Community was organized on a much wider scale being based on the principle which RT on one occassion defined as 'pas de mouvements de marchandises de pays à pays, si ce n'est en concertation de producteur à producteur' ('No movement of goods from country to country, save by concerted action between producer and producer') and which Export characterized, in a telex sent to RT and Sucre-Union with the words 'chacun chez soi'; ('each in his own home');

— that in conformity with this principle sugar for other sales areas of the Community was supplied either to competitors or to third parties with the consent of competitors or at an increased price based on competitors' prices, the dealers having to abide by this selling policy; these various ways of applying this principle were used separately or concurrently according to the specific characteristics of each market and marketing year;

— that it is therefore necessary to examine in detail the conduct of the undertakings (cf. below).

1. Complaint that Eridania, Cavarzere, Industria degli zuccheri, Volano, Emiliana, SADAM, Sucres et Denrées, Béghin, Say, Générale sucrière, RT and SZAG have engaged in a concerted practice having as its object the protection of the Italian market (Article 85)

(aa) The Commission states that during the 1968/69 marketing year certain Italian sugar processing industries complained of the lack of attractive offers from suppliers in other Member States, whereas Belgian and French producers in particular had large quantities of sugar available. These producers had already for this marketing year shared out among themselves their sales to Italy, standardizing their conditions of sale and assuring their Italian producer-purchasers, that any other sales by them on the Italian market would only be effected at a higher price.

At the beginning of the 1969/70 marketing year on the occasion of the conclusion of new sales agreements for large amounts between the French and Belgian producers on the one hand and Eridania acting on behalf of the Italian purchasers on the other hand, the parties met at Paris on 29 July 1969 and at Genoa on 11 September 1969. At the first meeting they discussed what measures should be taken to prevent 'outsiders' offering sugar for sale on the Italian market at lower prices. At the second meeting they laid down the principles which were to govern deliveries of sugar.

The following groups engaged in these arrangements

— a 'suppliers' group' (producers) consisting essentially of Béghin, Say, Générale sucrière, Lebaudy-SUC, RT and sometimes Sucre-Union, SZAG (for the marketing year 1969/70 only) and Sucres et Denrées; this latter company was mainly engaged in the wholesale trade and given the task of centralizing the offers and organizing the deliveries except those of SZAG;

— an 'importers' group' consisting initially of the Italian sugar producers who attended the meeting in Genoa, namely Eridania (which was the coordinator of the group), Industria degli zuccheri, Romana, Volano, Cavarzere, Emiliana, Sermide, SADAM and certain undertakings,

two of which Eridania has since taken over, and one of which has become the Société générale de sucreries; the latter undertaking and Cavarzere subsequently acquired control of Industria degli zuccheri and Emiliana acquired control of Romana and Volano.

The sugar imported by the importers' group was then sold to consumers and to the Italian sugar processing industries at the same price and on the same conditions as nationally produced sugar. The 'importers' group' took approximately 75 % of the total amount of imported sugar put up for tender, all of which was supplied by the 'suppliers' group'. In the 1969/70 marketing year 15 % of the sugar to be supplied by the 'suppliers' group' was reserved for and supplied by SZAG, which moreover continued in concert with the Italian producers to deliver to them the largest part of its exports to Italy.

Moreover producers, who were not Italian, undertook not to sell to any other Italian purchasers except at increased prices, the increase being FF 1·25 per 100 kg for the 1968/69 marketing year, FF 1·65 for 1969/70 and FF 1·75 for 1970/71. As a result deliveries to independent purchasers remained limited to small amounts.

At a meeting in Genoa on 22 September 1970 between the members of the two groups they reaffirmed the obligations which they had already assumed. In the 1970/71 and 1971/72 marketing years the major part of the Italian requirements of imported sugar were also met by deliveries — which were substantial — from producer to producer.

(bb) The beforementioned operations amount to concerted practices within the meaning of Article 85 (1) of the Treaty.

In support of this finding the Commission in addition to repeating the developments mentioned above under (aa) puts forward the following arguments:

The operations in question have eliminated competition in the case of the quantities concerned between the parties on the Italian market.

Had it not been for the sales between producers the manufacturers in the countries having a surplus would have sold sugar individually on the Italian market, each of them itself fixing the quantities, prices and organizing the distributive networks.

The sales effected, because of the existence of an 'importers' group', have given producer-buyers the opportunity to have larger quantities available and to resell them later, as sugar is a mainly homogeneous product, at the same prices and subject to the same conditions as apply to the sugar they produce themselves.

It is true that the undertakings concerned have argued that this conduct was made necessary by the system of invitations to tender adopted by the Italian authorities (cf. 2 above), that it enabled costs to be rationalized and did not affect all sales of sugar in Italy.

In fact they state that because of the very large quantities put out to tender at the same time foreign suppliers had to share out the amounts awarded according to their distributive capability; only the large Italian undertakings had a distribution network capable of channelling sales of large quantities of imports; deliveries in bulk made it possible to obtain very favourable freight rates from the French Railways; finally deliveries were made to independent Italian customers, in particular by Sucre-Union and Générale sucrière.

However according to the Commission these explanations are not such as to call in question the existence of restrictions on competition. In fact under Italian

regulations such a concentration of supply and demand was unnecessary; although most of the deliveries for Italy had been made under invitations to tender for import quotas, they were effected 'within the marketing system implemented by common accord by the producers concerned'.

In the normal course of events it is not in the interests of a producer to supply large quantities to his competitors, because he can obtain larger profits by supplying dealers and consumers direct. The conduct which is criticized is therefore explained by the wish to restrict competition and to prevent Italian consumers from obtaining their supplies of sugar freely from foreign suppliers.

The price increase fixed by common accord by the two groups and charged on sales to independent purchasers included a distribution margin and also a safety margin in favour of Italian producers which has been raised many times. This unjustified increase was discriminatory. In addition to other disadvantages it has made direct delivery to the said purchasers difficult if not impossible, with the result that after various unsuccessful attempts they resigned themselves to placing their orders with Italian producers.

2. Complaint that SU, CSM, RT and Pfeifer & Langen have engaged in a concerted practice having as its object the protection of the Netherlands market (Article 85)

(aa) The Commission states that during the marketing year 1968/69 to 1971/72 SU and CSM purchased increasing amounts of white sugar from their competitors RT and Pfeifer & Langen and sold most of it at the same prices and subject to the same conditions as Netherlands sugar. In general RT and Pfeifer & Langen did not deliver any large quantities to the Netherlands. RT in a letter to Export wrote 'With regard to the Netherlands the basic principle is that we do not wish to do anything that would upset Suiker Unie or CSM, just as they do not want to do anything which would disturb us'. In spite of the existence of large surpluses, especially in Belgium, RT, SU and CSM refused, when Regulation No 1009/67 entered into force, to supply sugar to customers in other countries who were not sugar producers on the ground that the amounts available should be reserved for the national market. During the 1968/69 and 1969/70 marketing years RT only exported a few hundred metric tons of sugar to the Netherlands and these exports were subject to the condition that the sugar was to be used for denaturing; during these marketing years it informed Belgian exporters on several occasions that it only wanted sugar to be exported to the Netherlands through CSM and SU.

From the end of the 1970/71 marketing year and with the exception of its sales direct to CSM and SU, RT gave the exclusive right to sell its sugar in the Netherlands to Export and Hottlet, subject to the condition that these undertakings should only sell to customers approved by CSM and SU and that they should no longer export to the Netherlands sugar produced by Belgian producers independent of the RT group; the producers' justification of the first condition was that they were anxious not to disturb the Netherlands market structure. The said approval was only given on condition that the sugar went to the Netherlands milk products industry, which uses large amounts. In addition very small quantities of Belgian sugar were also delivered to the Netherlands chemical industry in the 1970/71 marketing year by means of similar selling arrangements.

These procedures were followed also during the 1971/72 marketing year when sales to the milk products industry showed a marked increase.

SU and CSM manufacture the entire production of Netherlands sugar. Imports

of sugar into the Netherlands amount to about 10 % to 15 % of national production. These producers control nearly the whole of the imports of sugar.

During the 1968/69 marketing year Netherlands dealers bought about 90 000 metric tons of sugar in France to be delivered by instalments over several marketing years. The Netherlands producers and dealers agreed:

- that the latter should market the imported sugar at a price which would not be too competitive in relation to the price of sugar produced in the Netherlands;
- that the last consignments of sugar imported were to be delivered in 50 kg bags and in 1 kg packets bearing the trade-mark SU;
- that the sugar thus packed was then to be resold to Dutch producers to enable them to market it themselves.

During the marketing years 1969/70 and 1970/71 more than 14 000 metric tons of sugar were bought by these producers in this way at prices slightly lower than the resale prices; these prices were identical with the selling prices for sugar produced in the Netherlands.

The Dutch dealers had to accept this agreement because certain threats had been made especially by SU.

From the marketing year 1970/71 onwards SU and CSM made the Dutch dealers parties to the agreement they had entered into with RT; since then deliveries of Belgian sugar have been made through Belgian and Dutch dealers in agreement with SU and CSM. Cf. also 5. and 6. below.

(bb) The Commission evaluates these operations and describes their consequences in a way similar to that adopted in its description of the conduct relating to the Italian market (cf. 2. (bb) above). The considerations which apply in particular to the present complaint are in essence as follows: The operations in question have eliminated all competition between the four producers concerned on the Netherlands market.

Had it not been for the sales between producers, RT and Pfeifer & Langen, which are geographically the best placed, would have sold their sugar individually on the Netherlands market, fixing the prices and conditions themselves and using their own trade-marks.

It is true that the parties concerned have pointed out that part of the deliveries by RT to CSM relating to quick melting sugar is carried out pursuant to an agreement entered into between them, because CSM does not have the requisite plant for manufacturing sugar; other sales by RT help to complete the range of the qualities of sugar sold by CSM. These statements are not however relevant, as the deliveries by RT to CSM are not restricted to these special qualities and Netherlands consumers as a whole have no opportunity of selecting their supplier.

The parties concerned have also pointed out that part of the deliveries by RT to SU is sugar for denaturing. It is however no less true that the users of sugar for animal feed find that the number of offers made to them is restricted; further only a very small part of RT's sales to SU is sugar for denaturing.

SU and CSM have in the main only given their consent to deliveries to the Netherlands milk products industry, most of which have no competitive effect on the sale of sugar by SU and CSM.

3. Complaint that Pfeifer & Langen and RT have engaged in a concerted practice having as its object the protection of the market of the Western part of the Federal Republic of Germany (Article 85)

(aa) The Commission states that since 1968/69 Pfeifer & Langen has purchased raw and white sugar in increasing

amounts from Belgian and French competitors, the contracts for its delivery having been entered into with RT. In the 1971/72 marketing year it bought even larger quantities of raw sugar from competitors in other Member States. In the 1971/72 marketing year it sold a not inconsiderable amount to competitors in other Member States and in particular to SU WZV and its most important member, Pfeifer & Langen, sold the sugar which had been purchased, in some cases after processing, at the same prices and subject to the same conditions of sale and under the same trade-marks as national products.

The imports other than those from producer to producer with the Western part of the Federal Republic of Germany were on the whole small. To the extent to which these imports came from Belgian producers and the sugar was supplied for denaturing or export to third countries, the obligation — compliance with which was strictly observed — was usually imposed upon the dealers concerned not to sell such sugar for human consumption in the Community, conduct explained by the fact that sugar intended for the beforementioned purposes was sold in principle at the intervention price and therefore more cheaply than sugar for human consumption in the Member States. The right to resell was only allowed subject to 'an application being made and to the condition that prices were increased'. When following the abolition of the denaturing premium in 1969 sugar which had originally been intended for denaturing was sold in Germany for human consumption at prices below the usual prices, RT, following protests from German producers, instructed Export on 24 July 1969 to discontinue the operations in question in Germany as well as in the Netherlands. Damages were claimed against some dealers who had resold without permission at lower prices sugar originally delivered for denaturing. Since then no further instances have been recorded on the intra-Community market of sugar intended for denaturing being sold for human consumption.

During the 1968/69 marketing year some cases were recorded of refusal to deliver when sugar was to be delivered to Germany for human consumption; a German dealer established in the Saarland told a German purchaser that the German sugar industry had instructed his French supplier not to make any sales on the German market.

During the 1969/70 marketing year sales of Belgian sugar were made by dealers subject to the condition that in the event of resale for human consumption in Germany the consent of Pfeifer & Langen was to be obtained or the price increased by Bfrs 10.

During the 1970/71 marketing year much larger amounts were imported from Belgium into Germany, but of these three-quarters were in the form of deliveries from producer to producer. Export, after obtaining RT's opinion either refused to supply German importers on the ground that RT was not for the time being exporting to that destination, or — after close consultation between RT and Pfeifer & Langen — demanded too high a price calculated 'after adapting it to the internal price notified by Pfeifer & Langen'. The reason for acting in this way was not to disturb the German market. RT required Export to apply the said price also to exports from other Belgian sources. In November 1970 German dealers, who had at first been interested, informed Export that they had in the meantime entered into yearly agreements with the German industry which covered all their requirements.

(bb) The Commission evaluates these operations and describes their consequences in a way similar to that adopted in its description of the conduct relating to the Italian and Netherlands market (cf. 1. (bb), 2. (bb) above). The

considerations which apply in particular to the present complaint are in essence as follows:

Since the 1968/69 marketing year there has been a concerted practice between Pfeifer & Langen which has resulted in Belgian sugar being delivered into the sales territory of Pfeifer & Langen or WZV in such a way that the pressure of competition which could have been produced by the free marketing of this sugar has been considerably reduced.

The Commission pays particular attention to refuting the allegations of the persons concerned that:
- the conduct of RT, to which exception is taken, has been the conduct of RT alone;
- the complaint of a concerted action made by Export is based on misunderstandings arising out of differences of opinion and strained personal relations between RT and Export;
- since the evidence produced by the Commission is third-hand evidence, it cannot be used against Pfeifer & Langen;
- this firm never sought to restrict imports to Germany or to align prices;
- large amounts of sugar were imported apart from deliveries from producer to producer.

In particular it calls attention to the fact that:
- the statements by Export agree with those made by RT;
- the need to obtain the consent of Pfeifer & Langen was provided for in a sales agreement of the Moerbeke-Waas company belonging to the RT group;
- it was in the 1970/71 marketing year, the period during which most of the documents invoked by the Commission were drawn up, that it would have been possible to export to Germany on favourable terms, since an increase of selling prices had coincided with a bad harvest increasing the need for imports; only the existence of a concerted action can explain the fact that in spite of this situation deliveries by RT to German purchasers other than Pfeifer & Langen remained limited, whereas deliveries to this firm suddenly increased.

The concerted action also results from:
- the continual references to the principle 'chacun chez soi'; ('each in his own home')
- the way in which RT required Export to export also sugar coming from other Belgian producers at prices aligned with German prices;
- the fact that the German sugar industry prohibited the sale of foreign sugar by its main dealers without its consent (cf. 8. below).

All these measures would be incomprehensible if they were not based on a concerted action because:
- Pfeifer and Langen could have competed with RT in the latter's territory and in particular in those parts of Belgium close to the frontier where it could have made larger profits than by exporting to third countries;
- the normal policy of RT would have been to sell its surplus production in the neighbouring sales territory of WZV.

The statements of the persons concerned show moreover that Pfeifer & Langen 'tried resolutely to oppose any attempt to trade with its customers'.

The Commission proceeds to refute the arguments put forward by those concerned that:
- deliveries from producer to producer are justified on economic grounds;
- with regard to deliveries of raw sugar the advantages are obvious, since they enabled Pfeifer & Langen to make full use of its surplus capacity not required for its own production and for this purpose to approach raw

sugar factories which were closer than the nearest raw sugar factory of Northern Germany;
— the supplier on its part does not therefore have to set up a sales organization in the country of destination;
— competition is not restricted as deliveries between producers are not exclusive.

It replies in particular that:
— a restrictive effect on competition can only be denied in a case where a producer who does not have his own refining plant sells raw sugar to a refiner, since two such undertakings are not in competition with each other;
— this however is not the situation in thise case, as RT has a large refining capacity and is therefore a competitor of Pfeifer & Langen in respect of raw and white sugar.
RT's opportunities for supplying purchasers in Pfeifer & Langen's sales area other than this firm are restricted by the two facts that RT made large and regular deliveries to Pfeifer & Langen and could only sell to third parties with the latter's consent or at prices aligned with those of Pfeifer & Langen or WZV. In these circumstances such sales do not have any competitive effect.
In this context it is also important to take note of the measures taken by RT and Pfeifer & Langen with regard to the dealers in their respective countries with the object of preventing or restricting exports and imports (cf. 5. and 8. below).
In short the practices to which objection is taken are aimed at protecting the Belgian market and the Western German sales territory.

4. Complaint that SZAG and Béghin have engaged in a concerted practice having as its object the protection of the market in the Southern part of the Federal Republic of Germany (Article 85)

(aa) The Commission states that since the 1970/71 marketing year SZAG and Franken have bought raw sugar from Béghin and white sugar from Béghin and Sucre-Union in increasing quantities. These sugars have been marketed, in some cases after processing, at the same prices, subject to the same conditions of sale and under the same trade marks as German sugar.

The deliveries other than those from producer to producer on SZV's sales territory — a marketing organization of which SZAG and Franken are the most important members — which were principally from France, only represent a relatively small percentage of the total sales in this territory; quantitatively they decrease more and more by comparison with the imports by producers in Southern Germany.

Cf. also 7. below.

(bb) The Commission evaluates this situation and describes its consequences in a way similar to that adopted in its description of the conduct relating to the Italian and Netherlands markets and the Western part of Germany (cf. 1. (bb), 2 (bb), 3. (bb) above). The considerations which apply in particular to this complaint are in essence as follows:

The concerted practice is evident from the fact that deliveries from France have been made between producers to prevent German producers losing customers and shares of the market and from the practice of giving loyalty rebates adopted by SZV (for particulars cf. 7. below).

From the time the frontiers were opened by the entry into force of the Community regulation on sugar, French producers, having regard to their large surpluses and the higher price level in Southern Germany, could have supplied sugar in this area and indeed to purchasers other than their competitors. Yet in the 1968/69 and 1969/70 marketing years, leaving the Saar out of

account, there were hardly any French exports to Germany. The increase in these exports in the 1970/71 and 1971/72 marketing years coincided with a noticeable increase of deliveries between producers.

The Commission rejects the statements by the parties concerned that:
- such deliveries are economically rational as they enable variations in production caused by harvests to be offset, permit amounts which are available to be used and make it unnecessary for the suppliers to set up their own sales organizations;
- the addtional purchase of raw sugar and white sugar of poorer quality for processing into liquid sugar is particularly advantageous because of lower transport costs;
- the said deliveries do not prevent the creation of other patterns of trade which are found moreover to be increasing so far as imports into Southern Germany are concerned; if the volume of these other imports has remained small, this is due to transport costs which often make sales in other countries unattractive.

The small volume of imports cannot be attributed to transport costs. In fact the Saar is supplied with French sugar although German factories are nearer; even over longer distances these costs do not exceed the difference between the French and German prices; finally the numerous requests, usually unsuccessful, from Southern German customers show that there is an economic interest in importing sugar from other Member States.

SZAG has itself admitted that the practices to which exception is taken were intended to avoid a loss of customers.

The fact that Béghin and Sucre-Union have supplied mainly raw sugar and sugar of inferior quality which had to be processed does not invalidate the existence of any restriction on competition, as these suppliers are themselves able to refine the whole of the raw sugar which they produce and to process the sugar of inferior quality into liquid sugar.

The concerted practice is also evident from the fact that SZV has prevented its agents from importing sugar from other Member States and tied its customers by granting loyalty rebates (cf. 7. below for further particulars).

5. Complaint that RT brought economic pressure to bear on Belgian exporters (Article 86)

(aa) The Commission states that RT in the contracts entered into with Export and Hottlet systematically included clauses under which they agreed:
- only to resell RT sugar to producers and to impose the same obligation on other middlemen who might be concerned in such sales;
- only to sell RT sugar in the countries of competing producers with their consent and to impose the same obligation on other middlemen who might be concerned in such sales;
- only to resell RT sugar on the market for surpluses (denaturing, the chemical industries, exports on the world market) subject to the condition that the sugar is in actual fact intended for one of these purposes and to impose the same obligation on other middlemen who might be concerned in such sales.

Without contracts including such clauses RT refused to supply sugar to these two dealers. They had to accept the beforementioned clauses because there were no other major sources of supply and because RT informed them that otherwise it would not supply them with any more sugar, in particular sugar for export to third countries which makes up a large part of their turnover.

On the Belgian market Export and Hottlet and other middlemen are only

allowed to act as brokers or commission agents; it is therefore impossible for them to export the sugar delivered on this market.

(bb) In particular RT for the following reasons has a dominant position on the Belgian and Luxembourg sugar markets which form a substantial part of the Common Market for the following reasons:

— It alone accounts for 50 % of Belgian sugar production.
— It controls or is in a position to control — by means of majority holdings (e.g. Oreye and Moerbeke-Waas) and distribution agreements — approximately 85 % of Belgian production and a similar share of the Belgian Luxembourg market, as white sugar is only imported into Belgium in minimal quantities and the Grand Duchy is supplied by Belgium. Belgian producers controlled by RT do not as a general rule depart from the price policy fixed by RT.
— It exercises some influence on the sugar markets of other Member States, in particular France, because of its participation in Say and Raffinerie d'Erstein and of its financial links with certain large European sugar producers and because of its advanced technical knowledge and achievements (cf. also 2. and 3. above).

(cc) The object of the behaviour described in (aa) above was to limit the principal sources of supply of Export and Hottlet and of their customers. It amounts to an abuse by RT of a dominant position which is prohibited by Article 86 of the Treaty. In fact it may affect trade between Member States in a way which might adversely affect the attainment of a single intra-State market by restricting and in certain cases preventing the sale of sugar in other Member States.

6. Complaint of economic pressure brought to bear by SU and CSM on Netherlands importers (Article 86)

(aa) The Commission claims that SU and CSM compelled Internatio, Jacobson and Dudok de Wit to enter into an agreement under which these three dealers undertook:

— not to sell French sugar imported in 1969 and 1970 at prices considerably lower than those of SU and CSM;
— to resell to SU and CSM the last amounts which these dealers had agreed to import from France in 50 kg sacks or 1 kg bags so that SU and CSM can sell them on the Netherlands market under their own trade marks and at their prices;
— not to arrange any more imports of this kind without the consent of SU and CSM.

During the 1969/70 and 1970/71 marketing years more than 14 000 metric tons of French sugar was purchased in this way by SU and CSM and indeed at a price which was slightly lower than the price at which they resold the sugar.

In order to obtain this contract SU and CSM threatened to interfere with their traditional business of importing sugar for the Netherlands milk products industry by supplying that industry themselves on the terms applicable on the world market; these imports represent a large proportion of the turnover of the said dealers.

From the 1970/71 marketing year onwards SU and CSM integrated these dealers into the import network already agreed with RT. Since then deliveries of white sugar have been made through Belgian and Netherlands dealers in agreement with SU and CSM.

(bb) SU and CSM have a dominant position on the Netherlands market which constitutes a substantial part of the Common Market:

— They are responsible for the entire production of Netherlands sugar. Their sales represent more than 85 % of the Netherlands market. They control indirectly almost all the sugar imported into the Netherlands.

— They cooperate closely in almost all their activities. Towards other undertakings and particularly towards the beforementioned dealers they appear as a single entity.

(cc) The Commission regards the operations described (aa) above as an abuse and supports its view with arguments similar to those it put forward with regard to RT (cf. 5. (cc) above).

7. Complaint that SZV prevented its agents from reselling sugar from other sources and tied its customers by granting loyalty rebates (Article 86)

(aa) The Commission states that SZV sells sugar within its territory through seventeen local representatives with whom it has entered into agreements under which *inter alia* they have to agree not to sell sugar from other suppliers without their consent and that if they do so the contract can be immediately determined. This consent has only been granted for the import of a special quality of sugar and sugar for improvement by processing.

Further SZV grants its customers a loyalty rebate of DM 0·30 per kg which does not depend upon the amount bought but only on the condition that their annual requirements are covered exclusively by SZV. In some cases at least the loyalty rebate as been abolished or its abolition has been notified when the buyer has continued to import sugar which has led to the buyers concerned ceasing to import.

(bb) SZV has a dominant position in the Southern part of Germany which forms a substantial part of the common market:

— It sells almost all the production of its members and fixes the prices and the sales policy itself. To the extent to which these members sell individually they use the same agents.
— In SZV's sales territory, which is clearly divided from the sales territories of other operators, it has at least 90·95 % of the market, as sales by 'outsiders' or by German and foreign factories established outside the said sales territory are extremely small with the exception of deliveries by French producers to members of SZV who were producers.

(cc) The Commission regards the conduct described in (aa) above as an abuse and supports its view with arguments similar to those it put forward with regard to RT (cf. 5. (aa) above). In addition it makes the following observations:

So far as the obligation imposed by SZV on middlemen is concerned, it has in fact made it impossible for foreign suppliers to sell sugar through dealers obtaining their supplies from SZV. It is true that SZV has emphasized that other dealers and a series of processing undertakings in Southern Germany can obtain supplies freely from abroad. This however in no way alters the fact that the opportunities for foreign suppliers to sell in Southern Germany are considerably restricted, although the relatively high prices there makes such imports attractive.

So far as the loyalty rebate is concerned it is an unjustifiable discrimination against buyers who also buy sugar from other sources. Since the buyers depend for at least part of their supplies on SZV, the disadvantage of losing the rebate is very soon greater than the advantage of buying from outsiders even if they offer a favourable price, which the Commission endeavours to prove with figures.

The rebate allows the seller to control the customers' purchases from foreign producers, which can be done if he knows the average amounts bought annually which do not change very much.

The fact that SZV has from time to time granted a rebate even if purchases have

been made from foreign producers does not invalidate this complaint, as the mere notification or danger that the rebate is to be discontinued prevents customers from importing regularly large amounts of other imports.

Nor is it of any importance that in certain cases the rebate was deducted directly from the amount stated in the invoice, because the determining factor in the case of purchases from foreign producers is that customers must expect that the rebate will not be granted in future.

The rebate is an abuse because it is granted by an undertaking having a dominant position with the object of imposing further restrictions on opportunities to import and to consolidate the said position.

8. Complaint that Pfeifer & Langen entered into agreements with its agents restricting their opportunities for importing and exporting within the Community (Article 85)

(aa) The Commission describes the terms of the 'commission contracts' and the 'trade representation contracts' entered into by WZV and Pfeifer & Langen with operators through whom these firms sell their sugar and makes the following observations:

WZV's sales territory is subdivided into four sales areas; in some of these areas WZV only sells through its four area commission agents. In the territory bordering on NZV's sales area WZV has reserved the prior right to sell, which means that the commission agent must notify WZV of all negotiations in progress and wait and see whether it exercises its said right. The commission agent undertakes for himself and on behalf of the firms dependent upon him not to sell any sugar in this particular area either for or through other national or foreign manufacturers or dealers — or even in his own name and on his own account — without the express consent of WZV. If sugar from another source is sold without prior consent or through an unauthorized sales network penalties are provided for under the contract.

Pfeifer & Langen entered into contracts with WZV's agents under the terms of which the latter agreed not to sell sugar from other suppliers without the consent of Pfeifer & Langen, either as trade representatives or on their own account.

Other dealers are only supplied direct by WZV and Pfeifer & Langen if they have entered into one of the contracts referred to above or have stated that they agree with the princples on which they are based.

WZV ensured that the prohibition of competition was observed by getting the dealers whom it supplied to report any sale of sugar from another source. On the other hand dealers who sell on behalf of WZV and Pfeifer & Langen are free to market sugar intended for denaturing and export to third countries.

(bb) The beforementioned contracts are agreements prohibited by Article 85 of the Treaty:

- They make the agents agree only to resell the sugar supplied by WZV and Pfeifer & Langen in a particular territory and to specific customers and not to market sugar from any other source.
- In addition they make it more difficult to sell imported sugar in the Western region of the Federal Republic of Germany:
  - They prevent any increase in the number of suppliers of sugar for human consumption on this market.
  - Dealers are only allowed to act on behalf of other suppliers on this market if their operations are compatible with the interests which the parties to the contracts have in common.

— Even if consent is given to such a transaction in a particular case the parties to the contracts are able to control its essential terms, namely the volume, quality, price, identity of the supplier and of the customer. These kinds of control are effected and consent is granted only in the case of the sale of a specific quality of sugar and sugar for denaturing.
— In these circumstances agents cannot be important customers for suppliers of other Member States.

— Finally the WZV commission on sugar sales is calculated with reference to the amount exceeding the intervention price, so that it is not in the interests of commission agents to endanger the price level by selling imported sugar at more favourable prices.
— The effect of delimiting sales territories is to prevent agents from exporting to other Member States the sugar produced by members of WZV.
— The persons concerned cannot raise the objection that Article 85 does not apply to the contracts in question because they were entered into with agents who are not independent, being part of the sales organization of WZV. In fact the agents are not members of WZV, but, since most of them work for other producers, they operate to this extent as independent agents.

The contracts in question are not exempt from notifcation under Article 4 (2) (1) of Regulation No 17; in the absence of any such notification they are prohibited and there can be no question of making an application under Article 85 (3) of the Treaty; even if the question of notification is disregarded the requirements for exemption have not been fulfilled.

9. Complaint that RT, Say, Béghin, Générale sucrière and Sucres et Denrées engaged in a concerted practice in connexion with the invitations to tender for export refunds (Article 85)

(aa) The Commission with reference to Cummunity regulations for invitations to tender for export refunds states that in 1970 the abovementioned undertakings and Lebaudy-SUC and Sucre-Union entered into an agreement with each other concerning the said invitations to tender which covered the quantities to be offered and the amount of the refunds. That such an agreement was concluded is shown in particular by a telex from RT to Export which reads: '... elimination of competition for refunds, so that each producer will be guaranteed at least the intervention price. Consequently, ending of the struggle to sell quantities on the domestic market, where the price is more certain, rather than having to export (this applies primarily to France)...'.

(bb) This concerted action is prohibited under Article 85 of the Treaty for the following reasons:

If the tenders submitted in answer to an invitation to tender are based on actual knowledge of the tenders by other participants and concerted action between them and not on an individual evaluation competition is at least distorted or restricted.

Although these invitations to tender related to exports to third countries, it must be borne in mind that they permit the export of sugar produced inside the Community and that competition has therefore been impeded within the common market.

The concerted action to which exception is taken, between large producers from many Member States — France and Belgium, the countries having the largest surpluses in the Community — was likely to affect trade between Member States. In fact it enabled the parties to alter the quantities of sugar which each

of them, if there had been no such concerted action, would have sold on the markets of the Member States of the Community. In addition, although the object of the system of invitations to tender provided for in Community regulations is to sell a specific quantity of sugar on the world market, if the refunds are granted as a result of competition to those submitting the lowest tenders, producers are not certain what opportunities they have of exporting sugar to third countries; according to the results of the invitations to tender some producers rather than others have to sell surplus quantities to other Member States of the Community; therefore the concerted action was likely to cause a change in the quantities marketed within the Community. Further the fact that under this system of invitations to tender the sale of large amounts at an attractive profit was guaranteed has been one of the determining factors in the marketing of surpluses by the parties concerned. The concerted action in question supplements the other measures taken by the parties concerned to protect certain national markets.

These conclusions are not invalidated by the fact that the Commission can refuse to award a contract and thereby fix the amounts which are exported on the world market. In fact the Commission is not in a position to determine as it thinks fit the conditions for exporting sugar — either those relating to the refunds or to the amounts — since its choice is limited by the tenders submitted by the producers. It can therefore only determine these conditions within the framework of these tenders. Even if for the duration of one marketing year the Commission exercises some general control over the exports of the Community, the producers by means of a concerted action can modify the results of the various invitations to tender.

10. The exceptions provided for by Regulation No 26 are not applicable.

The Commission states that the concerted practices described above against which Article 85 (1) of the Treaty is directed cannot be regarded as falling within the exceptions provided for in the first sentence of Article 2 (1) of Regulation No 26:

With regard to the first exception it cannot be invoked where a common organization of the market has not left any room for national market organizations.

With regard to the second exception it is clear from the second recital of Regulation No 26 that it is only intended to apply to the extent to which Article 85 (1) of the Treaty jeopardizes attainment of the objectives of the common agricultural policy in the sugar sector. The necessary requirements for attaining these objectives have been fixed by Regulation No 1009/67 and its implementing regulations; the practices in question cannot be fitted into this context from whatever point of view they are examined.

The measures introduced for attainment of these objectives of the common agricultural policy must allow the free movement of the product between Member States; if Regulation No 1009/67 provides for basic amounts per Member State these amounts are only factors in calculating the quotas to be granted to each undertaking with the sole aim of limiting the guarantee regarding prices and sales and are not therefore a form of sharing out production between Member States.

Among the objectives of the common agricultural policy as defined in Article 39 of the Treaty the recitals of Regulation No 1009/67 emphasize the importance of guarantees relating to the employment and standards of living of producers. The practices in question are not one of the means provided for the achievement of this aim by Community regulations, were engaged in for purposes

extraneous to these objectives and, far from being necessary for attainment of the objectives of Article 39, even conflict with the measures laid down in Community regulations for attainment of these objectives in the sugar sector. In particular the concerted action in relation to invitations to tender (cf. 9. above) distorts competition between the undertakings concerned which is the whole purpose of the system of invitations to tender.

11. The principle in accordance with which the fines have been imposed and the amount thereof

(aa) With regard to the principle of imposing fines the Commission submits that the infringements resulting from the concerted practices have been committed 'either intentionally or at least negligently', since the parties concerned knew, or in any case could have known, that the said practices had a restrictive effect.

(bb) With regard to the amount of the fines the Commission first of all states that, in order to determine this amount, the measures referred to above in 5. to 9. must be considered in conjunction with the concerted practices in which the parties engaged (cf. 1. to 4. above).

In considering the seriousness of the infringements account must be taken:

— against the undertakings concerned of the fact that sugar is a product of special importance to the consumer and that the measures to which exception is taken are plainly contrary to the objective of the integration of the markets envisaged by the Treaty;

— in favour of the said undertakings of the fact that the production of and trade in sugar were regulated up to 30 June 1968 by national market organizations which even provided for sales territories, which accounts for a tendency to stick to old habits and a slowness to adapt to the opportunities for free trade offered by Community regulations, which moreover include restrictions without thereby eliminating competition.

With regard to the duration of the infringements it is necessary to bear in mind that in general they were spread over several years.

With regard to the particular situation of each of the said undertakings account must be taken of the nature and duration of the infringements in which it participated, the extent of its participation as well as its position on the market and in relation to its customers. The Commission then examines the individual cases of the various persons and undertakings to which the decision was addressed and gives *inter alia* the reasons why it is unnecessary to impose fines upon some of them.

4. Procedure

The procedure followed the normal course.

The applicant *SADAM* (Case 50/73) lodged an application on 23 May 1973 for the suspension by the Court of the operation of the contested decision. As the Commission has given notice that it does not intend to proceed to recover the fines before the Court delivers its judgment, SADAM has withdrawn its application. By an Order of 11 July 1973 the President of the Court ordered that the application be removed from the Register and reserved the costs of the application.

By Order of 28 June 1973 the Court decided for the purposes of the oral procedure that the present applications should be dealt with jointly.

By Order of 11 December 1973 it decided to allow the intervention of

Unione nazionale consumatori, an Italian association having its registered office at Rome, in Cases 41/73, 43 to 48/73, 50/73, 111/73, 113/73 and 114/73, to the extent to which the said intervention supports the conclusions of the Commission relating to the complaint that the Italian market has been protected.

By order of 19 February 1975 the Court decided of its own motion to hear the evidence of Messrs. B. Lemaire, R. Dudok de Wit, E.K.H. Lindeboom and Ch. Sanders, in Cases 40/73 and 42/73 and on certain questions relating to the complaint that economic pressure was brought to bear by SU and CSM on Netherlands importers. The said witnesses gave their evidence before the Second Chamber of the Court on 13 March 1975.

The Court invited some of the parties to answer certain questions and gave the opposite parties the opportunity of submitting their observations on these answers. The answers and the observations reached the Court within the time limits prescribed for this purpose.

As Sucres et Denrées, the applicant in Case 48/73, learnt that the Commission had decided to initiate the procedure specified in Article 169 of the Treaty based on certain of the Italian regulations referred to under 2 B above and as it took the view that this decision of the Commission would prejudice the solution of Case 48/63, it requested the Court to suspend proceedings until the procedure initiated against the Italian Republic had been determined. The Court did not grant this request; however it invited the Commission to report on the progress achieved by this procedure and the purpose thereof, which it did within the time limit fixed for this purpose.

The oral observations of the parties were heard at the hearings on 14, 15, 16, 17 and 18 April 1975.

The Advocate-General gave his opinion at the hearings on 16 and 17 June 1975.

II — Conclusions of the parties

(1) The main or only conclusion of *all the applicants* is that the entire decision should be annulled and some of them state that it should only be annulled so far as they are concerned.

Générale sucrière, Say, Béghin, Volano and Eridania claim in the alternative that the decision should be annulled to the extent to which it imposes a fine upon them. *These applicants with the exception of Volano* claim in the further alternative that the amount of the fine should be reduced.

SADAM claims 'in the alternative', and *Industria degli zuccheri* 'in any event' that the fines imposed should be cancelled or reduced.

SU, CSM, RT, Sucres et Denrées, Pfeifer and Langen, Emiliana and Cavarzere claim, in the alternative, that the fine should be reduced.

RT also claims in the alternative, that the decision should be annulled 'to the extent to which it prevents the applicant from deciding unilaterally, in application of its own commercial policy, to sell raw or white sugar direct to other refiners'.

Industria degli zuccheri and Eridania ask also for a declaration that the conduct, to which exception is taken, does not amount to an infringement of Article 85 of the Treaty having regard to the exceptions provided for by Article 2 of Regulation No 26.

All the applicants with the exception of Volano and Emiliana ask that the Commission should be ordered to pay the costs.

The *Commission* contends that the applications should be dismissed as

unfounded and that each of the parties should be ordered to pay the costs of its application.

(2) *L'Unione, the intervener* claims that Applications 41/73, 43 to 48/73, 50/73, 111/73, 113/73 and 114/73 should be dismissed, to the extent to which they relate to the complaint that the Italian market is being protected and that these applicants should be ordered to pay the costs.

Générale sucrière, Say, Sucres et Denrées, SADAM and Eridania, in their replies to the intervener's submissions are content to stress the merits of the arguments which they have developed in the main procedure without making the formal claim that the intervener's submissions should be dismissed. On the other hand *Cavarzere and Industria degli zucchere* put forward such a claim; *Industria degli Zuccheri* claims that the intervener's submissions are inadmissable and, in the alternative, that they are unfounded. *Béghin, Volano, Emiliana and RT* made no reply to the intervener's statement.

III — Submissions and arguments of the parties developed during the written procedure

General observations

Some passages in the pleadings deal with matters outside the scope of a particular complaint, either because they describe the legislation or economic situation forming the background of these applications (see A below), or because they give a general view on the interpretation and application of Article 85 of the Treaty (see B below). As these statements are however in part connected with certain submissions of the parties with regard to the specific complaints, reference must be made to Chapters 1 to 9 below.

A — *Some applicants and the Commission* discuss in more or less detail the scope and effects of Community regulations and the trend of the sugar market during the period in question. This discussion, which was partly controversial, includes in particular the questions:

- whether sales between Member States have been small or not and, if the answer is in the affirmative, whether this is caused by fiscal, monetary and administrative obstacles created by Member States or the Community, or not;
- according to the spirit of the said regulations what is the function of the various prices for which it provides (threshold price, target price, intervention price, minimum price to pay to beet producers) and what were the sale prices which producers in fact obtained; in particular whether the intervention price is or is not to some extent a price 'garanti' ['guaranteed'] to the producers, whether the target price must be considered as being at the same time the 'souhaitable' ['desirable'] market price or not, whether and to what extent it could be in the interests of producers to sell below the intervention price;
- whether or not the Netherlands are a country having a sugar deficit, having regard to the basic and maximum quotas granted to this Member State and its producers;
- whether or not it was in the interests of producers and whether they were in a position to boost their production to meet or exceed the maximum quota;
- whether the producers' freedom of action has or has not been restricted by the fact that in certain Member States the intervention organs have expressed the wish not to be offered any sugar;
- whether or not it is correct to say that, since Community regulations have established two distinct sugar markets — namely one for human

consumption and one for denaturing and exports to third countries — producers were entitled to insist that their purchasers do not resell for human consumption sugar supplied for one of these two latter purposes;

— whether or not, having regard to the homogeneous and interchangeable nature of 'sugar' products, the consumer minds very much whether he obtains sugar from one source rather than another, with the result that the promotional function of any trade-mark has practically no effect: whether, having regard to the low value of sugar in relation to its weight and volume, transport costs are or are not a significant item in the cost of the product; whether or not these facts lead to the conclusion that the natural sugar market is the one which is closest to its production centre.

B — (a) With regard to the history of the course of conduct to which exception is taken, the parties are not in complete agreement on the interpretation, for the purpose of evaluating this course of conduct, which must be given, or which the Commission has given to certain events which took place before the said course of conduct: the meeting at Munich on 30 May 1968 of the 'common market' sub-committee of the European Committee of Sugar Manufacturers (CEFS); the agreement entered into between French manufacturers in July 1968; the grouping of German manufacturers into four organizations each having a clearly demarcated sales territory; close cooperation between the two producers of the Netherlands.

The *Commission* takes the view that these facts disclose the intention to divide by common accord the surplus production in equal shares with the object of keeping market prices in the Community at the level of the target price. However these objectives can only be attained if the markets of each Member State are reserved for home producers.

Some of the applicants submit that the Commission has either misunderstood the meaning of the said earlier events or wrongly come to the conclusion that they must be taken into account in connexion with these proceedings.

RT states that it is 'unrealistic and contrary to the laws of psychology to take the view that undertakings had to make a mental adjustment in 1968 in order to switch suddenly from a national system with no competition to a European system of unrestricted competition'. On the other hand Community regulations, which are also intended to control the economy, only allow a very narrow margin for competition, within which it is unreasonable to require that undertakings should engage in unrestricted competition with each other.

(b) The *Commission* states that the decision is based on the fact that each of the groups of manufacturers referred to in the various complaints, but not all the sugar producers of the Community, have engaged in concerted practices. These practices, which in general amount to non-interference with competitors in their own territory, have various points in common (cf. Decision p. 23, Rt. Col.) which — together with the fact that some of the persons concerned engaged in several practices — led the Commission to deal with them in one decision. The Commission only objects to the restrictions, in which each of the undertakings participated.

With regard to the concept of 'concerted practices', it applies, as the Court has held, to a form of coordination which knowingly substitutes practical cooperation for the risks of competition. Parallel conduct can amount to important evidence of such practices, if this conduct does not correspond to the normal conditions of the market, and this occurs in particular if it is likely to enable the persons concerned to consolidate positions which they have

acquired to the detriment of the free movement of goods. The evidence must be evaluated as a whole.

Proof of a concerted practice does not depend on the fact that the persons concerned have agreed on a comprehensive plan. The concerted action lies in the knowledge that the respective decisions of the parties concerned are complementary.

C — (a) *SU, RT* and *Pfeifer & Langen* do not accept the Commission's interpretation of the concept of 'concerted practices':

According to *SU* this interpretation is incompatible with the case-law of the Court which SU analyses in detail. 'conscious parallelism' ('parallélisme conscient') is not enough. It must be shown that all the persons concerned agreed on and at a later stage implemented a common plan. The concerted action does not consist merely in a number of conjectures made by undertakings concerning the future conduct of their competitors; it presupposes in addition 'an act of communication' ('un acte de communication'). Objection cannot be taken to the mere fact that an undertaking has knowledge of the conduct of its competitors and reacts intelligently; this is also true if the parties know that their respective decisions are complementary and if the effect of the reciprocal reactions benefits all the persons concerned. The Commission's argument which emphasizes 'awareness' or 'knowledge' ('wetenschap') is impracticable, because it operates in the field of psychology where clear cut distinctions are impossible. It is necessary to proceed on the basis of tangible data, namely specific concerted actions such as oral agreements, discussions during meetings, prior information by an undertaking of its future conduct etc. This kind of 'consensus' is not forbidden.

Proof of the existence of concerted actions is often difficult. For this reason the Court, following the practice of American courts, has accepted the argument that, in a particular case and having regard to specific market patterns, it is inconceivable that parallel or complementary conduct is not the result of concerted action. However economic doctrine only provides a limited number of opportunities for confirming that there are the necessary links between the market pattern and the behaviour on the market; in particular parallel conduct with regard to sales territories can normally be achieved more easily without concerted action than parallel conduct with regard to prices.

RT submits that according to the case-law of the Court parallel conduct is only proof of concerted action if it leads to conditions of competition which do not correspond to the normal conditions of the market having regard to the nature of the products, the size and number of the undertakings and also the volume of the market in question. In this case the Commission passes over in silence the inference to be drawn from this argument namely that the conditions for the application of Article 85 are not fulfilled if there is no causal connexion between the alleged concerted action and the ensuing practices, because these practices arise from market conditions, so that they would have been the same if there had been no contact between producers.

Pfeifer & Langen criticizes the Commission for not having stated what it means by 'knowingly' ('sciemment') engaging in coordination. An agreement is not prohibited if operator A, while continuing to act independently, adapts its conduct 'knowingly' ('sciemment') to that of operator B; the two operators must have a common purpose, which means that they have notified each other how they will act if each of them adapts his conduct to that of the other. It is only by allowing competitors to disclose their future conduct that the parties concerned eliminate the risk of competition.

(b) The *Commission* submits that neither the wording nor the system, nor the scope of Article 85 requires a 'plan' to be established as a condition precedent to the existence of a concerted practice. The fact that Article 85 not only applies to agreements having as their object but also to those having as their effect the limitation of competition, shows that the concept of a concerted practice is not limited to the notion of premeditation. The existence of practices which are in fact concerted is sufficient. Commercial transactions between competitors are pre-eminently the means of adopting a concerted course of conduct on the market. The offer made to a competitor is in many cases evidence of the fact that the offeror is not anxious to compete with him, and the acceptance of such an offer shows that the offeree is contributing to the establishment of conditions which distort competition.

1. The complaint of a concerted practice having as its object the protection of the Italian Market

A — Formal and procedural submissions

(a) Eridania, Industria degli zuccheri and SZAG: Illegality of the policy adopted by the Commission for informing the public

(1) Summary of the applications

Eridania, Industria degli zuccheri and SZAG submit that the press policy implemented by the Commission both before and after the notification of objections to the parties concerned was unlawful by reason of:

— an infringement of general legal principles (Eridania, SZAG) under which every person accused of an offence is presumed to be innocent until his guilt has been proved (SZAG);
— an infringement of Article 19 of Regulation No 17 which provides that all undertakings concerned shall be given the opportunity of being heard and of the corresponding provisions of Regulation No 99/63 (Industria degli zuccheri);
— an infringement of Article 20 of Regulation No 17 enshrining the principle that the inquiry is secret (Eridania, Industria degli zuccheri) and of the corresponding provisions of Regulation No 99/63 (Industria degli zuccheri);
— an infringement of Article 21 of Regulation No 17 relating to the publication of decisions taken by the Commission (SZAG);
— an infringement of Article 2 of Regulation No 99/63 concerning the procedure for the notification of objections (SZAG).

Eridania calls attention to the fact that the objections made at the beginning of the administrative procedure and the final decision were communicated to the press before they had even been notified to the undertakings concerned. At a time when the latter still did not have the opportunity of defending themselves the Commission had already stated that it was convinced of their guilt. By adopting this attitude it was impossible for the Commission to proceed in a calm and impartial manner.

Industria degli zuccheri makes a similar submission and emphasizes that the public therefore got the impression that the undertakings concerned had no answer to the Commission's objections. Also after hearing the latter the Commission made further communications to the press without making any reference to the arguments put forward by these undertakings. The latter had to defend themselves in 'unsettled conditions'.

SZAG states in addition that throughout the administrative procedure and immediately after the adoption of the decision the Commission gave tendentious information to the public

which caused it to use expressions like 'The sugar Mafia'.

It is clear from Article 2 of Regulation No 99/63 that the objections raised by the Commission must only be communicated to the undertakings concerned and not to third parties. It is true that the second paragraph of this Article allows notice to be given in the Official Journal, if this appears appropriate from the circumstances of the case; but the exception provided by this provision would be undermined if the Commission was entitled to make known its objections at press conferences and interviews.

Article 21 of Regulation 17 does not provide for the publication of decisions taken in application of Article 15 of this regulation, that is to say, those imposing a fine; on the other hand it requires, so far as the decisions adopted pursuant to Article 3 are concerned that they shall be published in the Official Journal. The Commission misunderstood these rules, because in its communications to the press it gave prominence to the fines and made such communications before the decision had been published in the Official Journal.

This analysis is not in any way invalidated by the fact that the Commission sent SZAG on 13 December 1972 at the same time as it notified the public a telex to the effect that it had also adopted a decision concerning SZAG mentioning certain infringements and imposing a fine.

In fact undertakings should be able to make known their point of view to the public at the same time as the latter makes itself acquainted with the decision; however they cannot give their point of view so long as they do not know the contents of the operative part and grounds of the decision. In the case of SZAG this was the position until 15 January 1973.

It is true that the Court held in its judgment of 15 July 1970 (Case 41/69, *Chemiefarma*, Rec. 1970, p. 695) that the communication to the press of the decision which was the subject matter of that case neither altered its meaning nor its content. This case cannot however be applied to the publication of the charges made in the communication of objections.

(2) Summary of the Defences

The *Commission* replies that it is under a duty in all important cartel cases to inform the public of the measures which it takes: the interest which the public has in this information prevails over the contrary interest of the undertakings concerned. Moreover, such a way of proceeding is not prohibited by any provisions, provided that professional secrecy is protected and that the requisite precautions are taken to make it abundantly clear that, until a final decision has been taken, the infringement has not been finally confirmed. On the contrary Article 2 of Regulation No 99/63 acknowledges that the notification of objections is not confidential by providing that they may be published in the Official Journal. With special reference to Eridania's submissions the Commission states that this company was aware of the Commission's intentions so far as it was concerned, since in March 1971, the Commission carried out investigations at the company's place of business and informed Eridania on 13 May 1972 that an administrative procedure had been initiated against it.

After sending the communication to the parties concerned the Commission issued a press release on 24 July 1972 and held a press conference; at that time the public knew that investigations were in progress. After adopting the contested decision in principle on 13 December 1972 and informing the persons concerned the Commission published the communiqué of 18 December 1972 which was limited to repeating the

essence of the decision and Mr Borschette during another press conference made some general comments on the decision. During the period between the notification of the objections and the decision the Commission did not refer in public to the dispute.

(3) Summary of the replies

Eridania and *Industria degli zuccheri* state that they do not object so much to the fact that the Commission issued press releases as to the time and method chosen for this purpose. *Industria degli zuccheri* adds that the method adopted throws light on the punitive attitude by which the Commission has been activated during the implementation of the administrative procedure.

(b) Industria delgi zuccheri and SZAG: Unlawful method of notifying objections

(1) Summary of applications

(aa) *Industria degli zuccheri* submits that there has been an infringement of Article 19 of Regulation No 17 and of Article 4 of Regulation No 99/63 in that some of the documents upon which the notification of objections is based 'are not genuine and consist only of notes'. This way of proceeding, which is contrary to the principle laid down by these provisions that the parties to a dispute must be given the opportunity of being heard, has accordingly made it impossible for the undertaking to defend itself effectively.

Further, Industria degli zuccheri did not know the contents of certain documents such as the minutes of the separate hearings for which certain undertakings asked and the opinion which the Advisory Committee has to give as provided for by Article 10 of Regulation No 17.

(bb) SZAG states that pursuant to Article 19 of Regulation No 17 and of Articles 2 and 4 of Regulation No 99/63 and the principle that a party has the right to defend itself the objections raised against an undertaking and the evidence which the Commission intends to produce against it should be clearly stated. The Commission disregarded this rule by giving notice of its objections in identical terms to 48 sugar undertakings, although the facts alleged only affected either one or a limited number of the undertakings to which they were addressed. The undertakings therefore did not know the specific charges made against them and upon what evidence they are based. The effect of these blanket charges has been an unlawful shift of the burden of proof.

In particular, so far as SZAG is concerned, it was notified of the objection that it had engaged in a concerted action on an international scale on the principle 'chacun chez soi' ('each in his own home'); however, among all the documents produced in support of this objection there is not one which came from SZAG or was sent to it.

Since this company had therefore to accept the risk that the evaluation of the replies supplied by other undertakings would be against its interests, it asked the Commission in a memorandum of 28 September 1972 to send it copies of them which the Commission refused to do on the pretext that professional secrecy must be observed. This reason cannot however justify the fact that its defence has been adversely affected. The attitude of the Commission was moreover inconsistent, because if the observations of the other undertakings were confidential the Commission could not make a single decision. Whether this argument is correct or not the Court has held that the Commission can only rely on the principle of professional secrecy if it has asked the undertakings concerned for their opinion, which it did not do in this case.

In accordance with Article 3 of Regulation No 1 the notification of

objections to SZAG should have been drafted entirely in German. However this communication contained a large number of documents drawn up in other languages, without a translation and neither prepared by SZAG nor addressed to it. It is true that the Commission stated (see communication, footnote on page 40 of the German version and page 129) that a translation can be obtained on application from the Commission's departments 'of all the extracts quoted in their original language'. But this note cannot replace the missing translation in the communication itself (cf. paragraph 1 of Article 2 of Regulation No 99/63). Moreover the translations which could be obtained from the Commission would not have satisfied the requirements of a notification of objections, because they were revised by hand, incomplete, in the wrong order and incorrect.

As the communication referred to extracts of letters without giving the name of the sender and the addressee, it did not provide a complete presentation of the facts which the Commission used against the undertakings. If the Commission called attention to the fact that (communication, page 129) the documents mentioned in the communication could be examined in their original version, it is necessary to point out that SZAG's agent, who tried to make use of this opportunity, was only able to glance at a file in which the copies of the documents were as unidentifiable as they are in the communication.

(2) Summary of the Defences

to (aa) The *Commission* replies that it has not made use of documents which are not genuine. The general nature of the 'Industria degli zuccheri's' allegation does not enable the absence of any grounds for the allegation to be more specifically proved.

Article 9 (3) of Regulation No 99/63 makes it clear that hearings shall not be public; therefore the Commission cannot be required to notify to a particular undertaking the minutes of the hearing of another undertaking. With regard to the opinion of the Advisory Committee it is given solely for the Commission in accordance with Article 10 of Regulation No 17.

to (bb) The reason why the same communication was sent to 48 undertakings is that the practices, which it finds have taken place, have been to a great extent the same. The Commission has not decided that it will not produce evidence for each undertaking separately.

The Commission is not allowed to supply an undertaking with copies of the observations of other undertakings. The undertakings concerned can exchange copies of their observations.

The case decided by the Court cited by SZAG dealt with a different set of facts, namely the examination by the Commission of commercial documents of different parties.

With regard to the quotations in the communications in a language other than German it should be noted that the quotations in the original version are more reliable than translations. The allegation that SZAG has been unable to make use of the translations which the Commission had placed at its disposal is exaggerated.

The fact that the names of the senders of certain documents and the persons to whom they were addressed, which SZAG's agent was able to examine, were obliterated does not in any way affect the evidential value of these documents and has not prevented SZAG from delivering its defence. It is explained by the need to protect commercial operators whose business depends upon producers.

(3) Summary of the replies

to (aa) *Industria degli zuccheri,* with reference to its submissions on the main

issues, calls attention to the fact that the Commission's reply does not refute its submission on this aspect of the case. This applies in particular to the value of the 'evidence' produced to show that there is concerted action between producers-exporters and Industria degli zuccheri and to the documents from the industrial undertakings of the confectionery industry into which the Commission conducted an inquiry.

The fact that the opinion of the Advisory Committee is not intended to be published cannot be pleaded before the Court. Industria degli zuccheri asks the Court to order the Commission to produce the opinion or at least take note of it, since it is a material document in the proceedings.

to (bb) *SZAG* submits that the merits of this submission are apparent merely from a reading of the communication. The argument based upon the similarity of the facts used against the different undertakings is contradicted by the Commission itself which states in another part of its defence that there are altogether five different systems.

The statement that the Commission produced evidence relating to each undertaking separately is also refuted by the very wording of the communication. In order to show that the communication is defective the fact can be mentioned by way of example that it was notified to two of the members of SZV, Wabern and Wetterau (Friedberg), although the latter have not been mentioned once in the 129 pages of the communication.

(4) Summary of the rejoinder in Case 54/73

The *Commission* counters SZAG's reply by stating that a reading of the notification of objections leaves no doubt as to the nature of the infringements imputed to each of the undertakings. During the administrative proceedings SZAG moreover delivered a complete and detailed defence to all the objections specifically raised against it.

With regard to the notification of the communication to certain members of SZV, it is sufficient to say that the name SZV is found in the communication and that it is to be expected that the Commission should make known to the members of a cartel the objections raised against the organ of this cartel.

(c) Cavarzere and Industria degli zuccheri:

Failure to comply with the procedure for conducting inquiries into economic sectors; corresponding failure to consult the Governments concerned and the Management Committee for Sugar

(1) Summary of the applications

The combined effect of the submissions of *Cavarzere and Industria degli zuccheri* is that the sugar market has traditionally been a protected market and that Community regulations also aim at restricting and controlling production, so that they would have been caught by Article 85 of the Treaty if they had been the result of a cartel. To these regulations are added the special features of the national regulations in force in Italy. Considered together the present applications deal with the whole of a sector of the European sugar market, namely the sector for exports by surplus countries to the only country with a sugar deficit in the Community.

In such a situation the Commission should have conducted an inquiry into economic sectors as provided by Article 12 of Regulation No 17 if certain circumstances 'suggest that in the economic sector concerned competition is being restricted or disturbed within the common market'. If the Commission had adopted this procedure, in conformity

with the beforementioned Article and Articles 39 and 40 of Regulation No 1009/67 it would have had to 'request undertakings in the sector concerned to supply the information necessary for giving effect to the principles formulated by Articles 85 and 86 of the Treaty' and consult the governments concerned and also the Management Committee for Sugar; in particular it would have been necessary to consult the Italian Government. If the Commission had adopted this procedure, it would have found that the conduct of the persons concerned was dictated by Italian regulations.

(2) Summary of the Defences

The *Commission* replies that Article 12 of Regulation No 17 does not require it to follow the procedure which this Article lays down but only gives it the power to do so.

In this case the information which was at its disposal enabled it to form an opinion. In particular it was fully aware of the Italian regulations but came to the conclusion that they would have allowed an adequate margin of competition if the practices to which exception is taken had not taken place.

(3) Summary of the Reply of Industria degli zuccheri

Industria degli zuccheri replies that if there was ever a case which called for a special inquiry under Article 12 of Regulation No 17 it was the present case. By failing to carry out such an inquiry the Commission denied the undertakings the guarantees to which they are entitled and conducted an incomplete inquiry.

(d) Eridania, Cavarzere, Industria degli zuccheri and SZAG: Infringement of the procedural rules of Regulation No 26 and of the principle of legal certainty

(1) Summary of applications

Eridania, Cavarzere, Industria degli zuccheri and *SZAG* complain that the Commission has not applied the special procedure provided for by Article 2 (2) of Regulation No 26 whereby it determines by decision which agreements and practices in the agricultural sector fulfil the conditions exempting them from the application of Article 85 which are specified in the first paragraph of the said Article 2. These undertakings take the view that the Commission did not have the power to decide, on the basis of an inquiry carried out only under Regulation No 17, that certain practices relating to the sugar market did not satisfy the said conditions. In order to be able to make an effective decision on this point the Commission, in conformity with the said Article 2 (2), ought to have consulted the Member States and in particular Italy and by doing so would have been able to ascertain in particular that under Italian regulations the conduct of the undertakings concerned came within the exemptions specified in Regulation No 26. Further the Commission should have made a separate decision.

Eridania and *Cavarzere* call attention to the additional fact that the exemptions specified in Regulation No 26 apply automatically without it being necessary to give prior notification to the Commission. Therefore the latter should have applied the principle laid down by the Court that having regard to the principle of legal certainty cartel agreements which do not have to be notified remain valid — and consequently no fine can be imposed in respect thereof — until the Commission makes a decision affecting them.

Industria degli zuccheri submits more briefly a similar argument.

SZAG submits that the principle of legal certainty, which moreover is mentioned in the fifth recital of Regulation No 26,

requires that the very complicated relations between the common organizations of the agricultural markets and Community law on cartel agreements should in each case be investigated under a special procedure. Further, even if it is assumed that the Commission is entitled to include in a single decision its findings under Regulation No 26 and the measures taken in application of Regulation No 17, it could not in any event impose a fine retroactively.

(2) Summary of the statements of defence

The *Commission* replies that Article 2 (2) of Regulation No 26 could, to put it at its highest, be interpreted so as to mean that it must apply the special procedure for which the Article provides, if it has occasion to take a *positive* decision, that is to say to confirm that the conditions for exemption are fulfilled. On the other hand a *negative* decision, that is to say, one dealing with an infringement, which is not covered by Article 2 (2) of Regulation No 26, remains subject to the procedure provided for by Regulation No 17; this follows from Article 1 of Regulation No 26 which not only refers to the articles of the Treaty but also to the 'provisions made in application thereof'. For this reason, to which must be added considerations based on the need to keep the procedural steps down to a minimum, it could, to put it at its highest, be thought that the Commission is *entitled* to confirm, by means of a special decision, that a specific practice cannot come within any of the exemptions in question; it would however only be advisable to adopt such a procedure if the solution appeared to be in doubt. Legal protection of undertakings is not weakened by this fact, since they remain free to lodge an application with the Court against such a decision taken under Article 85 of the Treaty.

In any event there is no infringement of an *essential* procedural requirement within the meaning of Article 173 of the Treaty.

When replying in particular to Eridania's and Cavarzere's submissions the Commission submits that the principle that agreements which do not have to be notified are provisionally valid does not apply in this case. In the first place the present case does not fall within the field of application of Article 4 (2) of Regulation No 17. In the second place those cases specified in Regulation No 26 when Article 85 does not apply are exempted from the application of this Article by operation of law, whereas the provisions of Article 85 (3) can only be declared to be inapplicable by the Commission, which has a discretionary power in this respect and can only make a decision upon application by the undertakings concerned.

When replying in particular to SZAG the Commission states that it is difficult to understand the argument that it is impossible to impose a fine retroactively.

(3) Summary of the replies

Eridania replies that the fifth recital of Regulation No 26 has already indicated that the special procedure provided for by this Regulation must be adopted whether the decision to be taken is negative or positive. Further if the law lays down that, in order to arrive at a particular decision, a specific procedure must be adopted, this procedure should obviously be adopted whether the content of the findings, which it may produce and which the authority does not know when the procedure is opened, is positive or negative.

The procedure laid down by Regulation No 26 cannot be compared to that based on Regulation No 17, since it includes the duty to consult Member States.

Since the exemptions provided for by Regulation No 26 can be claimed as of

right, the Commission can only impose sanctions in respect of conduct after the decision bringing to an end the procedure carried out under the regulation. The fact that the Court held in its judgment of 6 February 1973 (Case 48/72, 'Haecht II', [1973] ECR 77) that notifications provided for by Article 4 of Regulation No 17 do not have suspensive effect does not invalidate this argument, since this judgment refers to the validity of agreements and not to the power to impose fines for a concerted practice.

Industria degli zuccheri puts forward similar arguments relying in particular on the last part of the wording of Article 2 (1) of Regulation No 26. It also submits that the Commission itself thought it necessary in the decision to confirm that this regulation does not apply, taking the view that otherwise it could not confirm that there had been an infringement or impose fines. But, if it was essential to confirm the infringement, it is difficult to understand why this should not have been done in accordance with the forms and guarantees provided for by this regulation.

But if it was true that, in order to establish that this regulation is inapplicable, it is unnecessary to adopt the procedure referred to in Article 2 (2), the Commission should at least, in conformity with paragraph 1 of this Article, have established that because of the practices to which exception is taken, 'competition is excluded or ... the objectives of Article 39 are jeopardized'. It is only after having made this finding that the Commission can act as it did; the undertakings which, it can be assumed, intended to abandon the said practices could then have limited the consequences which Regulation No 17 attaches to infringement of the rules of competition.

SZAG expresses the opinion that the Commission's argument amounts to saying that it is free to apply the rules of procedure of Regulation No 26 according to the result which it wishes to achieve. That means that this result must be decided upon when the Commission makes up its mind whether to apply the said rules or not. But Regulation No 26 contains mandatory provisions relating to the methods the Commission must adopt to form its opinion.

The Commission cannot maintain that non-compliance with the rules laid down by Regulation No 26 does not infringe the rights of the undertakings concerned, since they can make an application to the Court. Such an argument would lead to the denial that there is any duty to comply with the procedural rules, which is contrary to Article 173 of the Treaty.

(4) Summary of the rejoinder

The *Commission* replies to SZAG's submissions first by repeating certain arguments in the various statements of defence. It then states that the decision was taken after consulting the Advisory Committee referred to in Article 10 of Regulation No 17; the Member States represented on the Committee therefore had the opportunity of defining their position on the question whether Regulation No 26 applied or not. In addition the hearing of the parties provided for by Regulation No 17 at least offered the same guarantees as a hearing under Regulation No 26.

(e) Eridania, Industria degli zuccheri, SADAM and SZAG: The unduly short time-limits for the submission of observations

(1) Summary of applications

Eridania, Industria degli zuccheri, SADAM and SZAG state that in the communication of 24 July 1972 which reached the persons to whom it was addressed some days later the Commission fixed a time limit of two months for the submission of

observations, which expired right in the middle of the normal holiday period and which it refused to extend. Having regard to these facts and to the complexity of the matter, the general nature of the presentation of the contents of the communication, of its scope, of the need for each undertaking to take note both of the conduct and of the defence of the other undertakings affected by it and finally to the seriousness of the charges made, the Commission in breach of Article 11 of Regulation No 99/63 failed to grant the persons concerned sufficient time to prepare their defence. If this provision enacts that, in fixing time limits, the Commission shall have regard to the urgency of the case, this rule cannot be applied in this case, as the Commission began its investigations more than three years before notifying its objections to the undertakings concerned.

Eridania and *Industria degli zuccheri* call attention also to the fact that the reason put forward for rejecting the application for an extension — namely that the room reserved for the oral hearing was not available after the dates fixed for this purpose (17 and 18 October 1972) — cannot be taken seriously.

SADAM adds that the oral hearing took place 'in considerable confusion' owing to the number of people taking part and that the Commission merely rejected in their entirety the arguments of the persons concerned who had no opportunity to carry out a thorough examination of the problem.

SZAG makes the further observation that it had not been informed of the purpose of the procedure before receiving the communication so that it was unable to use this period to prepare its case.

This company by a memorandum of 31 October 1972 made use of its right, recognized in the case-law of the Court, to give its opinion in writing after the expiry of the time-limit fixed by the Commission. It was however not even on that date in a position to give a complete explanation of its conduct. After the beforementioned date it came to the conclusion that it would serve no useful purpose to make any supplementary declarations. In fact on the one hand the Commission stated in the notice of the oral hearing that 'the written part of the hearing was closed'; on the other hand, during this hearing, the President, Mr Jaume, called attention to the fact that undertakings 'have a period of 2 weeks from the date of the hearing to lodge with the Commission written statements completing their observations (there is no question of an extension of the time period for delivering a reply)'. In these circumstances SZAG had to assume that the Commission was no longer taking additional observations into account.

Finally there are some indications that the Commission did not take into consideration or only to a limited extent the beforementioned observations of 31 October 1972.

(2) Summary of the statements of defence

The *Commission* replies that under Article 11 of Regulation No 99/63 the minimum time-limit is only two weeks. The time-limit of two months granted in this case was enough, even if account is taken of the fact that this period coincided partly with the usual summer holiday period. The Commission could not show excessive generosity but had to take account of the fact that the procedure must not be unduly protracted. The number of documents, which the undertakings had to examine, was not excessive having regard in particular to the fact that this number was restricted in the case of each undertaking to that part of the text which referred to the facts affecting it. The communication expressly invited the parties concerned to examine the documents which it mentioned.

The parties concerned had the opportunity of defending themselves in

writing and during the hearing; some of them availed themselves of this opportunity by sending the Commission voluminous statements. The Commission duly took into consideration the whole of their arguments, as is shown by the fact that it changed its position on certain points, in particular by deciding not to impose fines on certain of the parties to whom the communication was addressed. With regard in particular to SZAG there is no evidence to support the assumption made by this company that, if it had taken advantage of Mr. Jaume's suggestion that it should submit additional observations, the Commission would not have taken account of them.

(3) Summary of the reply of Industria degli zuccheri

Industria degli zuccheri merely emphasizes that the refusal to extend the time-limit for the defence shows that the Commission in carrying out the procedure was activated by a repressive attitude.

(f) Eridania and SZAG: Infringement of Article 4 of Regulation No 99/63

(1) Summary of the applications

(aa) *Eridania* submits that, contrary to the provisions of Article 4 of Regulation No 99/63, the decision was based on facts which were not mentioned in the communication (reference to the complaints of Italian operators — decision, p. 23, Rt. Col. — and the amounts up to which foreign producers agreed to increase their prices for deliveries to independent operators — decision, p. 24, Rt. Col.). The Commission moreover did not indicate where it obtained its evidence on this point.

The Commission also infringed the beforementioned provision and general legal principles by using documents with no indication of their origin or simply internal notes from undertakings like Export which are not concerned in the administrative procedure.

Further Eridania asks the Court to order production of certain documents which appear to have been taken into consideration by the Commission but which the latter has not brought to the notice of Eridania, namely:

- the agreement between French producers notified to the Commission referred to on page 22 (Rt. Col.) of the decision;
- the minutes of the separate hearings of some of the undertakings concerned;
- the opinion given by the Advisory Committee on Restrictive Practices and Monopolies referred to in Article 10 of Regulation No 17.

(bb) *SZAG* calls attention to the fact that according to the decision (p. 24, Rt. Col.) it acted in concert with Italian producers so that 'the major part of its exports to Italy was delivered direct' to the latter. Now in the communication there was no mention of any such concerted action; on the other hand the Commission claimed in the communication (p. 102) that deliveries to Italian non-producers were made 'practically impossible'. The decision therefore contains statements which are not in the communication.

(2) Summary of the statements of defence

The *Commission* replies:

to (aa) With regard to the reference to the complaints of Italian operators and to the make up of the price increase applied in the case of sales to non-producers they were not objections raised against the undertakings which were criticized, but facts supporting the objections raised against the latter. The communication referred to them as such on pages 51 and 77.

Eridania was free to examine the original documents upon which the communication is based, in accordance with the invitation on page 22 of the latter.

The agreement between French producers notified to the Commission had no effect on the decision, so far as Eridania is concerned.

With regard to the minutes of the hearings Regulation No 99/63 does not provide that they must be communicated to other undertakings; on the other hand Article 9 of this Regulation provides that hearings shall not be public. With regard to the opinion of the Advisory Committee it is given solely for the Commission. Moreover these provisions refer to stages in the administrative procedure after the one referred to in Article 4 of Regulation No 99/63.

to (bb) The finding that SZAG acted in concert with Italian producers was inferred from the deliveries of this company to the latter, which were mentioned in the communication.

(g) Eridania, Industria degli zuccheri, SADAM, Sucres et Denrées, Say, Générale sucrière and SZAG: Infringement of Article 190 of the Treaty

(1) Summary of the applications

Some of the applicants put forward under the head of infringement of Article 190 of the Treaty submissions which really relate to the substance of the case and are therefore dealt with under B below. On the other hand *Industria degli zuccheri* under the head of infringement both of Articles 19 of Regulation No 17 and Article 4 of Regulation No 99/63 and of Article 190 of the Treaty puts forward submissions which can be understood as amounting to allegations that the statement of the reasons upon which the decision is based is defective. This observation applies also to the critical observations submitted by *SZAG* under the heading 'the taking of evidence by the Commission'.

(aa) *Eridania, Industria degli zuccheri and SADAM* regard the fact that the decision merely summarizes the communication concisely and passes over in silence — or rejects completely — the observations submitted by the persons concerned as a defect in the statement of the reasons upon which the decision is based.

(bb) *Industria degli zuccheri* calls attention to the fact that the decision (p. 19, Rt. Col.) states, without proving this statement, that 'the rest of Italian production' — that is to say the sugar produced by undertakings undertakings which do not belong to the three groups mentioned on the page which has been quoted — was marketed by these groups.

The statement that sugar undertakings of the Member States sought to implement a common sales policy based on the principles 'chacun chez soi' and 'pas de mouvements de marchandises de pays à pays si ce n'est en concertation de producteur à producteur' (each in his own home' and 'no movement of goods from country to country, save by agreement between producer and producer') (decision, p. 22, Rt. Col., p. 23, Lt. Col.) is meaningless so far as Italy is concerned. In fact the Italian market has a sugar deficit and the fixing of a regional intervention price for Italy excludes *a priori* any Italian sugar exports.

According to the Commission's own statement (decision, p. 44, Lt. Col.' the fact that the sugar market was regulated up to 1968 by national market organizations 'explains ... a slowness to adapt' to the opportunities of free trade between Member States opened up by Community regulations. Similarly the Commission admitted (decision, p. 22, Lt. Col.) that in Italy the ex-works price

was always close to the intervention price. These facts conflict with the charge made against Italian producers that they artificially restricted the Italian import market, in concert with foreign producers.

(cc) *SADAM* takes the view that the passage in the decision (p. 45, Lt. Col.) that 'SADAM is in the same position as AIE [Emiliana] or Zuccherificio del Volano with regard to its participation in the invitation to tenders of the Cassa conguaglio zucchero' is not clear.

(dd) *Sucres et Denrées, Say and Générale sucrière* submit that the statement that 'confronted with the existence of a common organization of the market which allowed no scope for national organizations of the market' the practices relating to the Italian market cannot benefit from the first exception provided for by Article 2 (1) of Regulation No 26 (decision, p. 42, Rt. Col.) should have been substantiated in law and with facts. This statement is inconsistent with the passages (decision, p. 21, Rt. Col. and p. 22, Lt. Col.) which find 'that there is a special situation on the Italian market which is the result not only of Community regulations but also of special measures taken by the national authorities' and describe this situation. *Say* and *Générale sucrière* add that, as a result, the Commission failed to consider whether the practices which it criticized were an integral part of a national organization of the market, namely the Italian market organization. *Sucres et Denrées* state in particular that the Commission cannot raise the objection that Italy has infringed Community law and that the undertakings concerned cannot take advantage of such an infringement. In fact the Commission — which moreover has taken no action against the Italian regulations — should prove that they are illegal; further the undertakings should have complied with these regulations.

(ee) *Say* takes the view that it is inconsistent to state on the one hand that a producer 'can obtain higher profits by supplying dealers and consumers direct' (decision, p. 31, Rt. Col.) — which amounts to saying that such deliveries at higher prices are justified — and on the other hand to criticize undertakings for having in fact applied such prices when they sold to purchasers other than producers.

(ff) *SZAG* states first of all that any procedure which may culminate in the imposition of a fine should comply with the principle 'in dubio pro reo'. Yet the Commission, in order to justify the existence of concerted practices, was content to rely on 'Anhaltspunkte' (indications, reference points; 'renseignements' ('information') according to the French version of the decision, p. 31, Lt. Col., first paragraph of 2.) and on 'Annahmen' (assumptions; cf. p. 37, Rt. Col., second paragraph of 2. in the German version). The decision is almost completely devoid of any evidence and often does not even indicate the circumstances surrounding the fact upon which it is based; in this way the Commission endeavoured unlawfully to shift the burden of proof. By way of example SZAG mentions:

- the statements that sugar producers 'since the Community regulations entered into force sought to bring about a general agreement relating to the sale of sugar' and that the meeting in Munich was organized with this particular aim in view (decision, p. 22, Rt. Col.);
- the passage in the decision claiming that 'during the 1969/70 marketing year the sales policies of sugar producers in the Community were formulated on more general lines' (decision, p. 23, Lt. Col.); the notes of Export which are quoted cannot be used as evidence against SZAG, since the Commission has never complained that this firm acted in concert with RT in connexion with the sharing out of the market;
- the fact that the Commission has used as evidence both the documents

and facts mentioned in the communication without specifying them and therefore without having incorporated them in the decision.

SZAG states that 'the operative part of the decision is defective' in that subparagraph 1 of Article 1 (1) of this decision states that SZAG has also committed an infringement 'since the end of the 1968/69 marketing year', whereas in the statement of reasons (p. 31, Lt. Col.) this undertaking 'only... participated in the group of suppliers for the 1969/70 marketing year'. It is true that the said statement of reasons goes on to say that SZAG 'during the following marketing years, ... continued to supply Italian producers direct with most of the sugar which it exported to Italy' (loc. cit.); but, as this represented a less serious infringement by SZAG, the Commission ought not to have placed the behaviour of SZAG in every respect on the same footing as that of the other undertakings concerned.

(2) Summary of the statements of defence

to (aa) The Commission replies that it does not have to refute all the submissions made by the undertakings.

to (bb) The fact that the marketing of sugar is assigned to a group of producers or not is neither an objection nor a fact invoked in support of the complaints. The other objections raised by Industria degli zuccheri fall within the substance of the case.

to (cc) It is a fact that SADAM, like Emiliana and Volano, and even more often than the latter regularly participated in the invitations to tender by tendering the same amount of 'sovrapprezzo'.

to (dd) There is no such contradiction as the one alleged. The Commission knew that there were certain special provisions regulating the Italian market, but took the view that their field of application is not large enough to constitute a national organization of the market. With regard to the other submissions the Commission refers to its reply relating to the substance of the case (B (b) 2 below).

to (ee) The Commission's reply to this submission by Say must be found in its reply relating to the submission of infringement of Article 85 of the Treaty made by this company (b (a) 2).

to (ff) The Commission has never denied that, in order to adduce complete evidence of a concerted practice, the same requirements must be satisfied as those laid down in national criminal procedure. The statements of SZAG do not prove that this principle has been overlooked. In particular it does not matter very much that the decision used occasionally the words 'Anhaltspunkte' ('information' 'renseignements') or 'Annahmen' ('assumptions' 'suppositions') instead of using the word 'evidence'. With regard to the examples mentioned by SZAG the Commission replies:

- that the Commission relied on the minutes of the meeting in Munich, that is to say on the best possible evidence; an extract was quoted on pages 41 and 42 of the communication;
- the passage on page 23 (Lt. Col.) of the decision quoted by SZAG does not refer to the latter;
- the argument that the decision should have referred to all the evidence mentioned in the communication is not supported by the case-law of the Court.

With regard to the alleged defect in the operative part of the decision the latter should be drafted in a concise and general form if it is to be intelligible. If any clarification or interpretation is necessary, reference must be made to the statement of reasons; in this case this statement indicates precisely the period during which SZAG committed infringements.

(3) Summary of SZAG's reply

SZAG states in connexion with the submission based on a defect in the operative part of the decision (1 (ff) in fine, 2 to (ff) in fine above) that the decision (p. 31, Lt. Col., under 1) expressly mentions that the company 'only... participated in the suppliers' group during the 1969/70 marketing year', but did not adduce a single fact or piece of evidence relating to the participation of the company in any infringements which may have been committed during the 1970—71 and 1971/72 marketing years. For this reason alone the finding that SZAG committed infringements should be annulled to the extent to which it refers to these two marketing years.

(4) Summary of the rejoinder in Case No 54/73

The *Commission's* answer to the reply is that the wording quoted by SZAG is immediately followed by part of a sentence worded as follows: 'but during the following marketing years it continued to supply its competitors among Italian producers direct with most of the sugar which it exported to Italy'. The 'suppliers' group' referred to in the text quoted by SZAG consists mainly of French and Belgian producers as well as the applicant. The expression '...' continued to...' could not logically refer to the 1970/71 and 1971/72 marketing years.

(b) RT: Lack of clarity in the operative part of the decision

(1) Summary of the application

RT submits that Article 2 of the decision, which requires it to put an end to the infringements found by the Commission to have been committed, cannot be severed from the grounds upon which the decision is based. However the latter do not make it clear whether in the opinion of the Commission sales from producer to producer are *ipso facto* prohibited or only if they are the result of a concerted practice. Such a failure of clarification is contrary to the principle of legal protection which it is particularly important to apply in a quasi-criminal matter. If in fact the Commission took the view that such sales are *ipso facto* incompatible with Article 85 the decision should be annulled because it infringed this provision.

(2) Summary of the statement of defence

The Commission replies that it only regarded as infringements those deliveries from producer to producer which fall within the category of the concerted actions which it criticized and the object and effect of which was to partition national markets. Each time it referred to such deliveries it explained in detail why and how they fit into this category.

B — Submissions on the substance of the case

(a) Générale sucrière, Say, Béghin, RT, Sucres et Denrées, SZAG, Eridania, Cavarzere, Industria degli zuccheri, Volano, Emiliana and SADAM: Infringement of Article 85 of the Treaty

(1) Summary of the applications

(aa) On the Italian regulations relating to the sugar market (meaning, application, effect, legality)

For a description of these regulations cf. 1-2. B above.

Similar descriptions in greater or less detail are supplied by *Générale sucrière, Say, Béghin, Sucres et Denrées, Eridania, Cavarzere, Industria degli zuccheri* and *Emiliana.*

(aaa) The meaning and application of the Italian regulations

Générale sucrière, Say, Eridania, Cavarzere and Industria degli zuccheri all submit that in order to understand these regulations they should be considered in the light of the economic situation existing in Italy which has the following features:

— The local conditions for beet cultivation are difficult. For climatic reasons Italian sugar refineries have to concentrate the treatment of sugar beet within a limited period, so that their plants remain unused for the rest of the year. The industrial value of Italian beet is very different from that of beet produced in the Northern parts of the Community. Production costs are relatively high in Italy. All these facts are likely to reduce the profit margins of the said sugar refineries.

— Italian beet and sugar production falls short of demand; the deficit increases each year because the demand for sugar increases.

— Italy has therefore to ensure that its deficit is covered by imports and to limit them so as to protect its producers. The fact that the Italian intervention price is higher than the market price of the other Member States marks out Italy as a country which only imports sugar.

— There has never been an independent commercial sales network for the sale of sugar, as this product has always been marketed by the producers. Similarly they are the organizations which always imported sugar. They have to extend their operations to include marketing in order to make the best use of their storage facilities and their administrative departments and to reduce the disproportion between the profit which can be made out of the said plants and their amortization costs.

Générale sucrière and Industria degli zuccheri state that as well as being subject to the 'sovrapprezzo' imported sugar in Italy is also subject to a series of other duties and taxes some of which are not levied on national sugar.

(bbb) The effect of the Italian measures on competition and on the conduct of undertakings

Most of the applicants and in particular *Générale sucrière, Say, Béghin, Eridania and Industria degli zuccheri* submit that, since the conditions of the Italian market have eliminated any effective competition, such competition was not capable of being restricted. The reasons put forward in this connexion can be divided into two groups, those put forward by the suppliers who export (suppliers-exporters) and those submitted by producers who import (producers-importers).

Summary of the observations submitted by non-Italian undertakings (suppliers-exporters).

Générale sucrière, Say, Béghin, RT, Sucres et Denrées and SZAG make the following submissions:

As is admitted in the decision (p. 22, Lt. Col.) the application of the whole of the 'sovrapprezzo' (Lit. 23 per kg), after taking into account transport costs as well, made it impossible to export sugar to Italy, since foreign suppliers could in that case only supply Italy at a price higher than the maximum selling price fixed by the Italian authorities. Sugar could only therefore in practice have been exported to Italy by undertakings awarded import quotas by Ccz of amounts fixed by it under an invitation to tender.

For the reasons mentioned below the Italian system either considered on its own or in conjunction with Community regulations, on the one hand, eliminated any real competition and, on the other hand, influenced the conduct of the undertakings.

By only awarding the 'sovrapprezzo' for limited amounts, corresponding to its requirements Italy harmonized supply exactly with demand and what is more on a market with a uniform price. However the nature of the laws of competition is such that a price can only change on a market as a result of demand exceeding supply or supply exceeding demand.

It is not surprising that imported sugar was 'sold for human consumption at the same price and subject to the same conditions of sale as nationally produced sugar' (decision, p. 24, Lt. Col.), since the Italian system leads to a stabilization of the price of imported sugar at the price level on the internal market.

The principal Italian sugar refining undertakings apply a system of equalization of transport costs which was at least strongly recommended by the Italian Government. They sell free to every Italian destination; for this purpose the prices include a 'quota trasporto' (an item for transport costs'), the amount of which corresponds, in the case of each undertaking, to the average of the transport costs from its factories to the purchasers' shops.

However if sugar imports are not effected to a very large extent by Italian producers they are likely to upset these equalizations. In fact on the one hand the sugar consumers of the plain along the river Po — which is the main centre of both production and consumption — are better placed geographically than those of the other Italian regions for the purpose of obtaining direct supplies of sugar from other Member States; but on the other hand, in so far as such direct trade is concerned, the proportion of sugar which Italian sugar refineries delivered in the North, at a price less than the 'quota trasporto', decreases, whereas the proportion which they despatch to the South, at a higher price than the 'quota trasporto' increases. The effect of this was an increase in the 'quota trasporto' and therefore in the price of sugar. It therefore soon appeared to be desirable to concentrate most of the importing in the hands of Italian sugar refineries, and this moreover was more or less enforced by the Italian Government. In the meantime the system of invitations to tender benefited tenderers for large import quotas.

The effect of the Italian regulations was that 'competition' was only possible when answering the invitations to tender. Now contrary to the normal practice this 'competition' tended to produce a rise in prices as the amounts put up to tender were awarded to those who offered to pay the highest 'sovrapprezzo'. Only the large Italian producers had a real interest in taking part in the invitations to tender; in fact

- There are no independent distributors in Italy.
- Italian industrial consumers only need small quantities; the system of invitations to tender places them at a disadvantage compared with the purchasers of large amounts.
- Foreign producers did not tender — contrary however to *Say's* statement so far as it was concerned — since they could only sell the sugar quota awarded to them at a loss or at an unsatisfactory profit, or by undertaking sales which were too risky: if the 'sovrapprezzo' exceeds Lit. 8 transport costs and fiscal charges make the transaction impracticable; if an individual undertaking wished to obtain a foothold on the Italian market, it would have had to set up an expensive commercial network which had to be located inside a powerful national organization and was subject to the uncertainty of invitations to tender the extent and dates of which could not be foreseen; finally the tenderers under the system of invitations to tender have to give security for a large amount. It is therefore wrong to state that were it not for the sales between producers,

the producers of the countries with a sugar surplus 'would sell their sugar individually on the Italian market, deciding on the quantities, prices and distributive networks' (decision, p. 31, Lt. Col.).

Italian producers found it necessary to contact exporters, who had a sufficiently large guaranteed production to be able to ensure regular supplies, offered firm financial guarantees and were in a position to offer low prices owing to the way in which their production and system of obtaining supplies is organized. These considerations caused Italian producers to get in touch with sugar producers in the other common market countries. In doing so the Italian producers only intended to negotiate for large quantities. They instructed Eridania, the only company which was authorized to enter into contracts on behalf of all Italian producers, to make these purchases; this company secured in this way 80 % of sugar sales in Italy. French and Belgian producers could not afford to sell exclusively to individual customers, who had been awarded small import quotas, but had to reckon with this powerful buyer. However, in order to be able to offer the large quantities for which it asked, they in turn had to form a group, operating through a single purchaser, namely Sucres et Denrées. The contracts which they entered into with this company had of necessity to be subject to the same conditions. The alleged concerted action was limited to a sharing out of the contracts proposed by Sucres et Denrées, which was inevitable having regard to the large quantities concerned.

French and Belgian producers had to fix stable prices in order to meet the requirements specified by Italian importers. In negotiating the said contracts they ran considerable risks which *Sucres et Denrées* enumerates in detail: in particular they had to make firm offers which their Italian partners could only accept if they had been awarded import quotas.

French and Belgian producers could only operate within a narrow margin when fixing prices. On the one hand it was not in their interests to sell below the intervention price; on the other hand they could not sell to Italian importers at a price higher than the maximum price fixed by the Italian authorities. In these circumstances they had to do all they could to reduce the effect of the main variable item, namely transport costs representing on average 6 % of the price of sugar. However, in order to obtain satisfactory freight rates from the railways, they were obliged to plan the deliveries of sugar to Italy and despatch them each time in large quantities which implied that exports are coordinated and deliveries made in bulk.

The producers in the Member States having a sugar surplus had to accept the conditions of the undertakings which had been awarded large import quotas or abandon trade with Italy. One of these conditions was the obligation only to sell to other Italian purchasers at a higher price.

Summary of the observations submitted by Italian undertakings (producers-importers)

Eridania, Cavarzere and Industria degli zuccheri together make the following submissions:

Italian producers are not free:
- to produce as much as they want because of the system of quotas;
- to negotiate the price of sugar beet, as a minimum price has been fixed for the sale of this product;
- to fix their sale prices independently as they are fixed by CIP uniformly for the whole of Italy;
- to sell their products wherever they like; they have to secure regular supplies for the whole of Italy;
- to import sugar without having either to pay the whole of the 'sovrapprezzo' or go through the tendering procedures.

For these reasons the said producers are placed at a disadvantage compared with other Italian operators (dealers or industries consuming sugar), who are not subject to comparable restrictions and some of whom are in a very strong position.

Italian producers were in a weak position compared with foreign suppliers for the beforementioned reasons and because they:
- had to import sugar;
- were unable to export and therefore to compete with foreign producers;
- they had to obtain firm offers in order to be able to take part in the tendering procedures without running unacceptable risks.

(ccc) The legality of the Italian measures

Générale sucrière takes the view that the Italian regulations are incompatible with Community regulations:
- The 'sovrapprezzo' is also used to finance aids other than those provided for by Article 34 of Regulation No 1009/67.
- Italy has levied taxes having equivalent effect to customs duties.
- The 'sovrapprezzo' has been and continues to be a measure equivalent to a quantitative restriction.
- Italian regulations have discriminated between producers of the EEC.

Industria degli zuccheri however calls attention to the fact that by its judgments of 26 May 1970 and 29 February 1972 the Italian Conseil d'État declared that the 'sovrapprezzo' and the setting up of Ccz are lawful.

(bb) On the relevance and evaluation of the facts upon which the complaints against the applicants are based

Générale sucrière submits that it has never denied that it was 'forced to participate in this sharing out of the market in order not to be eliminated'.

The company never refused to sell to individual customers, but — as emerges from the figures produced — supplied such customers during the four marketing years mentioned by the decision with more than one third of its total sales to Italy. The said figures should moreover be compared with those giving the results of the various invitations to tender, which show that, on each occasion, the Eridania group or the three large groups of Italian producers saw themselves awarded the largest proportion of the quantities put up to tender (for example, 104 400 metric tons out of 127 020 in 1969/70).

The undertaking only to sell to individual purchasers at a higher price did not in fact affect the prices applied by Générale sucrière in such sales. This company states, and supports its statements with figures, that:
- whereas Sucres et Denrées never obtained a price lower than the intervention price, independent purchasers did in three out of the four marketing years in question;
- a comparison of the lowest and the highest prices of the four marketing years in question shows that five times out of eight the price offered to the independent purchasers was the lowest and the reductions in their favour were often relatively large.

However the application of a higher price can be justified if the contracts relate to small quantities and therefore impose a heavier financial burden on the vendor, having regard, *inter alia,* to the fact that the railways only granted favourable freight rates for deliveries of large quantities. The price offered to Eridania also varied according to the amount which had to be delivered (cf. communication p.p. 79-81: telex of 2 October 1970).

Say maintains that it did not take part in any transaction which could be regarded as a concerted action.

It made use of all opportunities of penetrating the Italian market: direct

sales to independents or to a group of Italian importers; participation in the invitations to tender either directly or through Sucres et Denrées. The distribution of sales among these different sales outlets varied from year to year which proves that there was not concerted action. During the 1970/71 and 1971/72 marketing years Say supplied to independent purchasers 32 % and 46 % respectively of the total of its exports to Italy.

A comparison of the prices applied by Say to the other undertakings which are criticized, on the one hand, and to independent purchasers, on the other hand, does not bring to light the increases mentioned by the decision (p. 24, Rt. Col., under 13). Yet the decision itself proceeds on the basis of the concept that a producer 'can obtain a higher profit by supplying dealers and consumers who are interested direct' (decision, p. 31, Rt. Col.).

Béghin submits, and supports its submissions with figures, that its exports to Italy cannot have any influence on the Italian market in view of their small volume. These figures show that the company has not taken part in any action which may be regarded as a concerted action and that the objection that exporters have applied discriminatory prices cannot be raised against it.

The allegation (decision, p. 24, Lt. Col.) that French and Belgian producers, during all the marketing years referred to, operated through Sucres et Denrées is not true so far as Béghin is concerned, as the latter arranged for its exports in 1970/71 to be handled by an Italian dealer.

Moreover during this marketing year it supplied Italian sugar consumers with 50 000 quintals.

RT states that, since the results of the invitations to tender cannot affect sale prices in Italy but only the receipts of Ccz, Article 85 is inapplicable.

If foreign producers had to form themselves into a group in order to counterbalance the association of Italian producers, it was absolutely vital for RT to join such a group, since it was at a disadvantage compared with French producers owing to higher transport costs. It had to conform to the offers of these producers in order to be able to sell through Sucres et Denrées, which Italian producer-importers decided to approach.

Neither the report on the meeting of 29 July 1969 (cf. communication, p. 56), nor the decision by RT to join the group of French producers in order to submit a joint tender at a particular invitation to tender for import quotas is evidence of an agreement under which this group and the Eridania group agreed to trade only with each other. Each undertaking remained free to change its policy, from one invitation of tender to another, according to its individual commercial interest (cf. communication, p. 81: telex message of Eridania of 29 July 1970), in this way RT also exported to Italy through the firm Export. On every occasion when there was an invitation to tender the two groups held fresh discussions on the conditions attaching to the tender.

RT's commercial policy was determined by its own commercial interest; the Commission has produced no evidence that this policy was the outcome of an unlawful concerted action. If RT concentrated its sales on purchasers of large quantities, the sole reason for this was that such a policy appeared to it to be more profitable. It neither asked foreign producers for nor received anything from them in consideration for not systematically establishing a foothold in the market for medium and small foreign consumers.

The main evidence of the concerted action alleged by the Commission is the

correspondence between RT and Export and also between Export and third parties (communication of objections, pp. 63, 64, 67, 68). However — as RT states in detail — this correspondence is explained on psychological grounds by the strained relations and conflict of interests which had arisen between the two companies and should not be taken literally. In particular RT, in order to lower the temperature of the dispute, did not wish to explain frankly to Export that it was compelled by its commercial interest to eliminate the middlemen in certain transactions so as not to reduce further the return which was scarcely equal to the intervention price, although it would have preferred to shelter behind its foreign associates.

Sucres et Denrées submits that the concerted action, to which exception is taken, does not fall within Article 85. In fact it could not modify the geographical situation and the regulations which are features of the Italian market and did not achieve results markedly different from those which would have arisen if there had been no such concerted action.

The concerted action has improved the situation of Italian consumers. It does not have an appreciable effect on profit margins, as the applied price is only just above the intervention price. The reduction of the 'sovrapprezzo' cannot prejudice the said Italian consumers having regard to the fact that a uniform price is fixed by the Italian authorities. The reduction of transport costs and the costs of sale can only be achieved by means of the practices to which exception is taken.

Further, assuming that there can be said to be any restriction on competition, it cannot be imputed to Sucres et Denrées (which moreover is not a wholesaler but simply a dealer). The telex message sent by the RT company (cf. communication, pp. 57, 60) in which it held itself out to be 'the sole purchaser of sugar with the group of suppliers and the sole vendor in Italy' is explained by the fact that the company was instructed to centralize the invoicing of deliveries to Italy, which makes it possible to operate a more flexible system of deliveries and is justified by Sucres et Denrées being responsible for certain risks.

The company has only acted in accordance with the instructions of the exporters and on their account. Therefore, if the suppliers agreed between themselves not to sell to Italian importers other than those represented by Eridania, Sucres et Denrées attached no importance to this fact.

To the extent to which exporters have used this company they have done so without being under any obligation to deal exclusively with it.

In general Sucres et Denrées only forwarded offers and coordinated deliveries and payments.

SZAG submits that it could not attend the meeting in Paris but only the one in Genoa (cf. decision, p. 23, Rt. Col., p. 24, Lt. Col.). Contrary to the Commission's statements the object of this meeting convened by Eridania was only to inform Italian buyers of the opportunities there were for sugar deliveries. The statement (loc. cit.) that the result of 'the commercial correspondence exchanged ever since between the undertakings importing and exporting sugar on the Italian market' was that the basis of these operations 'was established during this meeting' is not correct and moreover cannot be proved in the case of SZAG.

The documents quoted by the Commission do not show that sales by SZAG to Eridania are the result of concerted action:

— The mention of the company in the letters from third parties (notification, p. 57 *et seq.)* is not conclusive; moreover it could at most establish that SZAG participated in practices for sharing out deliveries for October

1969 — and not for the whole of the period referred to by the Commission.

- More particularly the complete text of the telex message of Sucres et Denrées of 1 October 1969 (communication, p. 57) shows that this company had not received from SZAG any authority to submit a tender also on behalf of the latter and did not even know whether SZAG would send any deliveries to Italy.
- If the telex messages of 9 and 15 October 1969 (communication, p. 58) sent by Sucres et Denrées to Eridania state that 15 % of the deliveries offered to the latter are 'reserved to the German Südzucker group' this statement led to a correction by Eridania of 20 October 1969 that there was no question of a quota of 15 %, but that the 'Germans' had made an offer to Eridania of 15 000 metric tons.
- In the telex message of 10 April 1970 sent by Eridania to Sucres et Denrées (communication, p. 64) Eridania informed Sucres et Denrées that 'we do not agree with your formula of 85 %' — that is to say the formula reserving a quota of 15 % to SZAG — since 'we shall be compelled, as we were last year, to obtain certain quantities from German merchants'. It emerges from these facts that, although Eridania later in fact ordered from SZAG about 15 % of the amount that it was awarded, this order was an independent decision by Eridania and that as well as SZAG there were still other German suppliers including dealers. Finally in this exchange of letters in conjunction with the telex message in reply to Sucres et Denrées of 22 April 1970 can be detected a definite conflict between the French and Belgian undertakings of the one part and SZAG of the other part.
- On page 20 of the communication the Commission quotes a document prepared by Sucres et Denrées, which breaks down deliveries between the different suppliers and does not mention SZAG.

The statistics show; that SZAG supplied Italian producers with less sugar than the other purchasers in this country; that since SZAG's share of deliveries from producer to producer fluctuated considerably, there was competition between the members of the group called 'the suppliers'; that German 'outsiders' supplied larger quantities to Italy than SZAG; finally that the company's share of the total imports into Italy was too small to shield the Italian market from imports from other sources:

- Direct or indirect deliveries by SZAG to Italian dealers amounted during each of the four marketing years in question to 3 100, 2 900, 300 and 6 900 metric tons respectively.
- SZAG supplied 1·44 %; 8·51 %; 1·75 %; 3·8 % respectively of the total imports of sugar into Italy during these marketing years.
- During the 1969/70 marketing year SZAG sold 19 800 metric tons to Italy (16 900 to producers and 2 900 to dealers); other German factories supplied 13 600 metric tons, so that the share of 'outsiders' amounted to 48·8 % of deliveries from Germany. In 1968/69, 1970/71 and 1971/72 this share amounted to 95·4 %, 56·3 % and 70·5 % respectively.
- The respective shares of SZAG of supplies in 1969/70 to Italian producers and dealers was 9·1 % and 11·9 %.
- SZAG took part in the Italian invitations to tender by delivering supplies to Italian producers varying from 2·96 % to 9·63 %.

Because of the small quantities at the disposal of SZAG this company is unable to supply regularly processing undertakings over a certain size.

SZAG has never undertaken 'not to sell to any other Italian purchasers and in particular the sugar processing industry except at higher prices' (decision, p. 24, Rt. Col.; cf. also p. 32, Lt. Col.).

The Commission was wrong to assume that 'normally it is not to a producer's advantage to sell large quantities of his products to one or more competitors' and that 'he can obtain higher profits by supplying dealers and consumers direct' (decision, p. 31, Rt. Col.). A higher price would not necessarily lead to a higher profit. As emerges from SZAG's calculations the latter regularly obtained a higher profit by selling to producers than to dealers.

Even if it was true that suppliers shared out between them the amounts to be supplied there is no infringement. The amount awarded in 1969/70 was 110 000 metric tons; none of the parties was able to supply such a large amount. However according to the communication of the Commission of 29 July 1968 'agreements the sole object of which is the formation of temporary working groups for the purpose of carrying out orders jointly if the undertakings who are members of the groups ... are unable to deal with the orders individually' are not infringements.

In its communication of 27 May 1970 the Commisson admitted that, confronted by a share of less than 5 % of the market, trade between Member States was not affected to an appreciable extent. This criterion should be applied in favour of SZAG so far as the Italian market is concerned. In the alternative there is a case for taking account of the fact that SZAG played, as far as it was possible to do so, the part of an 'outsider'; the Commission shares this view since it refers to 'a certain rivalry which became evident inside the group of suppliers' (communication, p. 80). In conformity with the principle of equality of treatment before the law SZAG can therefore claim to be treated on the same footing as Sucre-Union which has not been fined.

Eridania submits that the conduct to which exception is taken, cannot fall within Article 85, since it was intended to re-establish equality of competition for the benefit of Italian producers and *vis-à-vis* the traders and consumers of this country.

The fact that Italian undertakings 'by mutual agreement' (decision, p. 31, Rt. Col.) entered into discussions for the purpose of sugar imports cannot amount to an infringement of Article 85. The concerted actions between purchasers were in conformity with Community law, since their aim, which has been attained in this case, was to obtain lower prices by ordering larger quantities.

If Italian producers had abandoned their traditional role of sugar importers, encouraged by the Italian authorities, there would in fact have been no one to replace them since there has never been an independent commercial network in Italy. If it is admitted that producers had to import sugar themselves, the fact that they imported direct from foreign producers is irrelevant for the application of Article 85.

With regard to the objection raised against Italian producers that they resold imported sugar 'at the same prices and subject to the same conditions as sugar produced by domestic producers' (decision, p. 31, Lt. Col.), *Eridania, Cavarzere and Industria degli zuccheri* together make the following submissions:

- Italian regulations prescribe uniform sale prices which have moreover benefited consumers, since they are always fixed at the lowest possible price (the intervention price).
- The objection is inconsistent with the complaint that foreign exporters applied a different price in Italy.

Eridania takes the view that the fact that foreign suppliers may have shared out between them the deliveries in question cannot be blamed on Italian producers.

Eridania, Cavarzere and Industria degli zuccheri submit that even if the

foreign producers applied a higher price in their sales to Italian importers other than producers there has been no infringement:

— The opposite view can also be taken that producers were allowed a discount price. For in accordance with a universally accepted custom the reseller is entitled to such a discount.

— Preferential treatment is only prohibited to the extent to which the groups of contracting parties in question are in a comparable position. This does not arise in this case in particular because Italian producers purchased considerable quantities, had to incur heavy charges (the costs of their commercial organization, agents' commission, the obligation to sell at a uniform price throughout Italy) and could offer their purchasers the advantage of regular supplies owing to the storage facilities at their disposal. Further the sugar producers and the processing industry were not in competition with each other because the latter was a customer of the former.

— The discounts cannot have the slightest effect on the prices applied having regard to the Italian regulations.

— The Commission in the part of the decision dealing with SZV (decision, p. 39, Rt. Col.) has criticized this company for having granted a loyalty rebate 'which *does not depend* on the amount bought'; on the other hand it has not punished SZV's customers.

— The legality of a quantity rebate, to the extent to which it varies according to the volume of the purchases from the seller who grants it, has been acknowledged in earlier decisions of the Commission and the High Authority of the ECSC.

— In this case the amount of the rebate alleged by the Commission to have been granted was not very large.

According to *Eridania* the effect of the practices to which exception is taken has neither been to limit imports nor to reduce the participation in imports of operators who are not parties to the said practices, nor to increase prices.

The statement that undertakings have operated a general concerted practice, that is to say one which applies to all imports into Italy (decision, p. 31, Lt. Col.) is contradicted by the telex message quoted on pages 79 and 81 of the communication and also by the documents produced by Eridania during the administrative procedure. It emerges from these documents that the company at each invitation to tender

— asked for, received and examined offers from a large variety of exporters including several who were not members of the 'group of suppliers' working with Sucres et Denrées;

— accepted such offers in those cases — which were infrequent — when they appeared to be more favourable than those forwarded by Sucres et Denrées;

— in the case of deliveries to Sucres et Denrées negotiated each time point by point, the conditions applicable to each transaction.

It is incorrect to say that Italian sugar refineries bought direct from foreign producers. Most of the purchases were carried out through Sucres et Denrées, which was the vendor in the contracts for sale. The invoices were issued by this company which was given notice of any dispute relating to the products sold.

With regard to the statement that certain Italian processing industries complained of the lack of attractive offers from suppliers in other Member States (decision, p. 23, Rt. Col.), *Eridania* and *Industria degli zuccheri* state that the Commission has not referred to a single case of a refusal by the suppliers to supply the said industries.

With regard to the statement that foreign producers undertook only to sell to Italian undertakings other than producers at a higher price (decision, p. 24, Rt. Col.,

p. 31, Lt. Col.) *Eridania* states that it is correct to say that Sucres et Denrées, during negotiations, sometimes offered Eridania, acting as 'spokesman' for the importers, 'this indirect form of rebate which consists of applying to other prospective contracting parties slightly higher prices'. However no such contract was ever concluded and the preferential treatment was never accorded; similar assertions are made by *Cavarzere* and *Industria degli zuccheri.* The Commission has not mentioned any case of an Italian operator other than a producer being offered a higher price. On the contrary these operators were able to import, on very satisfactory terms, quantities, which, as they amounted to 30 % of all imports, were very much larger than in the past. From 1969 to 1971 the percentage of imports of Italian sugar refineries fell from more than 95 % to a little more than 60 %.

The complaint that

'the largest Italian buyers, in particular industrial consumers, have been compelled to enter into yearly contracts for supplies of sugar with Italian sugar producers who are members of the importers' group, because they have not been able to obtain firm and advantageous offers from foreign sellers' (decision, p. 32, Lt. Col.)

fails to take into account the fact that the majority of the said consumers have traditionally asked for such contracts to be entered into, because of the need, which is understandable having regard to the sugar deficit on the Italian market, to ensure regular supplies. This aspect is also stressed by *Industria degli zuccheri* and by *Cavarzere,* which adds that the government authorities brought this matter to the notice of the sugar refineries so as to secure regular supplies for the persons concerned.

Cavarzere and *Industria degli zuccheri,* in addition to the submissions that have already been mentioned, submit that the Commission was wrong to regard Italian producers as competitors of foreign producers. *Cavarzere* states in particular that, as the demand for sugar in Italy exceeded home supplies, only foreign producers were able to make good the deficit. Moreover the Italian sugar refineries could not export, and indeed it was not in their interests to do so, because the Italian intervention price was higher than the market price in other Member States. This situation can be described, to put it at its highest, as one way competition, to the extent to which foreign exporters can prevent Italian producers from selling all their products.

The 'group' of Italian importers confined itself to negotiating, each time and not once and for all, the terms of the intended sales, and each undertaking was free to accept them or not and did not have to disregard offers from producers other than their usual suppliers. As the telex messages of 2 and 29 October 1970 between Sucres et Denrées and Eridania show (communication, p. 79 *et seq.),* the suppliers complained that Italian importers other than those who were members of the said group can participate in invitations to tender and that Italian producers did not comply with the alleged agreements to reserve the right to take part in invitations to tender for French and Belgian producers. Eridania did not receive any authority to negotiate or even to enter into agreements; the part assigned to it was merely that of a spokesman, instructed to notify other Italian operators of offers made by foreign suppliers in order to reconcile the proposals of the said operators.

The practices, to which exception is taken, have in no way affected trade between Member States. The amounts imported into Italy, having regard to the national sugar deficit, would in any case have had to be imported either by producers or consumers.

Cavarzere takes the view that the complaint of attempting to protect the

Italian market is meaningless, since Italy is a country with a sugar deficit.

The Commission has overlooked the fact that none of the 'groups', around which in its view Italian undertakings are polarized, account for more than 5 % of Community production.

The telex messages to which the Commission refers in its communication do not prove that there has been a concerted action but only show that undertakings were in touch with others at that time. The fact that there was a spokesman who was able to help undertakings to contact each other is from the legal point of view irrelevant.

The complaint that foreign producers 'in respect of the quantities sold to their competitors ... have given up independent commercial operations on the Italian market', 'deciding on the quantities, prices and distributive networks' (decision, p. 31 under 2) is incomprehensible. If the said producers sold individually to Italian consumers, they would not determine such matters unilaterally but would have to negotiate with their partners. In addition Italian regulations made it quite impossible for foreign producers to determine the beforementioned matters.

In stating that 'the system of invitations to tender in Italy does not make such a grouping of supply and demand necessary' (decision, p. 31, Rt. Col.) the Commission failed to understand that each notification of an invitation to tender fixed minimum quantities which were always large, and that, in order to attract imports, it was necessary to obtain from foreign suppliers prices which were highly competitive, a result which has only been able to be achieved by increasing the volume of the demand. Moreover certain measures and communication of the Council and the Commission show that such conduct is in conformity with Community Law. The methods adopted by Italian undertakings are far less serious than the practices which these texts admit are lawful; in fact the said undertakings have not established an organization, an office or a company with the object of handling imports.

The statement that sales to independents were only made at a higher price is not correct.

The independents have absolutely free access to foreign production, as emerges from the documents which the Commission itself obtained. They often made direct purchases either from the foreign producers referred to in the decision or from other foreign firms. During 1968, 1969, 1971 and 1972, 36 % of the amounts imported into Italy were imported by operators other than sugar refineries.

Industria degli zuccheri submits that the documents obtained by the Commission relating to the meeting in Paris (cf. decision, p. 23, Rt. Col., p. 24, Lt. Col.) do not establish that foreign and Italian producers engaged in a concerted practice, but, to put it at its highest, that there was a concerted action between foreign producers.

It appears that the object of the meeting was to discuss a report drawn up by a Belgian sugar refinery on the problems arising out of the sale of Belgian sugar on the Italian market. It emerges from this report that 'outsiders' (cf. decision, p. 24, Lt. Col.) — that is to say about 50 % of the French producers, some industries consuming sugar and Italian wholesalers — raised with foreign producers the problems of competition.

The Italian producers had to form a defence group, since they were not in a strong position, owing to their weak bargaining powers, the need to obtain firm offers before they could participate in the invitations to tender and the undertakings which they had to give when participating in them. Because of

the Italian regulations the said producers have not been able to obtain any advantage from the profit margins which might have resulted from any possible cartel.

Sales from producer to producer are justified, so far as Italian producers are concerned, by a series of objective facts relating to the market pattern and Italian regulations.

The requests made by the exporters for the purpose of obtaining prior commitments as to the quantities for delivery came up against a refusal to do so by Italian producers, which had always emphasized that they were free to buy from anyone and on the best terms.

At the last invitation to tender 80 % of the available amounts were awarded to Italian operators other than producers. Such operators often found that it was profitable to import into the frontier regions, even if a higher price had to be paid.

Volano and Emiliana criticize the decision for treating as one unit all the undertakings which imported sugar during the 1969/70 marketing year, without making any distinction between the companies whose aim was to enter into a general agreement for imports and those which simply accepted a satisfactory offer to purchase which had been made to them. It was only after reading the decision that Volano and Emiliana learnt that there was an agreement such as the one alleged.

As each undertaking is free to choose its suppliers, the fact that an agreement entered into with a supplier entails a restriction on competition does not of itself amount to a concerted practice. This is only the case if the contracting parties pursue the specific objectives of creating such a restriction in order to obtain an unjustified profit. However the facts set out in the decision do not permit the conclusion that Volano and Emiliana participated in an agreement of this type.

The Commission omitted to state what the price of sugar would have been if the practices, to which exception is taken, had not been engaged in. All that can be said is that in such circumstances the price could have fallen below the intervention price or settled at about this level.

Volano and Emiliana did not attend the meeting in Paris but only the one in Genoa, and solely in order to take advantage of the offer of the French producers made to all the participants and making it possible for them to obtain a large quantity of sugar on favourable terms.

Volano and Emiliana did not authorize Eridania to act as leader of the Italian importers and cannot do so, because, unlike Eridania, they do not belong to Assozucchero.

Volano goes on to say that in 1969 it was only a small undertaking in difficulties. Since it therefore had at all costs to look for the most profitable, economic operations, it accepted the proposal made specifically by Eridania and in general terms by 'Assozucchero'. Since it had to sell later the only two sugar refineries which it owned, it does not now have any formal existence until such time as a decision as to its future is made.

SADAM states that it did not attend the meetings in Munich and Paris or the second meeting in Genoa. The fact that it attended the first meeting in Genoa is not proof that it is a member of what the Commission calls the 'importers' group'. It is reasonable to expect an undertaking to attend meetings of representatives of the same trade.

In order to establish that there is a concerted practice there must be parallel conduct, an intention to cooperate and

a common intention to eliminate competition. The existence of the first of the requirements does not *ipso facto* allow the inference to be drawn that the other two are present.

The Commission has not produced any evidence that SADAM was involved in the cooperation between Italian and foreign producers. Further the decision — which does not object to any specific conduct on the part of SADAM — does not contain any evidence to show that the conduct of this company and of the other Italian undertaking amounts to parallel conduct. This cannot moreover be substantiated, having regard to its weak position, which makes it impossible for it to influence the price of sugar at all.

SADAM was not represented by Eridania in connexion with any of the discussions, negotiations or cartels. It is not a member of Assozucchero, the members of which, according to the decision (p. 36), assigned to Eridania the role of spokesman. It is therefore not in any way connected with the practices, to which exception is taken.

It can be assumed that the 'commercial correspondence' which discloses the implementation of the concerted action, to which exception is taken, (decision, p. 31, Lt. Col.) consists of the telex messages reproduced on pages 56 to 60 of the communication. But SADAM was never aware of the latter and its name does not appear on them.

(2) Summary of the Statements of Defence

The *Commission* replies by making the following observations:

to 1. (aa) (aaa)

The full amount of the 'sovrapprezzo' has never been paid by importers.

Order No 1236 and circular No 1237 of CIP re-introduced by means of 'price differentials' maximum consumer prices. Although these measures were annulled by the Conseil d'État, it appears that these prices continue in fact to be applied.

There are no longer any maximum prices for sales by producers to industrial consumers or to traders, except the indirect limit flowing from the maximum consumer prices. There is only the intervention price fixed by Order No 1195 (a price consisting of the Community intervention price to which is added a 'sovrapprezzo' of Lit. 23), a price which can be taken into account by producers when fixing their own sale prices.

In the case of the invitations to tender Ccz fixes in secret the minimum 'sovraprezzo' which it intends to accept ('prezzo congruo').

Once an award has been granted it is in the interest of the persons concerned to import the amount actually awarded, because otherwise they forfeit the security which they had to give beforehand. In these circumstances the successful tenderers, in order to be able to participate effectively in the invitations to tender, should have in their possession firm offers from foreign suppliers in regard to the amount as well as the price.

Order No 1215 imposes upon successful tenderers the double obligation to fix the same consumer price for caster sugar in the whole of the country and to abide by any rules which may be laid down by the Ministry of Agriculture relating to the place of destination. However the first of these obligations was not repeated in the later provisions; in any case that part of the consumer price determined by the authorities relating to fixed transport costs took this obligation into account. With regard to the second obligation later provisions provided that the said ministry now only has the right to designate the place of destination for not

more than 5 % of the amount awarded; in any case the ministry has never availed itself of this right.

Imports of Community sugar are free if the 'sovrapprezzo' is paid in full; however in such a case the final price of imported sugar normally exceeds the price of domestic sugar.

to 1. (aa) (bbb)

The Commission takes the view that the Italian market, because it has a sugar deficit, was destined to become the main theatre of competition between producers of countries having a sugar surplus. Such competition could be stimulated by the number of possible exporters (producers and dealers). The need to create a distributive network would not have been an obstacle; it only related to sugar intended for consumption in its original state — which would only have represented about a quarter of the sugar imported and could have been met without any difficulty, since the marketing of sugar does not require the creation of large stocks. As production costs are lower in the exporting countries than in Italy and therefore offset part at least of the higher transport costs, foreign sugar could be offered on the Italian market on attractive terms, in particular as the system of invitations to tender provides for a reduction of the 'sovrapprezzo' in favour of imported sugar. The conditions which have to be fulfilled in order to be able to take part in the invitations to tender were not such as to embarrass consumers, which are for the most part large industries. Finally the existence of a maximum price on the Italian market normally led to sugar being supplied through Italian producers which would have been 'irrational'.

Moreover the very actions of the producers show that they had an interest in limiting competition and furnish evidence that there was a marginal area in which there could be competition.

The fact that it was possible to establish a pattern of imports leading to direct delivery to consumers is explained by the facts that it could be in the interests of the latter to import direct against payment of a relatively high 'sovrapprezzo', that they never hesitated to take advantage of every opportunity which they were offered in this connexion and that their requirements were large:

- During the first marketing years following the entry in force of the common organization of the market, independent Italian purchasers tried to obtain Community sugar on attractive terms before having to resign themselves to sending their orders to Italian sugar producers, which compelled them to enter into contracts providing for the supply of their entire yearly requirements.
- When a quota outside the invitations to tender was established by Order No 1234 the consumers applied for the maximum permitted quantities (10 000 quintals per undertaking), but most of these applications were not granted owing to the quota being exhausted.
- 'Free' imports rose on average from 1969 to 1972 by an amount equal to 25·2 % of total imports; 21·9 % of this 25·2 % is made up of imports effected by one producer, who is not a member of the group, by the only two non-producers who took part in the invitations to tender or by the consumers who took advantage of the possibility of importing outside the invitations to tender at a reduced 'sovrapprezzo'.
- Italian consumers made use of the possibility of obtaining their supplies from SZAG in 1968/69 and, if the occasion arose, from Générale sucrière and Sucre-Union. The two groups of producers moreover attended to this matter by, for example, reserving for SZAG for the 1969/70 marketing year 15 % of deliveries to producers in order to 'neutralize the actions of the

outsiders', to quote the expression used by Eridania.

— During the 1969/70 marketing year SZAG, Say and RT sold to Italian producers which were not members of the producers' group.

— Price competition was also possible. At the meeting in Paris on 29 July 1969 (cf. decision, p. 23, Rt. Col., p. 24, Lt. Col.) RT expressed the fear that since the price level of sugar offered on the Italian market had been fixed 'in a somewhat friendly way' it does not 'give foreign offers much chance', which is tantamount to admitting that if there had been free competition, it would have been possible to deliver sugar at lower prices.

In the awards to purchasers who are not members of the group the percentage of the 'sovrapprezzo' offered and paid has in general been higher than that offered and paid by the successful tenderers who are members of the group.

It is wrong to claim that Community regulations together with national regulations excluded variations of the prices applied and laid down that prices of national and imported sugar respectively should be the same. It could be in the interest of a producer to sell at a price lower than the intervention price, rather than expose himself to the competitive pressure of resales by the intervention organs. With regard to the maximum consumer price the Italian authorities have fixed it by adding to the intervention price certain factors (such as the costs of marketing). Most of these factors are reducible because they have been calculated as lump sums.

In short if Italian importers had taken part individually in the invitations to tender there could have been variations in the prices in the tenders instead of the uniformity which the table of the results of the invitations to tender discloses. These prices could in this way have fulfilled the function for which they are intended, namely to make the participants compete with each other.

Finally there could have been competition concerning quality, service to the customers and in particular the conditions of sale; the correctness of this last statement is proved by the contractual obligations which producer-importers imposed on the processing industry and which a representative of this industry described as 'disastrous' ('ruineuses').

to 1. (aa) (ccc)

The Commission replies that the argument that competition was possible on the Italian market is correct independently of the question whether Italian regulations are in conformity with the Treaty or not.

to 1. (bb)

General considerations

The Commission first describes all the measures adopted by the applicants and the facts which prove the existence of concerted practices aimed at partitioning the Italian market to the advantage of the producers of this country and in which all the undertakings in question engaged, with the result, *inter alia,* as exports to Italy increased, the share of the deliveries between producers increased until in the last three marketing years it reached three quarters of exports. The Commission distinguishes between three concerted actions, namely one between suppliers, one between producers-importers and one between these two groups.

The concerted action between suppliers is evident in the sharing out of deliveries by French, Belgian and German producers, in the fact that these deliveries were effected on a common basis and also in the joint undertaking by suppliers only to supply Italian non-producers at an increased price.

The participation of Sucres et Denrées and of SZAG is shown by a large number of telex messages mentioned in the communication and in particular by a telex message of Sucres et Denrées to RT of 1 October 1969. Moreover SZAG attended the meeting at Genoa on 11 September 1969.

With regard to the French producers and RT their participation is established by their attendance at this meeting and by an internal memorandum which Sucres et Denrées drew up on 13 April 1970. The purpose of this memorandum was to carry out a check of supplies delivered to Italy by members of the suppliers' group and mentions RT, Générale sucrière and Béghin; the document does not mention Say although it is however the largest undertaking of the GISEC group which is mentioned in it.

The sharing out of deliveries is proved in particular by the minutes of the meeting in Paris on 22 November 1968 and by the contract entered into between Export and Sucres et Denrées on 8 October 1968 for the delivery of 20 000 metric tons to the Italian market; 4 000 of these 20 000 metric tons had to be supplied by RT and 5 000 by SZAG, whereas 11 000 had to be shared out between Générale sucrière, Béghin, Lebaudy-Sommier, Say and Sucre-Union. In addition the said distribution is found in the before-mentioned document of 13 April 1970.

The percentage reserved to SZAG is mentioned in a series of telex messages between Sucres et Denrées and Eridania and in particular in those of 9 and 31 October 1969.

The deliveries, with the exception of those from SZAG, were effected on a common basis through Sucres et Denrées. The correspondence between Eridania and Sucres et Denrées and in particular the two telex messages from Sucres et Denrées of 1 October 1969 show that the latter acted on behalf of the suppliers and after obtaining their prior consent.

The existence of the undertaking not to sell to non-producers except at a higher price is proved by:

- a contract for sale concluded by Sucres et Denrées on 3 October 1968;
- three telex messages between Sucres et Denrées and Eridania of 1 and 2 October 1969;
- a telex message sent by Sucres et Denrées to Eridania on 31 October 1969 from which it appears that the function of the said undertaking has been to prevent consumers from taking part in the invitations to tender;
- price increases applied in fact by SZAG in 1969/70, when the latter sold through German agents sugar intended for Italy;
- by the fact that RT disregarded a request for deliveries by a German dealer who wanted to sell sugar in Italy (two telex messages from Export to RT of 24 September 1970; telex message from the Gerike-Bahr firm to Export of the same date);
- by the fact that RT under a contract entered into with Export for the deliveries to Italy, sold on 22 September 1970 at Bfrs 1 107 per quintal, whereas it sold at Bfrs 1 114 pers quintal a few days later, under the terms of two other contracts entered into with Export for deliveries to Italy; the meeting in Paris on 22 September 1970 took place between the conclusion of the first and second contracts: a telex message from Export to RT of 24 September 1970 mentions 'fresh facts';
- by the fact that Say also sold to Italian consumers at a higher price;
- by the fact that the deliveries obtained by the importers' group all came from the suppliers' group with a few unimportant exceptions.

The concerted action between producers-importers is indicated by the fact that the latter requested deliveries and negotiated the terms jointly, offered exactly the same percentage of the

'sovrapprezzo' at invitations to tender, resold under exactly the same conditions of sale, that they all reserved to themselves the right to have some of the deliveries to the purchasers effected by other producers and finally made use of this right solely for the benefit of the other members of the group. In particular the Commission makes the following statements:

— The group of producers-importers included all the Italian undertakings which are applicants. This emerges from the telex messages from Sucres et Denrées to Eridania of 9 and 15 October 1969 asking for confirmation 'that your group will at least include all the Italian companies which attended the meeting in Genoa', of 11 September 1969 as well as the reply in the affirmative of Eridania of 20 October 1969. Further evidence is provided by the results of the invitations to tender, in which all the applicants were offered similar percentages of the 'sovrapprezzo', and also by the confirmations of sales which all the applicants sent to their customers and by the identical contracts entered into with these customers.

— The requests for supplies were dispatched by Eridania, which negotiated them on behalf of all the undertakings in the group and collected the offers on behalf of all of them. This emerges from the telex messages referred to in the preceding paragraph, from the telex message from Eridania to Sucres et Denrées of 31 October 1969 and from the telex message sent by Export to a German wholesaler of 14 September 1970.

— The fact that the percentages of the 'sovrapprezzo' offered were identical shows that Italian producers agreed to act in concert when participating in invitations to tender. The aim of this participation was to make on a common basis a purchase of sugar, which had been agreed by and divided among the members beforehand. This emerges in particular from:

  — the telex message from Eridania to Sucres et Denrées which was sent immediately after the award to the importers' group of 104 000 metric tons and which reads inter alia 'We confirm ... the purchase ... in our name and in the name of other sugar companies';
  — the reply by telex of Sucres et Denrées of the same date;
  — a telex message sent by Eridania to RT which mentions the 'group of Italian refiners' and the distribution between the companies in the group; the figures in this telex message indicating the amounts bought by this group in 1970/71 correspond exactly to the aggregate of the amounts awarded to members of the group;
  — the confirmation and contracts for sale referred to above from which it emerges that the prices and the conditions of sale by which the purchasers were bound were identical and that in addition the conditions were onerous.
  — All the beforementioned contracts reserved to the vendor the right to procure the substitution for him of another producer. When this clause was enforced the undertakings which benefited were members of the group as is shown by the letters sent by Eridania to the firms Motta and Ferrero on 21 September 1970 and by the letter of Industria degli Zuccheri of the same date and referred to in Annex 2, paragraph 2 of the communication.

The concerted action between the suppliers' and the exporters' group arises out of the fact that the two groups agreed to make joint arrangements for deliveries to the Italian market exclusively by members of the suppliers' group and only to Italian producers, with the exception of those deliveries which were

effected at a higher price. This is shown by the following facts:

— The minutes of the meeting in Paris on 29 July 1969, drawn up by RT, show that at this meeting the leading French and Belgian suppliers discussed the conditions of sale to be applied to the Italian group and ways of preventing third parties from selling on the Italian market.
These commitments were examined in greater detail and finalized at the meeting in Genoa on 11 September 1969, which all the members of the group attended.

These facts are proved:

— by the letter from RT to Export of 6 February 1970 referring to 'our obligations to our French colleagues' and to the fact that 'it had been decided that the Italian operation will be carried out direct between the groups of sugar manufacturers';
— by the minutes drawn up by Export of talks between this company and RT on 20 April 1970; in them reference is made to 'RT's obligations undertaken in connexion with the rationalization of the European sugar industry' by virtue of which 'a series of direct transactions between refiners and producers are eliminated from the field of application of the trade connexions RT/Export', relating *inter alia* to Italy;
— internal memoranda of Export of 23 and 30 April 1970 taking note of the agreements to which RT referred;
— the telex messages from Sucres et Denrées to Eridania of 9 April 1970 and the telex messages between RT, Export and the Gerike-Bahr firm on 24 September 1970;
— by the minutes of the meeting in Paris of 22 September 1970, which the French and Belgian producers, Sucres et Denrées and the leading Italian producers attended; it emerges from the said minutes that the price increases for the sales to Italian buyers who are not members of the group were the subject-matter of an agreement.

The Commission defines its position as follows on the arguments developed by each of the applicants with regard to the *general* evaluation of the course of conduct to which exception is taken.

Reply to Générale sucrière

The volume of 'free' exports effected in particular by Générale sucrière and Sucre-Union shows that the demand from industrial consumers, in particular large firms such as Motta and Alemagna, has been able to create an important and stable market. Independent Italian buyers in the end resigned themselves to concluding contracts with Italian producers for supplies of sugar on a yearly basis (cf. contracts of 9 October 1969 between Eridania and Ferrero, of 31 August 1970 between Eridania and Motta, of 9 September 1970 between Eridania and Ferrero and also the contracts referred to on page 97 of the communication) During its talks with representatives of the Commission the Ferrero company and 'Associazione industria italiana' mention cases of a refusal to sell.

The argument based on the alleged absence of profitability of sales to independents is not relevant, since the opportunity for free exports and price competition and also the existence of a large free demand has been proved. The creation of a commercial network is unnecessary for deliveries to industrial consumers.

Générale sucrière cannot put forward the argument that foreign producers had to form a group in order to be in a position to offer the amount requested, when at the same time it is this company which admits that it exported freely large quantities.

The part played by Sucres et Denrées shows that the concerted action was not the inevitable consequence of the Italian regulations and of the grouping of

imports. This is made clear by a telex message of 2 October 1970 sent by Sucres et Denrées to Eridania in which it recalls that previously it had to conduct separate negotiations with each of the Italian groups and expressed its conviction 'that it had made a big contribution to the renewal of the relations between and the joint interests of the different groups'.

The Commission has not failed to note that the system of invitations to tender has made it more difficult for independent buyers to import, but the main difficulty was caused by the concerted action to which exception is taken. The Italian provisions have not provided for the grouping of supply (l'offre).

Reply to Say

Neither of the two factors which make up the price increase is justified objectively:

— With regard to distribution costs they are the same whether sales are made to producers or 'outsiders'. In both cases there are no costs attributable to commercial networks. By stating that it sold to 'outsiders' without increasing the price Say has by implication admitted that the normal price was profitable.

— With regard to the security margin this is even more difficult to justify having regard to what has just been said.

Reply to Béghin

The price level applied by the companies is unimportant, as the Commission has not treated any influence which the concerted action might have on price as one of the factors constituting the infringement.

Reply to RT

The concerted action far from being engaged in from one invitation to tender to another was an agreement of general application. This is shown in particular by:

— the telex message from Export to RT of 24 September 1970 from which it emerges that RT refused to sell to a German dealer who wanted to export to Italy;

— the telex message from Export to Sucres et Denrées of 7 August 1970;

— a letter from Export to Sucres et Denrées of 8 August 1968 relating to a sale by RT to Sucres et Denrées via Export.

Experience shows that deliveries from producer to dealer covered the kind of distances from which it can be concluded that transport costs were not an important item.

Reply to Sucres et Denrées

The Commission does not deny that the grouping of supply can reduce transport costs but such a reduction cannot be obtained without the concerted action which is at issue. Sucres et Denrées have not shown that these costs represent on average 6 % of the price of sugar.

The risks and charges which foreign exporters have to cope with on the Italian market are normal trading risks.

The statement that the practices to which exception is taken have benefited Italian consumers is irrelevant, since they have not been notified to the Commission.

The argument based on the fact that undertakings cannot modify the pattern of the supply of sugar in Italy disregards the fact that the infringement found to have existed by the Commission consists of action likely to ensure that the Italian market remains under the control of the producers of this country. Moreover the said argument is incompatible with the statement that the practices to which exception is taken contributed to the attainment of the objectives of Article 39 of the Treaty (cf. b. below).

It is correct to say that no French undertaking took part in the invitations to tender. But, since there was no serious obstacle to any such participation, this abstention can be regarded as a supplemental indication of the concerted action.

Reply to SZAG

The criteria laid down in the Commission's communication of 27 May 1970 do not apply to the practice in question having regard to the turnover ceilings which they mention.

SZAG cannot either invoke the Commission's communication of 29 July 1968. This company forgets that all Italian undertakings wishing to acquire at least 1 000 metric tons were able to take part in the 1968/69 invitation to tender and that the recipients of the goods were Italian purchasers and not Ccz; it is therefore wrong to claim that foreign producers had to form themselves into a group in order to deliver the amounts requested.

Reply to Eridania

The statement that Italian producers, since they are at a disadvantage compared with other operators because they are distributors as well as producers, have been compelled to react as they did, is open to the following objections:

- It is incompatible with the statement that there can be no competition in Italy.
- Producers are also distributors because they have freely chosen this rôle and it does not place them at a disadvantage.
- The Treaty only provides for derogations from the principle of free competition which fall within the exemptions referred to by Article 85 (3), but does not permit 'self-defence' by the use of prohibited methods.
- Consumers depend upon producers for their deliveries and had to accept the onerous conditions of sale which were imposed upon them.

With regard to the claim that there has been no concerted practice of general application but negotiations conducted separately in each case and without any restrictions, at all, it does not call in question the concerted action between Italian producers but denies that there has been any concerted action between the latter and the suppliers' group. Even if this is the gist of the claim it is not corroborated by the facts. The telex messages which have been quoted simply show that Eridania considered offers from operators who were not members of the said group, that it endeavoured to obtain from the latter group more attractive prices and that there were some disagreements between suppliers and importers. Even at the invitation to tender to which the said telex messages refer it appears that the importers' group continued to obtain its supplies from the suppliers' group. These telex messages do not preclude the finding that imports from the suppliers' group were for the most part intended for the importers' group and that almost all the awards obtained by the latter group related to deliveries from the suppliers' group.

Article 85 also applies to cartels between undertakings which are buyers.

With regard to the circumstances which have been mentioned to confirm the legality of the concerted action they consist of facts which can only be taken into account under Article 85 (3); in the absence of any notification they cannot be examined.

The claim that Italian producers are in a weaker position compared with the suppliers' group is difficult to reconcile with the fact that imports have only been possible because of the reduction of the 'Sovrapprezzo' that the said producers have a commercial organization and that they are already established on the market in question; moreover it conflicts with the statement that the Italian market offers no opportunities for competition. Such a weak position

cannot either be caused by a system of invitations to tender which aims at preventing operators agreeing beforehand the tenders to be submitted.

The claim that Sucres et Denrées acted in the capacity of a vendor is contradicted by this undertaking's statement and by a series of telex messages.

The fact that marketing of sugar has been carried out in the past by Italian producers does not imply that it is necessary for imports to be channelled through them. On the one hand a distribution organization is not required for sales to the consumer industry; on the other hand the distribution of sugar does not present any special difficulties, so that independent commercial networks of producers could have been established if there had been free competition. Even if it was reasonable to assume that imports had to be arranged through Italian producers, that is no justification for them acting in concert.

The Italian regulations did not make it necessary for Italian producers to apply the same sale prices to imported and home produced sugar. With regard to the alleged absence of any damage suffered by industrial users and consumers it is sufficient to recall the complaints of the former and to stress that price competition in the long run always benefits the consumer.

The concentration of supply by foreign suppliers has been a factor constituting the practice by which they and Italian producers have aimed at controlling the Italian market; it is not therefore for the latter a 'res inter alios acta'.

Eridania cannot deny that the higher prices applied to independent purchasers are discriminatory. The fact that Italian producers also acted as resellers does not justify any preferential treatment, especially as independent purchasers were also able to act in this capacity. Price differentiation depended not on the amount of the purchases but on the question whether the buyer was a member of the group of producers-importers or not. The commitments which have been mentioned — the need for a commercial organization and the obligation to sell at the same price throughout Italy — did not affect sugar intended for industry representing 75 % of total imports. With regard to the said obligation laid down solely by Order No 1215 the consumer price applied includes an item for transport costs calulated as a flat rate; moreover this obligation is imposed on anyone who imports for resale to consumers.

The statement that independent purchasers could have obtained their supplies from vendors who were not members of the suppliers' group but preferred to obtain their supplies on their own initiative from producers-importers in order to secure regular deliveries has neither been proved nor is such as to justify the practice to which exception is taken. It does not explain why such deliveries could not be guaranteed by other suppliers and is difficult to reconcile with the complaints of the consumer industries.

Reply to Cavarzere

In order to show that Italian producers do not compete with foreign producers Cavarzere indulged in some artificial distinctions:

— between the demand for sugar produced in Italy and for sugar produced abroad;
— the supply of sugar to meet each of these two different demands.

The argument that Italian producers find it impossible to export in competitive conditions is irrelevant, since it is the restrictions on competition on the Italian market which have to be evaluated.

When Cavarzere submits that if there had been no concerted action foreign

suppliers would nevertheless have had to negotiate contracts for sale and that they would not in such circumstances have been able to fix unilaterally the prices and conditions of sale it puts cartels and contracts for sale on the same footing.

The previous measures and communications of the Council and the Commisson invoked by Cavarzere referred to situations different from those in this case and do not therefore justify the finding that these institutions have approved conduct comparable to that of the undertakings to which exception is taken.

The concerted action between producers and suppliers is not refuted by the telex messages quoted by Cavarzere:

— If the telex message sent by Sucres et Denrées to Eridania on 31 October 1969 deplores the fact that certain large consumers have succeeded in importing direct, it refers to imports of some thousands of metric tons only connected with an invitation to tender following which the group of producers-importers were awarded more than 104 000 of the 127 000 metric tons put up to tender, all of which came from the suppliers' group.

— It is true that the telex message sent by Sucres et Denrées to Eridania on 2 October 1970 complains that the latter had considered offers from operators who were not members of the group. This was however an example of normal commercial tactics, as the importers' group continued to obtain all its supplies from the suppliers' group; it appears that this is true in the case of the specific award to which the telex refers.

With regard to the price increase if Cavarzere tries to justify the preferential treatment applied to the importers' group with reference to the part played by each member of the group as an intermediary, it has then to concede that the absence of intermediaries can have a favourable effect on price levels.

The increase has not been small; moreover the Commission's finding was not that it was exorbitant but that it was illegal.

The actual application of the price increase emerges from the documents mentioned in the Commission's general observations (cf. above).

The practices in question have clearly affected trade between Member States since their object was to influence the import of large amounts of sugar.

With regard to the claim that the Italian processing industries also imported directly and that the importers' group also obtained its supplies from outside the suppliers' group, the telex messages quoted by Cavarzere disclose that these imports were the exceptions which prove the rule. Moreover for a practice to fall within Article 85 it is not necessary to show that it has achieved all its objectives.

It cannot be maintained that foreign suppliers who are not members of the group in question could be an alternate source of supplies. The producers belonging to this group controlled 75 % and 85 % of French and Belgian production. Producers who were not members do not normally refine sugar but produce sugar which cannot be sold to industrial consumers and of which a large part is forwarded to members of the group for refining. What is more these outsiders are not normally large organizations and do not have the requisite facilities for export.

The yearly contracts entered into with Italian consumers, considered in the light of all the concerted practices, are capable of supporting the view that Italian producers control the national market. The fact that the consumer industries complained of the producers' conduct

refutes the claim that the said contracts were in the interest of consumers. Cavarzere cannot make the further claim that the clause in these contracts giving the vendors the right to procure the substitution for them of third parties was dictated by the danger of running out of stocks; in fact since the companies in the group of producers-importers took part in the invitations to tender after agreeing beforehand the sharing out between them of the amounts awarded, no undertaking which was a member of the group ran the risk of being excluded from the invitation to tender.

Cavarzere states that there are commercial networks on the Italian market which are independent of the producers, it contradicts the statements of the other Italian applicants that the channelling of imports to producers is due to the fact that the latter have traditionally been the only undertakings marketing sugar in Italy.

Reply to Industria degli zuccheri

The claim that the bargaining power of the Italian producers is weak is both incompatible with the argument that there was no competitive relationship between foreign and Italian producers and with the argument of the French applicants that it was necessary to concentrate supply because of the concentration of demand.

The concentration of demand is justified neither by the volume of the amounts required, nor by the charges imposed upon successful tenderers, nor by the need to obtain firm offers, because such offers can be made by independent suppliers to independent importers.

The reasons put forward by Industria degli zuccheri to justify purchases between producers are not valid:

- The production deficit benefits all imports and does not force producers to import themselves.
- It is not correct to say that there is no chance of making a profit. The telex message of 2 October 1970 from Sucres et Denrées to Eridania refers to 'considerable profits'.
- The existence of a market pattern, the main feature of which is the absence of any largescale importers, does not call for the continuation of this pattern by means of a concerted practice.
- The minimum quantities which had to be tendered at the invitations to tender were not fixed in such a way that they excluded imports by undertakings which did not operate on a large scale.

It is impossible to explain deliveries between producers by criteria of commercial convenience, having regard in particular to their large size and to the fact that the normal functioning of the market should have produced an entirely different situation.

The price increases cannot be justified on the ground that producers-importers can offer certain guarantees. In fact these prices were not linked legally to these guarantees; in addition these guarantees, which consisted of the producers-importers having a distribution system covering the whole of Italy, are not required for sugar for industrial use.

In endeavouring to justify the said increases by showing that Italian producers resold the sugar Industria degli zuccheri fails to appreciate that the producers are criticized precisely because they held themselves out as necessary middlemen and concedes that the absence of such middlemen could have a favourable effect on price levels.

The specific invitation to tender to which Industria degli Zuccheri refers took place after the decision was adopted. The large amount of sugar imported under this invitation to tender by operators who were not members of the producers-importers group proves specifically that the setting up of import channels leading direct to consumers is possible and is

one of the usual conditions for the functioning of the market.

Reply to Emiliana

In order to establish that there is a concerted practice it is unnecessary to show that the undertakings in question have made an exorbitant profit.

The Commission then examines the *individual* behaviour of each of the undertakings in question and the arguments which they have developed in this connexion.

Générale sucrière

That this company engaged in the practices, to which exception is taken, is established by the documents already mentioned and also by the telex messages from Sucres et Denrées to Eridania of 9 April and 29 September 1970, the first of which mentions the 'group of French sugar refiners and manufacturers'.

The fact that the company freely exported large amounts does not show that it did not abide by the principle underlying the concerted action; in order to establish the existence of the practice to which exception is taken it is sufficient to show that it was more difficult to make free deliveries.

Générale sucrière's argument that higher prices are justified when selling to independents is inconsistent with its argument that the prices applied by the company for these sales were comparatively speaking low. The calculations submitted by the company do not make it possible to obtain an accurate idea of the prices applied and do not mention the names of the independents supplied by the company. Similarly Générale sucrière did not state how these prices have been calculated; it is necessary to know if certain facts which might influence prices were taken into consideration. After carrying out an analysis of the tables produced by Générale sucrière the Commission believes it must call attention to certain mistakes or inaccuracies. It concedes however that from 1971/72 onwards the company supplied outsiders without applying higher prices.

Say

Say's assertions that it exported sugar independently of Sucres et Denrées does not allow the conclusion to be drawn that it has not engaged in the concerted action. It has not been shown that the ultimate recipients of these deliveries were not members of the importers' group. Moreover Say has not mentioned the 1968/69 marketing year; with regard to the other three marketing years it emerges from the documents produced by Say that it supplied to the beforementioned group between 54 % and 99·94 % of the total amount of its exports to Italy.

The fact that Say engaged in the concerted practice is proved in particular by:

- the contract for sale entered into on 3 October 1968 by Sucres et Denrées;
- the telex messages after the meeting at Genoa between Sucres et Denrées, RT and Eridania;
- the internal memorandum of Sucres et Denrées of 13 April 1970 analysing the volume of deliveries to Italy;
- the telex message from Eridania to RT of 30 October 1970 dealing with the awards made during the invitation to tender of the same date.

The undertaking to apply higher prices in sales to outsiders is contained in:

- the telex messages from Sucres et Denrées to Eridania of 1 October 1969 and 9 April 1970;
- the telex message from Eridania to Sucres et Denrées of 20 October 1969;
- the beforementioned contract of sale of Sucres et Denrées.

The fact that in addition to deliveries between producers Say exported to third parties is not sufficient to prove that it has not engaged in a restriction on competition.

An examination of the documents produced by Say shows that, during the periods from December 1969 to September 1970 and from October to December 1970, the prices offered to Sucres et Denrées or to the producers-importers were in most cases lower than the prices applied in free sales.

Béghin

Judged by its turnover Béghin was the largest company in the group of French and Belgian producers.

Béghin cannot base its argument on the small volume of its exports to Italy. Its participation in the concerted practice is proved by the documents mentioned above in connexion with Say and also by the minutes of the meeting in Paris of 22 September 1970. The fact that Béghin may not have applied higher prices is irrelevant to the extent to which it only effected deliveries from producer to producer.

RT

The three contracts between RT and Export mentioned in Annex 9 of the application do not in any way prove that RT was able to export freely in Italy. They were concluded at a time when Export protested to RT against the price increases decided at the meeting in Paris on 22 September 1970. In addition Export sold direct to Italian producers; similarly the amounts specified in the contracts entered into subsequently by Export's agent were supplied to the said producers.

With regard to the correspondence between RT and Export the Commission has thought fit to regard it as referring to the relation between these two firms and more generally to the concerted practices engaged in by the producers. It leaves it to the Court to evaluate this correspondence.

Sucres et Denrées

Sucres et Denrées cannot claim that it merely acted as an intermediary. According to its Memorandum and Articles it carries on business as an independent trader. In its reply to the communication it admitted that it is the owner of sugar in which it deals. The beforementioned documents show that it was the driving force in the concerted action, a part which went far beyond invoicing the deliveries.

SZAG

The correspondence between Eridania and Sucres et Denrées following the meeting in Genoa on 11 September 1969 (cf. communication, pp. 57, 62 and 64), shows that the persons who attended this meeting, including SZAG, proceeded to allocate the quotas of deliveries of foreign producers to Italy. This is confirmed by the fact that deliveries from SZAG to Eridania corresponded, at any rate in 1969/70, to the quota of 15 % which was allocated to SZAG. If the only object of this meeting had been to examine the opportunities for actual deliveries, it is impossible to understand why it took place, because Eridania could have obtained all this information in writing or on the telephone.

The telex message from Sucres et Denrées of 1 October 1969 reads, *inter alia*, 'if German vendors decide not to take part in the operation, their quota shall be shared out among French and Belgian vendors in proportion to their respective quotas'. This proves that SZAG was a party to the agreement.

The Commission is entitled to use against SZAG documents from third parties or addressed to third parties,

which leave no room for doubt concerning the conduct of the company. It was not in the interests of Sucres et Denrées and Eridania to mention a participation of SZAG which did not in fact take place. This participation is not ruled out by the fact alone that the company did not instruct Sucres et Denrées to negotiate on its account with Eridania.

The fact that Eridania, in its telex message to Sucres et Denrées of 20 October 1969 (Communication, p. 58), stated '15 000 metric tons of the total amount and not 15 % must be reserved for the Germans', is explained by the concern to make it clear that the share of the Franco-Belgian group was not necessarily 85 % of the amount put up to tender. It was also necessary to take account of traders among the German suppliers who could otherwise disturb the Italian market (cf. telex message from Eridania to Sucres et Denrées of 10 April 1970). In its telex message to Sucres et Denrées of 31 October 1969 Eridania stated: 'As agreed, 85 % belongs to you, 15 % belongs to Süddeutsche Zucker'.

The Commission states, and produces figures in support of its statement, that during the four marketing years in question SZAG delivered on average more than 75 % of its exports to Italy to Italian producers.

As SZAG participated in the suppliers' cartel, there is every reason to suppose that it also undertook only to sell sugar at a higher price to customers other than Italian producers. The table in Annex 9 of the application shows that SZAG in fact worked out higher prices for Italian dealers and consumers; it shows that from the beginning of the 1969/70 marketing year it earned less from its sales to producers than from its sales to dealers.

SZAG cannot challenge the statement that 'deliveries made to Italy outside the group of suppliers are limited to small quantities offered by 'outsiders' (decision, p. 24, RT. Col.) by comparing its own deliveries to those of other German producers. When the Commission speaks of 'outsiders', it only refers to deliveries made to Italian dealers or processing industries. The Commission produces, for each of the marketing years in question, figures relating to the volume of sugar covered by the contracts entered into by the suppliers respectively for deliveries from producer to producer and for deliveries to other Italian purchasers.

Some of the deliveries by SZAG to German dealers proved in the end to be indirect sales to Italian sugar refineries.

It is unnecessary to know SZAG's share of deliveries to Italy; the decisive factor is the restrictive effect of the conduct of all the undertakings concerned.

SZAG's argument that it earned more profit from sales to producers is contrary to all experience. It is not proved by the calculation in Annex 9 of the application; SZAG will have to explain the methods used in making this calculation and produce the contracts which it mentions.

SZAG did not play the part of an 'outsider'. The reasons which led the Commission not to impose a fine upon Sucre-Union, namely the independent nature of this company's operations on various markets, do not apply to SZAG.

Cavarzere

It does not matter very much whether Cavarzere entered into a strict undertaking to accept deliveries negotiated by Eridania or not, as the Commission blamed Cavarzere for having participated, not in an agreement, but in a concerted practice.

The telex messages exchanged by Eridania and Sucres et Denrées and quoted by Cavarzere confirm that the

latter imported sugar through Eridania; they show therefore that Cavarzere did not enjoy any freedom of action compared with the other members of the importers' group.

Volano and Emiliana

The possible financial difficulties of Volano cannot justify the infringement which it has committed. To the knowledge of the Commission Volano's balance sheet showed, on 31 December 1972, a net profit of more than Lit. 9 million.

The fact that Volano and Emiliana engaged in the practices in question because they wished to buy on the best terms does not justify the conduct of these companies. Similarly it is not important to know whether or not the latter authorized Eridania to act as the mouthpiece of the producers-importers. Volano and Emiliana passed on requests for supplies to and negotiated the terms of deliveries like the other Italian undertakings through Eridania.

SADAM

The fact that SADAM engaged in the practices in question is proved by the documents mentioned previously and by the contract entered into on 10 September 1970 between SADAM and Ferrero. It is irrelevant that SADAM is not a member of Assuzucchero and has never been represented by this association.

The fact that SADAM has not directly participated in the commercial correspondence referred to in the decision is explained by the fact that this applicant passed on its requests for supplies to and negotiated the terms of the latter through Eridania. This correspondence moreover refers to the performance of undertakings given at the meeting in Genoa of 11 September 1969 which SADAM attended.

(3) Summary of replies

to 1. (aa) (aaa)

Eridania repeats and enlarges upon the description of the history of the development of the Italian regulations and the trends of the Italian economic situation and emphasizes in particular:

- that the price of sugar has always been fixed in such a way as not to offset as a general rule production costs which are particularly high in Italy;
- that by Circular No 1237 CIP indicated in substance that it intended, *inter alia,* to make the intervention price, disregarding the 'sovrapprezzo', the sale price in Italy; this price is therefore also a maximum price;
- that the Commission is wrong to claim that since the Conseil d'État annulled Regulation No 1236, there is no longer a maximum sale price in Italy; if such a price no longer exists by virtue of valid orders made by CIP, the Italian authorities would infer this price however from other sources, and would not only do so but in such a way that it would be binding;
- that the Italian system of a controlled price also applied to sugar for industrial use, as emerges from certain announcements by CIP and Ccz.

Industria degli zuccheri also describes the development of the Italian regulations. It calls particular attention to the fact that the fixing of maximum consumer prices of necessity determines the ex-works prices and that there are also maximum consumer prices for sugar not intended to be used as a foodstuff.

It is true that the later regulations reduced the obligation imposed on producers-importers only to attend the invitations to tender if they had firm offers from foreign suppliers both as regards quantity and also price by

making it only applicable to 5 % of imported sugar. Nevertheless, notwithstanding these regulations, this obligation had often to be supported as a result of telephonic instructions from the Italian authorities.

Emiliana points out that, although the Italian Conseil d'État annulled Regulation No 1236 and Circular No 1237, it nevertheless confirmed that CIP has power to determine maximum prices. The regulation therefore continued to be complied with.

to 1. (aa) (bbb)

Générale sucrière replies that it is completely illogical for the Commission to state that the system which the undertakings concerned implemented to restrict competition shows that competition was possible.

The argument that the Italian regulations did not exclude competition is inconsistent with the admission made by the representatives of the Commission, that is to say that 'the procedure of invitations to tender in fact encourage ... the concerted action of the Italian producers to control all sugar imports'.

The amounts which consumers could import outside the procedure of invitations to tender reached at the most 25 % of the amounts awarded; the only obstacle encountered by consumers was therefore in the Italian regulations. The Commission cannot therefore claim that, had it not been for the alleged concerted action, free exports would have been larger, or blame producers-exporters for only supplying consumers with 25 % of the total amounts exported by them in Italy. Foreign producers could not guarantee consumers regular supplies, since every direct delivery was dependent on their being successful, if not at the invitations to tender which they could not attend, at least in being allocated a proportion of the 25 % mentioned above. Thus, both the Motta and Alemagna firms, for example, entered into separate contracts with Générale sucrière for 2 500 metric tons, although each of them could only import 920 metric tons; Motta had to enter into a contract with Eridania to cover the remaining amounts.

So far as deliveries to Italian producers are concerned, French producers had the option, either to give up 75 % of the Italian market, or to form a group with the object of selling the amount requested. The complaint that they engaged in a practice for the 'protection' of the Italian market has no foundation, as this market protects itself without any outside assistance.

If 75 % of the total amount exported into Italy was not sold to producers-importers, the amounts corresponding to this percentage could not be sold to anyone in Italy and would have been missing on the Italian market. No doubt in such circumstances there would have been competition, but between purchasers and with prices rising.

A market, where competition is to prevail, requires a demand, a supply and a price which arises out of the varying relationship between these two factors. In Italy this mechanism is prevented from functioning, because supply and demand are arbitrarily determined by CIP. Owing to this fact the price ceases to be an equilibrium price; it is no more than an artificial price fixed officially. The 'price' which could vary if Italian importers attended the invitations to tender individually, would not have been a sugar price, but the proportion of the 'sovrapprezzo' paid by the successful tenderer, which the Italian administration planned to keep as high as possible. Moreover, this administration fixed itself the 'prezzo congruo' which it wishes to obtain.

RT states that when the Commission denies that the absence of any commercial service abroad is an

important factor, on the ground that deliveries could be made to industrial consumers who did not need such a service, it ignores the many problems which have to be solved by the supplier in order to be able to meet the requirements of foreign customers.

RT states that, for its part, it does not claim that the Italian regulations allowed no opportunity for competition, but that they did not permit the company to export outside the procedure of invitations to tender the amounts of sugar which it wished to deliver to Italy. The producers who wanted to export to Italy had to find purchasers who were entitled to take part in the invitations to tender and were prepared to import at least 1 000 metric tons. Moreover they could not endanger the import of amounts for which tenders were submitted by granting prices which were the same as or less to third parties who in this way could tender a higher 'sovrapprezzo'.

Sucres et Denrées states that the Commission claims, on the one hand, that the practices to which exception is taken show that there could have been competition and, on the other hand, that the fact that intra-Community trade has not developed in the way which could have been expected if there had been opportunities for competition must be regarded as proof of a concerted action. 'In other words, according to the Commission, the existence of a concerted action raises a presumption that there are opportunities for competition which it removed and the presumed existence of opportunities for competition which it removed permits ... the assumption that there is an unlawful concerted action'. This reasoning is absolutely illogical.

The argument that price competition was possible is contradicted by the Commission itself, when it admits that, in certain circumstances a group offer can lower transport costs and when it acknowledges that it does not regard the prices applied by Sucres et Denrées as infringements of Article 85. Further the maximum consumer price in Italy is calculated in such a way that it only exceeds the intervention price by the amount of the general costs of transportation and sale. The sale price applied for exports into Italy was only 0·1 to 0·6 % above the intervention price. The limitation of the consumer price has a direct effect on the sale price payable by intermediaries who can only buy below the maximum consumer price.

Eridania takes the view that the statement that it is at times in the interests of producers to sell below the intervention price cannot apply to Italy, a country having a deficit.

Eridania does not deny that, even under an economic system based on the maximum amount of state planning, opportunity for competition, even if it is only marginal, can exist. But confronted by regulations producing the maximum distortion of normal competition, it would be lacking in realism to require that undertakings 'continue to carry on within the narrow and distorted limits within which their own initiative is allowed to operate, according to the rules governing the purist classic liberalism'. Eridania repeats the enumeration of the facts, set out in its application, which impeded the freedom of action of Italian producers; it adds to them that the latter were compelled:

- in the event of a later increase of the domestic price applied at the time of an invitation to tender and taken as the basis for determining the 'prezzo congruo', to repay the difference to the 'Ccz'.
- to tender, at an invitation to tender, an amount of 'sovrapprezzo' at least equal to the 'prezzo congruo' fixed by the said fund on the basis of the intervention price and to resell afterwards the sugar imported at the single price fixed by CIP and on the same basis.

The concurrent function of importers and traders traditionally carried out by Italian producers is indispensable, because in Italy, for reasons mainly connected with agriculture, production operations only last a very short time, so that, if they were not accompanied by commercial operations, the assets — and in particular the 'human capital' — of undertakings would not be utilized for most of the time. This function corresponds to the public interest, as it enables national requirements to be completely met by large imports at prices fixed by the Government. The Italian authorities have always required the sugar refineries to import sugar themselves. Each time there was a shortage of sugar in any region of Italy these authorities got in touch, if necessary by telephone or telegram, with the sugar refineries and invited them to increase distribution in the region in question.

It is impossible to understand what advantage the consumer or the foreign producer exporter could obtain from the introduction of another 'link' ('maillon'), that is to say traders, in the chain of distribution.

The Commission cannot deny that the uniform sale prices in Italy, including the resale prices of imported sugar, were caused by the deliberate policy of the Italian authorities, seeing that a request for information sent to the latter would have enabled this fact to be confirmed.

With regard to the complaint made by certain sweet manufacturers of Northern Italy, they reflect the dissatisfaction of the latter with the system of invitations to tender and of the single domestic price, measures against which they lodged applications with the Conseil d'État without ever being successful. This system did not enable them to make the fullest use of the favourable geographical situation of their factories. Had it not been for this system sugar would probably have cost less in Northern Italy, but much more in Southern Italy, but this would however have been contrary to the considerations which prompted the Italian State to adopt these systems.

Eridania asks the Court, if it comes to the conclusion that the facts hereinafter mentioned are not sufficiently proved:

— to hear as a witness Professor Paolo Albertario, former president of the Special Office for International Economic Cooperation in Agriculture, former Director-General of the Ministry of Agriculture and Forests and, president at the present time and when the events in question took place of Ccz;

— to send a request for information to this Fund, to the Italian Minister of Industry or to CIP, on the following questions:

Is it correct that it was the aim of the Italian authorities, in each of the years 1968 to 1972, to achieve a uniform price for both home produced and imported sugar throughout the whole of the national territory, in the case of sugar intended for human consumption and also for the processing industry? Is it true that, in order to attain more successfully the beforementioned objective, these authorities, while conforming strictly to the principle that anyone is free to take part in the invitations to tender, always wished the Italian sugar refineries to participate in them and — in a rationalized way — to import the necessary quantities of sugar to make good the deficit not filled by home production?

Cavarzere submits that, if several undertakings buy jointly, they are forced to offer a 'sovrapprezzo' which is relatively high. In fact, having regard to the large amount which they intended to import together, they ran the risk, if they did not do so, of seeing this quantity reduced as a result of more advantageous offers being made by third parties nearer the frontier who for that reason incurred much lower import costs. This shows

that the effect of competition can in fact be obtained by means of the concentration of purchases and participation in invitations to tender. Competition can also be 'negative', for instance if an undertaking increases its own costs, although such competition does not benefit anyone.

Cavarzere challenges the argument that — owing to the lower production costs of French sugar, which enable part at least of the higher transport costs to be offset — free competition enabled imported sugar to be sold on favourable terms:

- The comparison drawn up by the Commission between the price of Italian sugar, on the one hand, and of sugar imported from France in accordance with conditions laid down in the notification of invitation to tender No 4 of 2 April 1970, on the other hand, does not correspond, for reasons which the company sets out in detail, with Ccz's calculation. However the Commission calculated the price of French sugar for Milan, whereas, in the case of Sicily, transport costs were six times as high.
- Imported sugar is not less expensive if account is taken of the fiscal charges imposed upon the imported product.

  As a result of the system of invitations to tender, imported sugar had necessarily to be sold at the domestic market price, used as a yardstick for establishing the increased cost of imported sugar. In fact, if this price increased, Ccz asked for payment of the amount equivalent to the reduction of the difference between the (new) domestic price and the cost of imported sugar which it calculated in this way. By doing this it increased the cost of imported sugar, made sale prices on the Italian market fixed prices and prevented competition.

When the Commission describes the situation which exists when a producer sells sugar to another producer rather than to a consumer as an incongruous link in the chain of distribution, it forgets that Italian sugar refineries, when they have achieved their production quota, are no longer producers but only intermediaries.

The statement that competition between sugar refineries could be of importance so far as the conditions of sale, service and quality are concerned, comes up against the following objections:

- The seller of sugar should guarantee a uniform standard quality in compliance with the Community criteria for classification and in conformity with the wishes of the purchasers. The quality of sugar to be imported is fixed by the notification of invitations to tender.
- With regard to competition at the service level, the question has to be asked whether the Commission means by this expression that undertakings have to deliver free to the consumer or free at destination, without making the purchaser pay for the service, in practice therefore unfair competition.
- With regard to competition in respect of the sale conditions, the United Nations have been actively engaged for decades in producing standard clauses in agreements for international trade.

When the Commission states that it was in the interests of foreign producers to export to Italy at a lower price than the intervention price, it recommends dumping, which is contrary to Article 91 of the Treaty. Further, the only effect of exporting in this way would be that a corresponding amount of domestic sugar, which cannot be sold, would have to be bought by the Italian intervention agencies. As the Italian intervention price is higher than the intervention price laid down for exporting Member States, the FEOGA had for this reason to bear a higher charge than that which it would have incurred if the foreign supplier had

offered the sugar in question to the intervention agency of its own country.

Industria degli zuccheri takes the view that the Commission's opinion is wrong, that there is, in Italy, a 'price bracket' ('fourchette de prix') the top limit being the consumer price and the bottom limit being the ex-works price, these limits including adjustable factors which allow some degree of competition:

— The difference between the maximum consumer price and the ex-works price is caused by factors over which the sugar refineries have no control (taxes, charges, transport charges, commercial profit margins for wholesalers and retailers).
Moreover industrial consumers obtain their supplies direct from sugar factories at the ex-works price.

— Even if the ex-works price was above the intervention price, it only enabled sugar companies to earn a margin for processing sugar-beet equal to and sometimes below that taken into account in order to determine the intervention price, for the higher profits linked to this latter price find their counterpart in the price increases and improvements granted by agreement to beet growers by the administration.

It is not correct to say that Italian regulations were likely to facilitate imports, and benefited Italian producers. In fact the system of invitations to tender aimed at matching the price of imported sugar with the price of national sugar and thereby modifying the conditions created by free competition.

The orders granting industrial consumers a certain percentage of the amounts to be put out to tender confirm that even imports of non-producers come under a system which excludes any competition.

If the invitations to tender did not restrict the participation of industrial consumers, the field of activity of sugar undertakings and traders was limited in such a way that all that was in practice left for them were the areas furthest away from the frontier. Under those circumstances they were obliged to offer a lower 'sovrapprezzo'. The consumer industries, for whom the 'sovraprezzo' was adapted to the 'sovraprezzo' resulting from the invitations to tender, derived a profit from this which varied according to their proximity to the frontier, so that the difference in the costs incurred by the industries in the North and those in the South in obtaining supplies of sugar was increased to the advantage of the first. All this shows that the imports of non-producers, although amounting altogether to a large proportion (35-36 % for all direct consumers and traders) could not represent a genuine element of competition on the Italian market which was dominated by fixed prices.

In a report of 29 May 1973, CIP admitted that the system of invitations to tender aims at aligning the price of imported sugar with the price of home sugar.

With regard to the assertion that there could be competition in connexion with conditions of sale, service and quality, the Commission has ignored the fact that only producers-importers are in a position to meet their customers' orders, if the arrival of imported sugar has been delayed, by supplying the former with a domestic product of the same quality.

It does not appear that foreign suppliers who are not members of the group in question (50 % of French producers) made any offers on the Italian market at prices lower than those of the said group, which shows again that, even if there had not been a concerted practice, there could not have been any effective competition.

It is wrong to claim that industrial consumers and traders could take part without experiencing great difficulties in the invitations to tender and import direct in this way:

— The statement of the reasons upon which Order No 1234 of CIP is based, states precisely 'that all economic operators do not have at their disposal an organization capable of enabling them to take part in the invitations to tender ...'.
— The Italian system is so organized that the vast majority of consumers preferred to obtain their supplies direct from producers and by doing so pay a price perhaps lower than that, which sugar bought direct from abroad would have cost, increased by transport costs.
— The statement that foreign producers could sell direct to consumer industries without nevertheless having to have at their disposal a distribution network is incorrect so far as the small and medium sized industries are concerned, for they found that from this point of view also it was a very difficult task to obtain supplies from abroad. This is confirmed by the fact that very few of these industries took part directly in the invitations to tender, whereas many of them took advantage of the facilities offered by Order No 1234 of CIP, by proceeding to instruct third parties to purchase for their account; the imports obtained in this way outside the invitations to tender reached 11·5 %.

to 1. (bb)

Générale sucrière admits, that certain errors have crept into the calculations given in the annexes to the application relating to the prices applied by the company. Générale sucrière produces new annexes intended to be substituted for the former. Notwithstanding these mistakes the new documents confirm, in substance, the submissions in the application.

Say states that, if French producers had given up selling to Italian producers, the consequence for them would have been a serious disturbance of their business, accompanied by the high cost of storage. As exports to third countries are restricted by the Community authorities, the only way out would have been to dispose of the surplus sugar to the intervention agencies at the intervention price. As the latter could only resell at a price higher than the intervention price, the effect of such a disposal, assuming that Italian regulations did not prevent any sale at such a price, would have been that sugar had to be imported into Italy at a higher price than that which had been in fact applied.

Foreign producers in fact found that they could only do business with one purchaser. Fixing times for delivery and the date for crossing the frontier required mutual negotiation.

Foreign producers obtained no advantage from the alleged concerted action. The prices obtained were, either below the intervention price, or 0·3 % higher; Say produces the relevant figures.

During the whole of the 1969/70, 1970/71 and 1971/72 marketing years direct sales to consumers represented 20 % of the amounts exported by the company to Italy, a percentage which only differed by 5 % from the 25 % fixed by the Italian authorities for sales outside the system of invitations to tender.

Say only applied, in these sales and during the 1969/70 and 1971/72 marketing years respectively, increases of FF 1·05 and FF 0·77 per quintal. This small difference was mainly justified by the special features of these operations (special expenses, quantities, periods, additional agents etc.). The prices were freely negotiated.

Béghin points out that the fact that it is the largest company judged by its turnover, is irrelevant since it carries on business in fields other than sugar.

The fact that Béghin also approached an agent other than Sucres et Denrées —

namely the Grandi Molini firm, through which it arranged all its exports during the 1970/71 marketing year — is sufficient proof that there was no concerted action between Béghin and Sucres et Denrées.

RT points out that according to its statement of defence imports of sugar into Italy amounted altogether for the 1970/71 marketing year, to 331 055 metric tons, whereas the communication (p. 13) mentioned 477 400 metric tons.

The annexes to the statement of defence and the figures produced therein confirm that the concerted action between the group of exporters and the group of importers was only engaged in at each invitation to tender:

- These annexes only refer to the invitations to tender of 30 October 1969, 17 April 1970 and 30 October 1970, whereas between 1968 and 1972 there was twelve invitations to tender.
- The conditions, to which each tender was subject, varied each time. The price advantage of FF 1·65, compared with the offers which were made to other Italian importers, only appear in the tenders submitted at the first two invitations to tender. This clause was the consideration for the undertaking by Eridania not to look for offers elsewhere, For the third invitation to tender Eridania did not give such an undertaking.
- At the third invitation to tender the amounts awarded to the Franco-Belgian group were 19 000 metric tons, whereas they amounted to 88 000 metric tons at the first invitation to tender. Therefore RT at the date of the third invitation to tender found that it had to sell elsewhere in Italy.
- It was only in the 1969/70 and 1970/71 marketing years that the Franco-Belgian group's share of Italian imports exceeded 60 %.

At the invitations to tender for which RT submitted a tender jointly with certain French producers the Italian group approached Sucres et Denrées, the largest business house of Paris and therefore the best placed, through its contacts with producers in countries having a surplus, to get hold of the large amounts which the Italian group required. Sucres et Denrées got in touch with the suppliers concerned and considered with them the best possible terms for a joint offer to the Italian group. If RT participated in this offer, moreover for relatively small amounts, the reason is that this procedure had considerable advantages over direct and separate operations (commercial service of Sucres et Denrées; preferential freight rates offered to the latter by the SNCF up to the Italian frontier).

During some of the invitations to tender RT refrained from making any contribution to the supplies which Sucres et Denrées had to secure, because it considered that the price at which the French producers agreed to sell was too low. There was therefore effective competition.

It emerges from the facts mentioned in the statements of defence and their annexes that Italian industrial consumers were not forced to obtain their supplies each time through the Eridania group. To the extent to which Italian regulations allowed, they could attend the invitations to tender and submit tenders bases on the offers made to them by exporters who did not belong to the Franco-Belgian group. Competition between the Franco-Belgian group and the other sources of supplies in the Community therefore made itself felt. At the time of the invitation to tender of October 1969, whereas Sucres et Denrées first envisaged a price of FF 119·50, the price offered was reduced to FF 117·50 owing to the possible competition of 'outsiders'.

Sucres et Denrées states that if, during the operations in question, it became in law an owner, it still maintained its role as a

mere agent, as emerges from the documents which the Commission itself has produced. An undertaking in such a situation did not have any interest in a partitioning of the national markets or the power to bring about such a situation. It is therefore a mistake to assume that Sucres et Denrées was the driving force in the concerted action relating to the Italian market.

The intervention of Sucres et Denrées was in conformity with the objectives of Community policy and that of the Italian authorities.

The Commission cannot make Sucres et Denrées responsible for the grouping together of suppliers. The company informed all the suppliers concerned, without excluding any of them, of the conditions under which Italian importers were willing to purchase sugar. The documents produced for the Court's file by the Commission do not prove the contrary:

— In the telex message of Eridania of 20 August 1970 the Chairman of Sucres et Denrées wrote that he could not 'forget that some years ago, on the occasion of international invitations to tender in Rome', he was 'compelled to negotiate with each of you in different offices because your managers refused to meet in the same room'; he added that he is 'absolutely convinced that he made a very great contribution towards renewal of contacts between the various groups and reconsideration of their joint interests'. These statements refer to the rôle which the said chairman played during the years 1960 to 1965, that is to say before the entry into force of Community regulations, in order to enable Italian importers to secure a more regular and rational supply of sugar for their national market. On that occasion he therefore suggested that the system of bulk imports should be established, in place of the 'chaotic' system of importing small quantities for each group of Italian importers.

— In the minutes of a meeting held in Paris on 29 July 1969, the authenticity of which cannot possibly be checked, Sucres et Denrées is made out to be a company having an influential position in Italy. This statement can only be taken to refer to the fact that, during the years 1960 to 1965, a period during which the organization of their national market presented the Italian public authorities with many problems, Sucres et Denrées was recommended to them by the French authorities as one of the undertakings knowing most about the international sugar market and therefore capable of giving them good advice.

If Sucres et Denrées acknowledged that it was 'the agent for the transmission of offers and the coordination of deliveries and payments', that simply meant that it displayed commercial dynamism and not that it was the originator of the alleged concerted actions.

Sucres et Denrées did not take part in price fixing on the Italian market, except indirectly through the coordination of the deliveries which it supplied; in this field its influence could only be favourable. Moreover the Commission contradicts itself when it states, on the one hand, that Community regulations left price fixing to the law of supply and demand and that Sucres et Denrées engaged in practices which distorted the price mechanism on the Italian market, and when it recognizes, on the other hand, that it — the Commission — has not blamed this company for the prices which it applied.

The statement that it would have been possible to supply consumers direct with sugar, apart from being theoretical, has no relevance so far as Sucres et Denrées is concerned. As the latter company never made any deliveries on its own account, it could not confer an advantage on one Italian importer rather than on another. Moreover, no Italian consumer

applied to pass on its order to the producers. Assuming that foreign suppliers intended to reserve exclusively for themselves the amounts exported to Italian producers, such practices are not attributable to Sucres et Denrées.

The Commission wrongly states that the object of the practices in question was to secure for Italian producers the protection of their market. Foreign producers, and in any event Sucres et Denrées, are not even potential competitors of Italian producers. The Commission fails to understand the Italian system, and in particular the obligation to provide security of a large amount, when it states that there was no serious obstacle preventing a French undertaking from taking part in the invitations to tender. In any event, Sucres et Denrées, in its capacity as a middleman, could not participate in them or contemplate distributing sugar on the Italian market.

SZAG submits that, in its statement of defence, the Commission only states in connexion with the marketing year 1969/70 that 'the participation of the applicant in the cartel ... must be regarded as proved' (cf., for the formal submission relating to the same question, but referring to the content of the decision, above, A g ff in fine). It is true that in another part of its statement of defence it argues that during the marketing years 1970/71 and 1971/72 SZAG was involved, together with Italian producers, in a restriction of competition. This deduction is however only based on deliveries to Italian producers; moreover, the Commission itself acknowledges that such deliveries do not in themselves amount to an infringement.

Neither is the volume of the deliveries an indication of a cartel. Italian producers obtained, respectively in 1969/70, 1970/71 and 1971/72, 87·15 %, 77·40 % and 60·77 % of the amounts put up to tender.

The fact that deliveries from producer to producer amounted to much more than one half of imports was therefore due to the Italian system. The figures supplied by the Commission on the respective amounts of total sugar imports into Italy (877 000 metric tons from 1969 to 1972) and imports effected in particular by Italian producers (659 970 metric tons, that is to say 75·1 %), only establish that these producers in fact imported the amounts which they were awarded.

With regard to the statement that SZAG's deliveries to German dealers consist partially of indirect deliveries to Italian producers SZAG did not know to whom the dealers resold the sugar; it had no influence at all on the ultimate destination of the product.

The decision proceeds on the basis of the notion that, for the 1970/71 and 1971/72 marketing years SZAG did not undertake only to sell to operators other than Italian producers at higher prices and that it did not come to an agreement with anybody in this connexion. It seems that the Commission no longer wishes to accept this finding, but there is not the slightest indication of any participation by the applicant in illegal actions of this kind, during the 1970/71 and 1971/72 marketing years. With regard to the 1969/70 marketing year the Commission merely talks of 'serious indications' ('sérieuses raisons') ('Anhaltspunkte').

When it denies that the figures supplied by SZAG show that the latter derived from deliveries to producers a profit equal to or greater than that which it obtained from sales to traders, the Commission confuses the price (the invoiced price) and the net profit ex-works and loses sight of the fact that only net profits ex-works can be compared with each other.

The telex message from Sucres et Denrées to Eridania of 1 October 1969 does not prove that SZAG engaged in a cartel relating to import quotas. It only contains a proposal in case SZAG receives no order or does not effect any

delivery. The telex message from Eridania to Sucres et Denrées of 22 October 1969 shows that no quota of 15 % was reserved to SZAG and that the latter was to receive an order for 15 000 metric tons.

When the Commission regards deliveries by agents to Italian producers as indirect deliveries to producers, it in fact argues that deliveries 'of outsiders' to Italian producers are in no circumstances possible which shows that its reasoning is defective.

In its observations relating to its communication of 29 July 1968 relating to the cooperation between undertakings the Commission fails to understand that Eridania placed an order for 95 865 metric tons and that one producer alone is not in a position to carry out such a large order.

Eridania calls attention to the fact that the complaint, put forward in its statement of defence that undertakings tendered at the invitations to tender identical rates of the 'sovrapprezzo' is not in the decision. Moreover, the factors taken into account in the calculation to determine the 'prezzo congruo' (the 'appropriate price') were fixed and the same for all Italian producers with the consequence that whether or not there was any concerted action the results of the calculations made by each operator had necessarily to be the same.

The telex message from Eridania to Sucres et Denrées of 29 October 1970 (cf. communication, p. 81) shows very clearly that the undertakings did not come to an agreement once and for all but negotiated each individual transaction separately. It says in effect that 'we have not entered into an undertaking with anyone'. The same conclusion is drawn from:

— the telex message of Sucres et Denrées to Eridania of 2 October 1970 (cf. communication, p. 80), which states that Eridania, before concluding a deal for importing sugar, consulted the whole 'field' of sugar vendors in the common market, including people who were not members of the exporters' group, and that it had 'definitely decided' to place Sucres et Denrées 'on the same footing as the various German, French or Belgian brokers', which Sucres et Denrées accepted in the end although with regret;
— certain documents, produced by Eridania in the administrative procedure and which make it clear that on the occasion of the invitations to tender, Eridania asked for, received and examined offers from a great variety of sugar exporters and that it did not fail to accept these offers whenever they were more favourable than those transmitted by Sucres et Denrées.

The 'concerted actions' between Italian producers did not affect trade between Member States; on the contrary exports of sugar to Italy increased during the period under consideration. The said 'concerted actions' did not either distort competition, within the meaning of Article 85, because the ultimate object and the effect was the import of sugar at reasonable prices, which benefited the consumer.

It emerges from the Commission's own statement relating to the history prior to the events in question, (agreement of French producers of 1 July 1968, etc.) that the concentration of supply preceded concentration of demand.

With regard to the preferential treatment which was reserved by the suppliers' group for Italian producers during certain negotiations, Eridania calls attention to the following facts:

— No evidential value can be placed on the internal memoranda of Export or on this firm's correspondence, because it collected them together 'somewhat mischievously', and they have nothing in common with the usual commercial correspondence

and internal memoranda of a company.

— Eridania never attached any special importance to the preferential treatment offered by Sucres et Denrées, to such an extent that it never mentioned it in its correspondence, because of the impossibility in practice of checking the implementation of this offer.

— The analysis by the Commission of Ccz's data relating to imports by operators other than producers invites criticism. It gives a lower percentage than that which results from these data and it deduces from the total figure, without any valid reason, the imports effected by two traders and those 'outside the system of invitations to tender', reserved to consumers.

— There is a contradiction between the Commission's argument that foreign suppliers applied the price increases in question, on the one hand, and, on the other hand, the statement of the Ferrero company, in one of the documents produced for the Court's file by the Commission according to which, since 1968, offers from abroad have ceased.

— Infringement of Article 85 cannot result from a mere intention but only exists if — *quod non* — the suppliers had in fact applied or demanded price increases.

— It is unreasonable to maintain that sugar intended for consumer industries can be distributed without an adequate distribution network being necessary. The Commission fails to take account of the fact that in Italy, outside the four or five large sweet manufacturers there are dozens of medium sized or small sweet manufacturers which cannot obtain their supplies direct from abroad, because they have to take in regularly small amounts throughout the whole of the year and not large deliveries from time to time.

— The situation of producers-importers and sweet manufacturers, which cannot be compared with each other, results also from the fact that the former did not buy sugar for use in plants near to the frontier, but to resell it throughout Italy at a uniform price fixed by the authorities.

The object of the right reserved by producers in the contracts for the delivery of sugar to industry to enable part of the delivery to be carried out by other producers, was to guarantee an uninterrupted supply of sugar to consumers, generally the smallest, who were in the habit of obtaining their supplies from time to time and in limited quantities from sugar producers. This clause was therefore welcomed by them since, in their eyes, the important fact was not the identity of the supplier. On the other hand, the sugar producers took the view that the clause in question was a lawful way of carrying out their contractual obligations punctually even if there was a temporary shortage of stock.

With regard to the annual supply contracts entered into by Italian producers with industrial users, the statements of fifteen of them, produced by Eridania to the Commission during the administrative procedure, have much greater weight than those of the persons consulted by the Commission of whom there seem to have been moreover only two.

For reasons which *Cavarzere* states in detail Italian producers cannot apply lower prices than those which were applied in practice. The Italian Conseil d'État moreover in fact acknowledged that these prices were fair.

It could not be in the interests of Italian producers to come to an agreement with their counterparts in other Member States to adopt a policy of 'chacun chez soi', ('everyone in his own home'), since in any case, they were not in a position to export and could not therefore reasonably 'offer' foreign producers the consideration of not disturbing their market.

It is acknowledged by all legal orders that the grouping of purchases is lawful. However, there is not even a purchasing organization within the legal meaning of this word. As is clear from the telex message from Sucres et Denrées to Eridania of 20 October 1969 each producer-importer retained the right to obtain its supplies elsewhere.

With regard to the price increases which were applied in sales to third parties Cavarzere makes the following submissions:

— The Court has held that discrimination can only be established if there is a list of fixed prices, which is lacking in this case, since prices were negotiated each time.

— The only specific facts mentioned by the Commission in this connexion are the sale prices applied by SZAG to its producers, on the one hand, and, on the other hand, to outsiders, in particular the German firm Töpfer & Co., to which SZAG delivered sugar intended for Italy. An examination of the figures in the annex to the statement of defence proves, however, that Italian producers found that the prices offered to them were equal to or distinctly higher than those offered to other firms.

— The contracts entered into with the Ferrero, Motta and Alemagna companies, powerful customers and therefore difficult to tie down cannot be criticized.

— The Commission has not been able to prove that the undertaking, contained in certain offers by French suppliers, to apply a price increased by FF 1·25 per quintal for any other delivery of sugar intended for Italy, was ever implemented. The differences between the prices applied to sugar undertakings and those applied to other importers were always appreciably above or below the 'guaranteed limit' which the French group undertook to observe in certain contracts, and never corresponded exactly with the figure offered by French vendors. This establishes that, if the 'outsiders' had to pay a higher price, they were exposed to the effect not of a concerted action but of market conditions.

If the quotas had been allocated in a different way, or if large amounts of sugar had been imported outside the invitations to tender, the result would not have been an increase in the amount of sugar available, but, on the other hand, an increase of prices, for reasons which Cavarzere mentions in detail.

With regard to the refusal to enter into a contract the Commission only mentioned one example relating to RT. There was moreover no obligation to enter into a contract with anyone.

The fact that an undertaking can be substituted for a supplier with the consent of the purchaser, which moreover is admissible under Article 1406 of the Italian Civil Code, cannot invite any criticism, since sugar is a homogeneous product which can be replaced.

With regard to the duration of the undertaking given by the consumers, it is clear from all the contracts produced by the Commission that sales were effected for specific quantities and that no industrial consumer ever undertook to buy all the amounts required to cover its entire annual requirements. Even if any such consumer had done this, it could but have benefited, since there was a real possibility of a sudden sugar shortage which was a feature of the Italian market.

The fear expressed by RT, that the price offered on the Italian market was fixed 'in a somewhat casual manner' and does not lead to 'making a good thing out of offers from abroad', would have had no justification if, within the terms of a concerted action, Italian producers had

confronted foreign suppliers as an association.

It is not surprising that the percentage of the 'sovrapprezzo' offered by the 'outsiders' was always higher than that offered by producers-importers. The importers who were not members of the group, while they paid for the sugar at slightly higher prices, incurred in general lower costs, in particular transport costs, since they were almost all established near the frontier.

If one producer approaches another producer in order to buy its product, there is no competition between them, but a conflict of contractual interests. So far as this transaction is concerned the undertaking which is normally a producer-vendor becomes a purchaser reseller. This dual role is particularly evident in the case of Cavarzere and the imports of granulated sugar for industrial use. The percentage of sugar of this category produced by Cavarzere was very small in relation to domestic requirements; for this reason competitive relations with foreign producers was not even an assumption which could be contemplated.

The concerted action between producers-exporters was notified as early as 1968 to the Commission which found nothing in it to criticize; for this reason Italian producers could expect that the grouping of purchases which they organized was also regarded as lawful.

With regard to the fact that the prices of imported and domestic sugar respectively are identical it is economically out of the question that two different prices can exist on one single market; prices always align themselves on each other.

The regrets expressed by the Ferrero company and l'Association des industries de la confiserie italienne (The Association of Italian Sugar Manufacturers) cannot be used as evidence against the sugar manufacturers, since Ferrero and the said Association are in disagreement with them, because they plan to prevent the latter from operating as middlemen. The accusation made by the sugar undertakings, that the sugar factories 'compelled them brutally' to enter into contracts with them, is moreover without foundation, since they are larger undertakings than those which they say dominated them.

According to *Industria degli zuccheri,* the practices to which exception is taken have not had a negative effect on competition, as is shown by the fact that offers were made also by foreign suppliers not belonging to the group in question. The objection that these suppliers were undertakings which were not in a position to export, as they were producers of raw sugar and did not have the necessary equipment, 'proves too much', since it is tantamount to saying that the members of the group were the only ones able to export, which also makes the complaint of infringement of Article 85 null and void. But the fact is that the beforementioned offers were followed by imports which continually increased during the period under consideration.

It is not true that Eridania negotiated on behalf of all the other sugar undertakings and received on their behalf offers from foreign exporters. All the producers took part in the negotiations, and it happened that some of them decided not to import, as emerges from the telex message from Eridania to Sucres et Denrées of 20 October 1969 produced for the Court's file by the Commission.

The Commission can only criticize Italian producers for the fact that whenever the clause allowing one supplier to be substituted for another was invoked, the substitute was invariably also a producer. Outside the 'group' which is alleged to exist, no undertaking possessed the large amounts for which purchasers in general applied. The said clause was also inserted because with

regard to the amounts stipulated in the contracts the producers could neither be certain either of the amount produced nor of the outcome of the invitations to tender.

The documents relating to the meeting in Paris of 29 July 1969, in Genoa of 11 September 1969 and in Paris of 22 September 1970 (cf. decision, p. 23, Rt. Col., 24) do not establish the existence of a concerted action within the meaning put forward by the Commission. To the extent to which the notes drawn up by Export must be considered there is every reason for supposing that this firm intended to take the place of Sucres et Denrées as middle-man for trade with Italy.

Industria degli zuccheri does not know whether price increases were applied in the sales to non-producers.

If there was in fact any damage, it was negligible and was not suffered by any competitor of Italian producers, which is a decisive factor with regard to the application of Article 85. There could be drawbacks for one or other of the large industrialists, who was unable to exploit fully the advantage which he derived from the geographical position of his factories, or one or other of the large traders, who could otherwise import small quantities for delivery to customers near the frontier and benefit from the favourable freight rates; moreover no wholesaler ever complained of any disturbance of the market. The industrial consumers did not compete with producers.

Volano states that its position is similar to that of Emiliana in that it also used, although to a very limited extent, the system of negotiable delivery notes suggested by Eridania and the other companies to the small and medium sized Italian undertakings. It was only a small undertaking exercising no influence. In the meantime it was taken over by l'Istituto finanziario industriale ligure (IFIL).

Emiliana submits that at that time, it did not have sufficient sugar to meet its customers' requirements. The suggestion was made that it should buy, on favourable terms, from French producers which it did not know. For this purpose it was invited to the meeting at Genoa. Since the conditions of purchase appeared to be satisfactory, it bought. The profits made from the resale were lower than those which the company made from the sale of its own sugar. It is not understood why Emiliana had to buy from other producers. No purchaser of goods spends time and money on inviting general and informative bids from the maximum possible vendors. This is what happens in practice: The purchaser knows the average prices applied on the market by reading the very large number of official or unofficial publications; he purchases on the basis of the prices found in these publications and his personal information concerning the good quality of the product offered by a particular producer. If he finds, and it does not matter how, a good producer who offers him an advantageous price compared with the average price applied on the market, after taking into account freight rates, commissions etc., he naturally buys from this producer.

The Commission cannot put on the same footing undertakings which participated in an action with the intention of entering into a general agreement for imports and those which participated in it for the express purpose of obtaining a product on satisfactory terms.

In the case of Emiliana the subjective and the objective element of a 'concerted practice' are both missing:

— When the Commission speaks of the 'coordination shown by the conduct of the participants', it uses a very vague idea. The view can be taken that 'coordination' only takes place between those who take part in working out and formulating a plan establishing the concerted practice, that is to say the protagonists among

whom, in this case, Emiliana was not numbered.

— It does not matter that Emiliana sent requests for supplies through the Eridania company, tendered at the invitations to tender a similar percentage of the 'sovrapprezzo' as that offered by the other participators, and resold the imported sugar subject to conditions of sale which were identical to those of the other undertakings; this course of conduct was not coordinated but at times identical. If Emiliana acted through Eridania it was because that was the most satisfactory method of obtaining supplies and the easiest. The 'sovraprezzi' tendered were always the same, as the invitations to tender were 'technically speaking an instrument which amounted only to a simple formality'.

— Emiliana did not prevent competition. It did not sell to consumers.

— Contrary to the allegations of the Commission the 'unjustified profit' is also a vital factor in order to be able to establish an infringement of Article 85.

According to *SADAM* the fact that it was not a member of 'Assozucchero' or represented by this company is of considerable importance. In fact membership of this association, of which the other Italian undertakings who are criticized in the decision were members, could raise the presumption that it was within the Assozucchero that the procedure in question for importing sugar was defined. In the communication (p. 41), the Commission attributed to the Assozucchero the role of the Italian partner in contracts entered into between sugar manufacturers at Community level; it is the Commission's view that these contacts were made inside the Comité européen de fabricants du sucre (CEFS), of which the Italian member was in fact Assozucchero.

SADAM claims that it played the part of 'an outsider'. After the first meeting in Genoa it dissociated itself from the progress made in the matter and did not attend any of the later meetings. Before taking part in an invitation to tender it asked Sucres et Denrées and other suppliers independently, by telephone, to make offers; the amount on offer and the price were also directly negotiated. SADAM enumerates, with documents in support, a series of offers made to it, during the period under consideration, by Sucres et Denrées, a German firm Gerike Bahr & Co. and la Société pour l'exportation des sucres. In 1973 SADAM continued this policy of independent purchasing by contacting, either Sucres et Denrées, or Béghin, or the Safracom firm. On another occasion it got in touch with the Marcel Bauche maison business house in Paris.

SADAM's statements are also proved by the telex messages of Sucres et Denrées to Eridania of 29 September and 2 October 1970, set out in page 79 of the communication. They show that Eridania arbitrarily assumed a right of representation or, what was even better, that it proceeded to transact business without SADAM even being aware of what it was doing.

With regard to the complaint that Italian producers, including SADAM, came to an agreement for participating in invitations to tender, the conduct of the undertakings in this connexion should not be considered together with the concerted action which is alleged to exist between Italian and foreign producers, but independently. It is true that SADAM offered a 'sovrapprezzo' equal to that offered by the other undertakings taking part in the invitations to tender, just as it is true that the differences between the 'sovrapprezzi' offered respectively by producers-importers and the third operators were negligible. As the price of sugar is in a form which enables its value to be calculated, it is not difficult to ascertain the price offered by the 'leaders' of the sector; in an oligopolistic market 'price-leadership' is

common and does not ncessarily violate the rules of competition.

In any event a possible exchange of information between the participants cannot come within Article 85, as it does not affect trade between Member States.

That SADAM entered into contracts of the same type with consumers as those entered into by the other Italian producers is explained by the fact that the company, which only represents 4 to 5 % of Italian production, had no alternative but to fall in line with the large producers.

The substitution clauses criticized by the Commission were made necessary by the system of invitations to tender, because the suppliers cannot be certain of being awarded a quantity of sugar which they had agreed in advance to sell. Moreover the mere existence of such clauses refutes the Commission's complaint; in fact if everything had been concerted these clauses would have been superfluous.

It can be inferred from the case-law of the Court that the question whether conscious parallelism amounts to a concerted practice is only raised in the case of oligopolists, but not of small operators who in any event are not in a position to compete with large undertakings. In a general way in an oligopolistic market normal competition only occurs to a limited extent, since undertakings tend to avoid a major struggle. Conscious parallelism of conduct corresponds to the requirements of the normal functioning of such a market.

Large consumers such as Ferrero, Motta and Alemagna were well able to compete with Italian producers in the field of sugar imports. If they decided not to do so, that cannot therefore be explained by the existence of a concerted practice — in which moreover these undertakings have not been found to have engaged — but because the latter found that it was in their interests to buy from producers.

SADAM describes in detail the considerable economic and financial difficulties with which it had been familiar since 1966, and which forced it to conform, without any question of a cartel, to a situation characterized by 'price-leadership.' The profits which it obtained were very modest.

(4) Summary of the rejoinders

The *Commission* replies as follows:

to 1. (aa) (aaa)

The Commission considers that it is important to stress that, contrary to what is true in the case of sales to the ultimate consumer in the shops, sales to industrial users or to traders are not subject to maximum prices fixed by the authorities; the producer is therefore free to fix his own ex-works price, taking into account the different taxes and his profit.

The Commission challenges on many points the description of the Italian regulations given by *Eridania* and *Industria degli zuccheri* by calling attention in particular to the fact that there is no legal foundation for the application of maximum prices in Italy. This difference of opinion is, however, in practice irrelevant, since the Commission does not deny that such prices in fact existed and were observed.

to 1. (aa) (bbb)

General observations on the submissions of the applicants who are not Italian

The Commission regards the distinction drawn by certain applicants, between the 75 % of imports which are authorized through the system of invitations to tender and the 25 % which can be imported outside this system as a fallacy. The fact that the Italian authorities provided for the import of certain quantities outside the system of invitation to tenders but also in

consideration of a reduced 'sovrapprezzo' does not divide the persons taking part in the invitations to tender into two distinct and unchanging groups. In fact every economic operator, whether producer or consumer, could freely decide to submit, either a tender with the object of becoming a successful tenderer, or an application to obtain a quota of the sugar reserved to undertakings not wishing to take part in the invitations to tender. In practice several consumers made use sometimes of the first and sometimes of the second opportunity. The choice seems to have been determined by the amount to be imported or by the size of the undertaking. — The conditions for joining in the invitations to tender are the same for everyone; with regard to the practical difficulties of varying degrees of importance in complying with these conditions this problem arose less between Italian undertakings and foreign undertakings than between large and small undertakings. In general the actual distinction is not between the 75 % and the 25 %, but between the opportunity of taking part in invitations to tender (in the case of tenders for more than 1 000 metric tons) and the opportunity of being able to import outside the system of invitations to tender (offers for less than 1 000 metric tons). Moreover sugar could be imported against payment of the whole of the 'sovrapprezzo'; this method of importing accounted for about 200 000 metric tons during all four marketing years.

The opportunity of price competition — not only between different groups but also within each group — is shown in certain statements in RT's reply.

The fact that the concerted action prevented consumers from obtaining their supplies direct from producers-exporters emerges from several documents annexed to the statement of defence, and in particular from the telex message of Sucres et Denrées to Eridania of 2 October 1970, according to which 'several industrial Italian consumers came and begged us to be allowed to buy their sugar from us', and Sucres et Denrées acknowledge that they refused to sell and 'complied 100 % with the rules of the cartel game'.

It is significant that the non-Italian applicants did not investigate the Italian market but preferred in the case of large quantities to 'play it safe'; on the other hand Sucre-Union formed an Italian subsidiary.

The Commission has never denied that the Italian regulations reduced competition on the Italian market but only that they excluded it. In fact the applicants 'used ... Italian regulations in order to restrict the opportunities for competition left open by these regulations'. The latter 'do not explain ... everything', indeed they explain even less if the similarity between the practices in question and those in which other undertakings engaged in order to protect the Netherlands and German markets which are not subject to any specific regulations, is borne in mind. In particular undertakings could perfectly well attend the invitations to tender alone, that is to say, compete by submitting more favourable tenders.

Even if it is assumed that Italian regulations are a national organization of the market — *quod non;* cf. infra, b, 2 and 4 —, that is not incompatible with the existence of opportunities for competition.

Individual replies to certain non-Italian applicants

By quoting the finding, mentioned by the representatives of the Commission that 'the procedure for awarding import quotas helps ... the Italian producers to control all sugar imports by the concerted action', *Générale sucrière* omits to mention that the document in question also emphasizes the difficulties faced by consumers which spring from

the disputed cartel. The Commission never denied that because of the Italian regulations consumers' requests had to be reduced, but it denies that they were ever the only obstacle encountered by consumers. The main effect of the concerted action to which exception is taken was to exclude 'outsiders' from the invitations to tender whether they were exporters or importers; if there had not been a concerted action 'outsiders' could have been awarded larger quantities compared with producers.

Générale sucrière plays upon words when it claims that the 'price' tendered at invitations to tender is not a sugar price but the proportion of the 'sovrapprezzo' to be paid by the successful tenderer. It is important to bear in mind that the system of invitations to tender allows tenders to be competitive.

When *Générale sucrière* and *Say* state that they only had the choice of either giving up 75 % of the Italian market or joining a group, they shirk their duty; the Commission did not attack the deliveries as such but the concerted action in connexion with the deliveries. Having regard to the economic context sales in Italy would have in any case taken place; but if there had not been a concerted action inquiries from 'outsiders' would have been met on a larger scale.

In reply in particular to *Say,* the Commission states competition could cover the proportion of the 'sovrapprezzo to be paid and, once this proportion had been fixed, the price to be obtained subsequently on the Italian market.

RT cannot seriously maintain that an undertaking operating as it does on a large scale can encounter insuperable obstacles if deliveries have to be made to industrial consumers, even in the absence of a commercial organization abroad.

Sucres et Denrées is wrong to state that the transport and marketing costs used by the Italian authorities to calculate the maximum consumer price were 'fixed sums'; on the contrary these were the factors, *inter alia,* which could offer scope for competition. Sucres et Denrées admits moreover that 'exporters must do all they can to minimize transport costs, which are the principal variable item'.

General observations on the submissions of the Italian applicants

As Article 85 prohibits also concerted practices which only have *'as their object',* and not as their effect, the restriction of competition, the Commission, having produced evidence of cooperation capable of adversely affecting competition and aiming at its restriction, does not have to prove that, in the absence of this collaboration, there would have been on the market real opportunities for competition. On the contrary it is for the undertakings to prove that the characteristics of the market exclude effective opportunities for competition, whatever form it took (a situation which does not often arise), and that their conduct is explained by other reasons than the intention of adversely affecting competition. This problem is, however, of secondary importance since the Commission showed that the Italian system permitted such opportunities.

Individual replies to the Italian applicants

Eridania's argument amounts to saying that it is natural for undertakings to remove the opportunities for competition left by the Italian regulations. — Neither the obligation to produce the quantities determined by the authorities, or that of paying a fixed price for raw materials, nor the obligation to apply the maximum consumer prices, nor the burden of charges on successful tenderers prevented competition from developing at the level of imports. Nor could the invitations to tender, which by definition imply competition, strangle it.

In reply to *Cavarzere,* the Commission first of all states that, so far as

competition relating to the conditions of sale is concerned, the desirable standardization of the pattern of the forms of contract used for international sales, likely to make this trade easier, must not be confused with the insertion in these forms of contract of conditions which are too onerous for the co-contractor.

The notices of the invitations to tender which do not deal with caster sugar, that is to say sugar in the first category, deal with sugar in the 'second and/or third category'. They do not therefore always state the category; moreover each category, and in particular category 1, includes various kinds of sugar. The opportunity for competition with regard to quality is, therefore, proved by the purchasers' complaints disclosed in the minutes of the meeting in Paris of 24 September 1970 and the report on the checks carried out with the 'Associazione industria dolciarie'.

Competition in connexion with service and the delivery of sugar free to the consumer are two quite different things.

The Commission sets about refuting, with detailed arguments, the claim that the comparison which it drew between the price of Italian and imported sugar can be challenged.

The Commission never intended to deny that it was perfectly lawful for Italian sugar refiners to perform two functions as producers and middlemen, but it persists in thinking that, if there had been free competition, the maximum consumer prices would have had the effect of eliminating the first of the four actual phases of distribution, namely: sales of producer-supplier to producer-importer, from producer-importer to wholesaler, from wholesaler to retailer, from retailer to the ultimate consumer.

The Commission replies to the arguments of *Industria degli zuccheri* by submitting that this company's claim that only producers-importers were in a position to secure continuous supplies, does not take into account the possibility of storing imported sugar and above all does not invalidate the argument that the conditions of sale, the quality and service could have been improved by competition.

The obligations attached to participation in the invitations to tender have not succeeded in putting off the majority of consumers. The latter on the contrary, according to the statements of the other Italian applicants, enjoyed a competitive advantage compared with producers. The fact that producers have the advantage of a commercial organization, if it is accepted that such an organization is sometimes necessary, only applies to the smallest industries.

to 1. (aa) (ccc)

The Commission examines the question whether certain aspects of the Italian provisions can fall within the prohibitions of the Treaty; for example the 'sovrapprezzo' may be incompatible with Articles 13 and 95. But in any event one infringement cannot justify another.

to 1, (bb)

General considerations on the submissions of all the applicants

The Commission states that, *grosso modo,* the applicants do not challenge either the facts alleged or the documents which have been produced in support thereof, but are content to make general observations or endeavour to divert the arguments from their relevant field, in particular by trying to justify the disputed conduct.

It is significant that producer-exporters endeavour to claim that responsibility for their being grouped together rests with the grouping together of producers-importers, whereas the latter make the opposite submission. This line

of defence is untenable, since the Commission has not attacked these two groupings separately but has challenged the concerted action as a whole.

The Commission enumerates and reproduces some of the documents which it regards as being the most important for the purposes of its case, namely:

- the minutes of the meeting in Paris of 29 July 1969;
- the telex messages after the meeting at Genoa of 11 September 1969:
  - telex message from Sucres et Denrées to RT of 1 October 1969;
  - telex message from Sucres et Denrées to Eridania of the same date;
  - telex message of Eridania to Sucres et Denrées of 31 October 1969;
- the minutes of the meeting in Paris of 22 September 1970.

Individual replies to certain applicants or groups of applicants

Reply to Générale sucrière

The amended figures of the prices applied by the company either give rise to doubts, or confirm that the prices applied to third parties (in this case the Victoria firm) were higher than those applied to Sucres et Denrées.

Reply to Say

The Commission did not treat the effect of the concerted action on the price level in Italy as amounting to an infringement; it simply claimed that price competition was possible and took exception to the price increases applied in sales to third parties.

The Commission takes note of the fact that Say does not deny having applied such increases. With regard to the extent of these increases the Commission challenges the method of calculation used by Say, in particular by claiming that the prices should be compared contract by contract; Say should produce all the contracts into which it entered.

Reply to Béghin

So far as the size of this applicant is concerned the Commission only referred to it in order to determine the amount of the fine, calculated by reference to the total turnover of the company and not to an estimated turnover calculated within the context of the practices to which exception is taken. Further the Commission found that the applicant took part in concerted actions which had not only as their 'effect' but also as their 'object' the restriction of competition; in this connexion it is advisable to consider the part played by the applicant in the concerted actions, independently of the amounts which were in fact exported.

The fact that Béghin also applied to the Grandi Molini firm in connexion with its exports to Italy does not invalidate the evidence of its participation in the concerted action, which is found in the documents annexed to the statements of defence.

Reply to RT

With regard to the total amount of imports into Italy in 1970/71 the figure of 331 055 metric tons mentioned in the statement of defence, represents the total amount of sugar awarded, whereas the figure of 477 400 metric tons, mentioned in the communication, represents the total amount of sugar registered as passing through customs.

The fact that the concerted action was engaged in continually and not from time to time is shown by certain documents, which indicate that contact was regularly maintained; moreover this has been admitted, explicitly or by implication, by Générale sucrière and by Sucres et Denrées, in particular when the latter points out that the practices to which exception is taken were an integral

part of a national organization of the market and that they secured the stabilization of the Italian market. — So far as the third invitation to tender in particular is concerned, the minutes of the meeting in Paris of 22 September 1970 prove that the price increase, arising out of this invitation to tender, was the subject-matter of an agreement. It is not correct to say that at this time RT delivered 'elsewhere in Italy'; the deliveries referred to by RT were made through Export and were intended for Italian producers.

Reply to Sucres et Denrées

Sucres et Denrées admitted that they supplied more than 150 000 metric tons to Italy. This large figure makes it easier to understand that this company played the part of the driving force in the concerted action, which is moreover conclusively proved by certain documents annexed to and mentioned in the statement of defence. In these circumstances its argument that as a non-producer it was not in its interests to protect the Italian market is unfounded. Its position on the sugar market is not economically different from that of producers. It makes its appearance on the market in the capacity of an offerer of quantities of sugar which it owns; it emerges from some of the beforementioned documents that on one occasion it sold 5 000 metric tons whereas the other applicants shared out 11 000 tons between themselves. It could supply the Italian market without conferring with the producers-exporters and thereby calling in question the concerted actions to which exception is taken. But in fact it did participate decisively in the supply of almost all the amounts delivered from producer to producer. It cannot deny that it had a financial interest in participating in the concerted action bearing in mind the margins which it obtained.

By stating that it was never approached by any Italian consumer Sucres et Denrées is playing upon words. The Commission found by showing the points which the various concerted practices have in common, that the methods used 'are similar ... to a great extent'; it was therefore concerned with a general description of the concerted actions. In the case of Sucres et Denrées the Commission found that it engaged in the concerted action, in particular so far as the deliveries from producer to producer and the charging of price increases are concerned.

The wording of the telex message from Sucres et Denrées to Eridania, of 20 August 1970, proves beyond doubt the part played by the applicant in the grouping of supply. The fact that it brings out certain differences of opinion between it and Italian producers is further confirmation of the kind of commercial relations which existed between the undertakings concerned.

The minutes of the meeting of Paris of 29 July 1969 show that Sucres et Denrées attended this meeting and came to an agreement with French and Belgian suppliers to sell certain quantities to Italian producers through Eridania and to prevent sales to Italian 'outsiders'.

It is not clear why it is inconsistent to say, on the one hand, that the Italian regulations allowed opportunities for price competition and, on the other hand, that the effect of the concerted action on the price level in Italy has not been treated as a factor constituting infringement.

When the applicant argues that exporters cannot be regarded as competitors of producers-importers it fails to understand the nature of the infringement for which it is blamed. The Commission treated the deliveries from producer to producer as one of many other indications ot the alleged concerted action; for the remaining indications the Commission refers back to the arguments developed

in the statements of defence from which it emerges that the group of exporters was economically in competition with Italian producers in connexion with deliveries into Italy.

The conditions for attending the invitations to tender are the same for everyone; undertakings which were far smaller than Sucres et Denrées attended.

Reply to SZAG

The statement of defence shows clearly why the Commission takes the view that the infringements committed by SZAG covered all four marketing years.

The argument that the size of the deliveries to Italian producers is not an indication of a cartel is based on the erroneous view that the Italian system does not allow Italian producers to participate in invitations to tender.

SZAG cannot gain acceptance for the view that it did not know to whom the German dealers resold the sugar with which it supplied them. It was sugar which had to be exported pursuant to the division of functions agreed by SZAG and SZV. The sales in question were direct sales, the sugar going direct from the producer to the Italian customers; therefore SZAG had to be informed of the destination. The telex message of Eridania to Sucres et Denrées of 10 April 1970 (cf. Communication, p. 64) proves that this undertaking reserved certain quantities of sugar for German dealers.

With regard to the comparison of the profits which SZAG made respectively from sales to producers and to traders, it is necessary first of all to consider that it is not normally in the interests of a producer to sell his goods to a competitor, since he transfers to that competitor a profit which he cannot make himself. The explanations supplied by SZAG to show that the situation was different in this case are not convincing. The company has not clarified its statement that the Commission drew the wrong conclusions from the figures set out in Annex 9 to the application. SZAG must produce the corresponding contracts which alone can throw light on the substance of the problem.

With regard to the evidence of SZAG's participation in the cartel relating to import quotas, the Commission refers to the proof mentioned in the statement of defence; in its reply SZAG did not define its position on the detailed particulars supplied by the Commission.

The Commission gave the expression 'outsider' its normal meaning by only regarding 'outsiders' supplies as being those which producers or agents delivered to dealers or to the Italian processing industry.

General reply to the Italian applicants

The Commission deems it appropriate to recall that it does not accuse them of a concerted practice having as its object the fixing of prices. There is no doubt that the practices which have in fact been found to exist eliminated price competition as well as every other opportunity for competition. But protection of the market controlling imports, for which the applicants are blamed, is an accusation which has a much wider effect and is in an entirely different field. Even if it is admitted, *quod non,* that the Italian system did not permit price variations, the applicants did not for that reason lose all interest in protecting their market, so that an argument precluding the existence of a culpable practice cannot be based upon such a situation:

— So far as *producers-exporters* are concerned their interest in avoiding competition between themselves is due to the fact that sales on the Italian market offered them prospects which were economically better than those offered by other outlets, such as for instance access to the intervention agencies. In fact only production not

exceeding the maximum quota could be disposed of through these agencies; further sales on the Italian market could be remunerative even at a price equal to or slightly less than the intervention price; finally the profits made by such sales could easily exceed the profit from sales to the said agencies.

— So far as *producers-importers* are concerned, the protection of the market allowed them to prevent the arrival of new competitors. In this connexion it must be borne in mind that, during the period in question, imports went up from 15 % to 26 % of consumption, and that this trend is capable of increasing in future because of the widening gap between consumption and production and the expiry of the transitional period provided for by Regulation No 1009/67. In these circumstances it was in the fundamental interests of Italian producers to maintain their position on the Italian market, including the market for imported sugar.

In order that the infringement can be regarded as proved the Commission does not have to show that the mutual undertakings to which exception is taken — in particular the agreement that producers-exporters were only to sell to 'outsiders' at increased prices — were part of a course of conduct amounting to performance of these undertakings. As the concerted practice is a form of coordination which has not reached the stage where an agreement in the proper sense of the word has been executed, indirect proof of the conduct by which this coordination was effected can be adduced.

However when, in the case of some of the elements of the concerted practice, the existence of a course of conduct producing a common intention can be directly established, it is no longer necessary to produce indirect proof of such conduct, by establishing the existence of other courses of conduct from which the first course of conduct can be presumed (in this case: the application in practice of the agreed price increases). This problem is however only of minor significance, because the Commission has produced evidence of this application of prices and the price increase is only one, and not the most important, of the factors which go to establish the concerted practice.

The arguments which are intended to justify the cooperation to which exception is taken and not to challenge it are unsuitable for proving that there has been no infringement, as the practices have not been notified to the Commission; these arguments can only be relevant for determining the seriousness of the infringement.

Evidence from a source whose interests could conflict with those of the applicants does not, for this reason, cease to be conclusive. If the source is credible and the evidence is compatible with other evidence from different sources, this evidence should be accepted. To the extent to which Eridania refers to the documents from Export, it is necessary to emphasize that they are not the only evidence upon which the Commission bases its case.

Reply to Eridania

To claim that the 'prezzo congruo' is ascertained by adding together factors which are fixed and known, is to deny that the invitations to tender have any justification and to ignore the fact that, at these invitations to tender, offers from foreign undertakings to the group of producer-importers differed as much from those of the members of the group as they did from each other. Cavarzere, Industria degli zuccheri and Emiliana moreover admitted that, it was in fact the invitations to tender which provided opportunities for competition.

The statement that Eridania only paid little attention to the offers made to it by

Sucres et Denrées, namely to take advantage of the protection derived from the application of a higher price to third parties, is contradicted by the fact that on another occasion Eridania requested that the increase should include a 'margin of security' ('marge de sécurité') larger than that which was finally agreed (FF 1·65 instead of 0·75; cf. minutes of the meeting of Paris of 22 September 1970).

The percentage of direct imports by consumers which, for the period from 1968 to 1972, was slightly more than 15 %, is additional evidence of the control of imports by the applicants, having regard to the fact that:

- the characteristics of the market which, when it functioned normally, benefited direct imports;
- the measures adopted by the Italian authorities reserved for consumers a proportion of imports;
- direct imports only increased after this proportion was reserved for them by virtue of this measure;
- according to Eridania's statements, consumers' costs were lower than those of producer-importers;
- the deliveries in question were not, as a general rule, effected by members of the suppliers' group;
- a proportion of the imports was apparently effected by producers on behalf of consumers.

As the suppliers' group undertook only to sell to firms which were not members of the importers' group at an increased price, the coexistence of refusals to sell and the price increases comes as no surprise.

The statement that the increase is similar to a quantity discount is inconsistent with the minutes of the meeting of Paris of 29 September 1970, which state that the increase includes a 'margin of security'. — As it was agreed that the increase was not to apply only to direct consumers but also to persons who were not members of the group, including agents, it cannot be justified by the cost of setting up a commercial organization which falls on producers-importers.

Reply to Cavarzere

With regard to RT's fear that the price offered on the Italian market was fixed 'in a somewhat friendly manner', it is understandable that, at a meeting of French and Belgian producers intended to determine the terms to be offered to the Italian group, the suppliers' group were afraid that the cooperation which had only recently been initiated would be withdrawn by the importers' group if the prices which were asked were exorbitant. Moreover at the meeting held in Genoa a little later (11 September 1969), the exporting and importing undertakings agreed on the principles which were to govern the sale of sugar in Italy (cf. Notification of objections, p. 56 to 57).

If importers who are not members of the group benefited from the lower costs, this advantage should have caused them, under normal market conditions, to increase their share of imports.

The application, by producer-importers of onerous conditions of sale to their customers is not in itself an objection, but part of the evidence put forward in support of this objection. Under a competitive system the conditions of sale could have been less onerous; this is shown by an examination of all the clauses imposed unilaterally on the said customers, for example: 'the quality is deemed to have been noted, checked and accepted by you on delivery', 'the weight declared in the delivery documents is deemed to have been accepted by you', 'even in the case of the sale of products net weight, the before-mentioned list price shall be applied to the gross weight of the bags'.

In particular the argument that foreign suppliers did not apply a 'price increase', but granted a discount to producers-purchasers according to the amount of

their purchases comes up against the fact that the so-called discount did not depend on this volume but on the beneficiaries' membership of the importers group.

The statement that the increase was not effected is not in accordance with the facts, as Générale sucrière, Say and Béghin admitted, or at least did not deny, that it was applied. It is irrelevant to know whether the amount of the increase corresponded to the agreed amount or not.

The statement denying that the cooperation to which exception is taken took the form of a grouping of purchases is irrelevant, since Cavarzere admitted that there was a concerted action in connexion with demand and joint consultations at the invitations to tender. — Grouping of purchases can, if necessary, be exempted under Article 85 (3) of the Treaty but is not *licite ipso facto.*

Reply to Industria degli zuccheri

If the Commission stated that only members of the suppliers' group were in a position to export to Italy, the complaint of infringement of Article 85 would not for this reason be nullified. In fact the view actually maintained by the Commission is that the members of the group should have competed with each other.

If the telex message from Eridania to Sucres et Denrées of 20 October 1969 can show that before Eridania concluded a joint purchase it obtained the consent of its principals, this would confirm that the company negotiated on behalf of all the members of the group.

Reply to Emiliana

Emiliana could not be unaware that the purchasers negotiated and carried on jointly, which moreover covered a large part of the imports, entailed control of the latter and that such a practice is contrary to Community law.

Similarly undertakings which attend meetings such as the one at Genoa, with the object of making agreements which may prevent third parties from selling on the Italian market more effective, and which for years sent joint requests for supplies, negotiate jointly the conditions for delivery, submit absolutely identical tenders at the invitations to tender and apply conditions of sale which are also the same, cannot claim to be unaware of what the parties concerned agreed or why it was agreed.

It is not important to determine whether Emiliana itself took part in the working out of the concerted practice or whether it only followed the initiative of other undertakings.

With regard to the statement that there was neither disturbance of competition, nor any unjustified profit, it is necessary to note first of all that, for a concerted practice to be prohibited, it is sufficient that it has as its *object* the restriction of competition. Moreover, competition was in fact disturbed It is immaterial to know to whom Emiliana sold the imported sugar or what was the price of the sugar it imported. It is sufficient to establish that consumers did not benefit from a greater choice of sources of supplies which was one of the objectives to be attained by the Community system for sugar. Further Emiliana made a profit from the disputed practices which shielded it from the competition of undertakings well qualified to export to Italy (foreign producers, dealers), and which reduced the risk, for Emiliana, of failing to retain its customers.

Reply to Volano

The Commission refers, in respect of the other matters, to the statement of defence and finds that Volano has confirmed the key part played by Eridania and the fact that the deliveries

in question came from a group of suppliers.

Reply to SADAM

The fact that SADAM attended the meeting in Genoa proves that Eridania did not arbitrarily arrogate to itself the right to represent the other undertakings, including SADAM, but acted in agreement with all the members of the group. Even if this had not been the case, the fact remains that SADAM never objected to Eridania's operations, which covered many years, but, on the other hand, retified them. In fact all the known purchases of imported sugar effected by SADAM during the period covered by the contested decision were effected through the group of which Eridania is a member.

The relevant factor is not whether the differences between the tenders submitted at the invitations to tender by the undertakings belonging to the group and those submitted by undertakings which are not members, are minimal or not, but the absolute similarity of the tenders made by the members of the group.

A course of counduct intended to secure direct control over imports from other Member States plainly affects trade between these States.

SADAM cannot argue that its conduct is explained by the existence of 'price leadership'. Such an argument would first of all be incompatible with the pattern of Italian production, which, during the period under consideration, was shared by about twenty undertakings. In addition what is at issue is participation in invitations to tender where the tenders are secret and the number of possible competitors exceeds the number of producers. Finally the Commission has never blamed applicants for having proceeded to increase prices simultaneously.

The telex messages from Sucres et Denrées to Eridania quoted by SADAM show that there were differences of opinion between these two companies, do not however support the argument that SADAM obtained its supplies without making use of middlemen.

It is true that for the period to which the decision refers, SADAM produced *offers* which it had requested and obtained from several operators who were not members of the group, but it did not produce *contracts* entered into with these operators.

With regard to the relationship between SADAM and the Marcel Bauche business house, it must be emphasized that this company felt it necessary to state that the purchase had to be effected direct, otherwise it could not take place. Such a condition precedent is difficult to understand if it had to be admitted that SADAM operated freely. In any event, the purchase and the consideration never materialized.

(5) The argument between the intervener and the applicants

to 1., (aa) (bbb)

Unione nazionale consumatori, the intervener hereinafter called 'Union', with reference to the Commission's statement makes in particular the following submissions:

One of the typical operations in the sugar sector consists of packing it in cans, packets or in bags. In Italy this operation is carried out both by the sugar producers and also by many small undertakings. These independent packers increase the opportunities for competition.

There is also a large number of wholesalers in Italy who are interested in promoting competition between producers and, if necessary, buying direct from foreign manufacturers. The same applies also to the consumer industries, some of which have large requirements;

it has been in the interest of these industries to import even on payment of the 'sovraprezzo', which in fact is what happened.

The applicants' argument that competition was possible is based on the erroneous view that it was not in the interest of foreign producers to sell below the intervention price.

Générale Sucrière asserts that the intervention price is in fact in practice a guaranteed minimum price.

Say states that Union does not take account of the effects of Community regulations, or of the economic consequences of the concerted action in question. It is important to bear in mind that the company's sales were effected at prices which were close to, if not lower than, the intervention price and invariably below the target price. If the latter has not been reached the conclusion would have to be drawn that the Community policy had not been able to attain an essential objective of Article 39 of the Treaty, namely 'to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture'. Union fails to consider the fact that the Treaty does not aim only at consumer protection. Similar considerations are put forward by *Industria degli Zuccheri*. *Say* adds that, if there was on opportunity for competition, 'it could only be found within the margin of 25 % allocated to direct imports'.

Sucres et Denrées is surprised that Union appears to take the view that sales at a price lower than the intervention price are normal. Union's statement corroborates the applicants' argument that non-Italian operators were not in practice in a position to participate in the invitations to tender. It also confirms that the Commission ought not to have refrained from examining the effect of the organization and functioning of the Italian market on the applicants' course of conduct.

Cavarzere emphasizes when Union argues that foreign sugar could be sold in Italy below the intervention price, it overlooks the fact that, according to CIP's statement, foreign sugar could not be imported into Italy at prices equal to the price of domestic sugar.

to 1., (aa) (ccc)

Cf. also (b) below.

Union gives in detail the reasons why it takes the view that the Italian regulations are unlawful:

The 'sovraprezzo' levied on imported sugar is a tax having equivalent effect to customs duty, a tax prohibited under Article 20 (2) of Regulation No 1009/67:

- It is levied unilaterally 'by a national administrative organ having no connexion with the Community legislator'.
- It is collected by the Italian customs which then pays it to Ccz.
- As its effect is to distort the cost price of the imported product, it had 'the same restrictive effect on the free movement of goods as a customs duty' (cf. Judgment of 19 June 1973, *Cappolongo/Maya*, Case 77/72, Rec. p. 623, No 12). This is in particular due to the fact that importing sugar into Italy was prevented, or at least made very difficult, by the application of the whole of the 'sovraprezzo'.
- It is not consideration for a service rendered by the Administration (cf. the Judgment of 1 July 1969, Commission/Italy, Case 24/68, [1968] 202).
- Its sole object is to finance aid to Italian producers (cf. the Capolongo Judgment, loc. cit., p. 624, No 14).

The 'sovraprezzo' levied on home-produced sugar is incompatible with Regulation No 1009/67. The latter

regulation, which provides for a Community system of prices, is drafted in such a way as to exclude any national intervention in this field and is based on the notion that the price of sugar must be the result of free competition.

Further the general legislative power in the sugar sector has been transferred in its entirety to Community institutions.

The 'sovraprezzo' levied either on imported sugar or on home-produced sugar, in breach of Article 34 (3) of the Treaty, discriminates against Italian consumers compared with other consumers in the Community.

The system of invitations to tender is vitiated by the same defect. On the one hand, by limiting access to the invitations to tender to undertakings capable of importing more than 1 000 metric tons, it restricts in the case of many undertakings their opportunities of competing effectively with Italian manufacturers; Union refers to the minutes of the meeting in Paris of 29 July 1969 (cf. decision, p. 23, Rt. Col., p. 24, Lt. Col.), drawn up by RT (statement of defence, Annex I. 57) which reads: 'In addition I suggested that Eridania ... can arrange with the Italian authorities that the invitation to tender is only open to minimum tenders of 5 000 metric tons, which should eliminate quite a large number of firms'. On the other hand the said system infringes the principle of non-discrimination in that it makes participation in an invitation to tender subject to a firm offer by a foreign producer, a condition which was exploited by undertakings which were members of the cartel in order to restrict further competition.

Fixing a maximum consumer price is inconsistent with the system of prices defined by Regulation No 1009/67.

Générale sucrière regards Union's statement as confirmation of its own statement. 'However surprising it may seem, the Court is asked to decide the present case although this fundamental issue' — namely the question of the legality or illegality of Italian regulations — 'has not been settled since the Commission has not made use of the powers conferred upon it by the Treaty'.

Say states that it agrees with Union's statement that the system of invitations to tender infringed the principle of non-discrimination; it does not challenge Union's other arguments to the extent to which they tend to establish the illegality of the Italian regulations. The Commission's forbearance to initiate against the Italian Government the procedure laid down in Article 169 of the Treaty must be interpreted as a decision to uphold these regulations *(Sucres et Denrées* also expressed this idea). This failure is therefore one of the reasons for the grouping of supply for which the non-Italian applicants are blamed.

Sucres et Denrées takes the view that it does not have to express an opinion on Union's arguments but, if they are presumed to be correct, they amount to harsh criticism of the Commission's failure to act.

Eridania calls attention to the fact that the Italian Conseil d'État acknowledged that the system in question is lawful. But even if it is assumed that it was wrong, there are grounds for the view that Italian producers are bound by the legal order of their state and that the measures taken by the official authority are valid until they have been annulled or declared to be unlawful. The Commission's failure to act in connexion with the Italian measures has raised a presumption that they are lawful. Moreover the system of invitations to tender is based on Article 34 of Regulation No 1009/67 which authorizes Italy to grant aids.

Cavazere also stresses the fact that the Italian regulations do in fact exist. It points out that only the part of the 'sovraprezzo' raised from domestic

production is used to finance the aids for Italian producers, whereas the part raised from imported sugar is intended for the repayment of the higher costs of importing. — So far as the discriminatory nature of the system of invitations to tender is concerned, Union only mentions the matters of secondary importance (the need to submit a minimum tender for 1 000 metric tons; the existence of a firm offer from a foreign producer), but fails to mention its principal object, namely to obtain quota restrictions upon imports which are supported by aids.

Industria degli zuccheri develops arguments which are to some extent similar to those put forward by Eridania and Cavarzere. It admits however, although it seems for different reasons, that the Italian measures are discriminatory.

SADAM also takes the view that the 'sovraprezzo' levied on imported sugar 'as well as, in a more general way, the mandatory principles which govern the pattern of the sugar market in Italy' are incompatible with Community law. This affords further proof the company cannot be blamed for any irregularity.

to 1. (bb)

Union states that the facts put forward by and the evidence obtained by the Commission sufficiently establish the existence of the infringement in question. It calls attention in particular:

— to the uniformity of the percentages of the 'sovraprezzo' tendered by Italian producers, which are in striking contrast to the varying amounts of the tenders of 'outsiders';
— to the uniformity, except in the case of certain secondary matters, of the contracts for sale entered into between Eridania, Cavarzere, Industria degli zuccheri, Emiliana and SADAM, on the one part, and their customers, on the other part;
— to the content of the clauses in these contracts, which confirms the statements of the Commission relating to the 'subsidiary concerted actions between Italian producers'.

The actions to which exception is taken conform to an old tradition against competition of Italian sugar factories, which many documents confirm. Union submits this argument in detail, emphasizing in particular that, even before the period covered by the decision, Eridania played a 'leading' role.

The disputed cartel is exemplified again by a letter of the Ferrero company to Union of 20 February 1974 which repeats and sets out the statements already made to the Commission's agents.

The existence of a cartel having as its object and effect the exclusion or reduction of the competition of other undertakings so far as the obtaining of supplies of imported sugar is concerned, is also established by the following facts:

— On the basis of imports effected during the 1969/70 marketing year and the estimates of home production for the 1970/71 marketing year Ccz was authorized to make good a deficit of granulated sugar intended for processing undertakings by arranging an invitation to tender for the import of 1 500 000 quintals of sugar, together with an additional amount of 300 000 quintals for the requirements of consumer undertakings which had, for their part, lodged an application for permission to import amounts not greater than 10 000 quintals. At the invitation to tender of 10 September 1970 Italian producers were awarded almost the whole of the amount for which they had tendered (1 380 000 out of 1 400 000 quintals), which meant that consumer undertakings which had decided to import direct part of their requirements and took part in the invitations to tender to the extent of tendering for a total of 308 000 quintals, were awarded no quota at all.

— Since however this exclusion of consumer undertakings from awards showed that the amount put up to tender was not enough to make good the sugar deficit, Ccz issued on 22 October 1970 another notice of an invitation to tender for 600 000 quintals. The consumer industries therefore submitted tenders amounting to 410 000 quintals. The sugar undertakings which at the invitation to tender of 10 September had a deficit of only 20 000 quintals, nevertheless submitted tenders amounting altogether to 1 100 000 quintals. The various requests had therefore to be proportionately reduced; once more the consumer industries were unable to obtain their requirements direct.

Sugar undertakings always refused to sell sugar to operators which packed the sugar in bags or packets ('packers'); cf. above, to 1. (aa) (bbb)); it even drew up a kind of 'black list' by imposing upon wholesalers the obligation not to sell sugar to packers. The latter therefore attempted to buy sugar direct from foreign producers once again, meeting with refusals to sell. The packers were therefore forced, either to buy small amounts of sugar from a small number of Italian producers who were not members of the cartel, or to approach the Italian applicants for quotas by concealing their actual identity behind figureheads ('prête-noms') which changed each time.

By submitting that the course of conduct to which exception is taken should benefit from the exemptions specified in Regulation No 26 (cf. (b) below), the applicants have admitted by implication that there is a cartel. Such an admission can also be inferred from the statements of some of the applicants.

Générale sucrière states that the conduct of Italian producers in September and October 1970, as described by Union, confirms the company's argument that the Italian regulations gave the said producers a monopoly for importing sugar, and excluded any form of competition. Générale sucrière however criticizes Union for not having drawn the logical inferences from its argument, namely, that there are no grounds for criticizing the practices of producers-exporters.

Say takes the view that Union's statement confirms that the grouping of Italian producers preceded the action of foreign producers. The latter found that they had to deal with one single demand for supplies at a predetermined price.

Sucres et Denrées takes the view that it ought to draw the attention of the Court to the fact that, not having knowledge of the statements of defence and evidence exchanged in the cases brought by the other applicants, it is unable to analyse some of Union's statements; this conflicts with the principle of equality of treatment of the parties during the proceedings.

Union omitted to give the slightest indication of the influence which the Italian public authorities had on the formation and development of the various concerted actions between Italian producers. However account must be taken of this influence in order to evaluate the conduct to which exception is taken.

Union's detailed explanations contradict the Commission's statement that Sucres et Denrées was the driving force in the concerted action in question. The statement that there were refusals to sell does not concern Sucres et Denrées; moreover it is not supported by any evidence.

Eridania states that as a result of the contested decision, foreign and Italian producers abandoned the policy which they had previously adopted. At the first invitations to tender after the decision Italian sugar manufacturers only obtained a minority of the import quotas. Later

they were even forced not to attend the invitations to tender, as they had not received any offer from foreign producers, who on the other hand had supplied large quantities to other Italian operators. These events gave rise to serious difficulties in obtaining supplies and entailed an increase in prices on the Italian market. All this shows that the Commission's complaints are not well founded; in fact the Treaty cannot be interpreted to mean that it is in favour of such a disastrous development.

The way Union interprets the course taken by certain invitations to tender in the autumn of 1970 and the awards which were made are not correct. If at the first of the said invitations to tender no quota was awarded direct to consumers, the reason was that the 'sovrapprezzo' tendered by the latter was lower than that tendered by producers-importers. So far as the second of the said invitations to tender which put 600 000 quintals up to tender is concerned, the amounts awarded to producer-importers, trading companies and consumer industries respectively amounted to 385 965, 70 175 and 143 860 quintals.

It is wrong to state that the aim of the Italian applicants was to consolidate the dominant position of producers beyond the duration of the provisional Community system. Thus it can be anticipated that the freedom to fix prices caused by the change over from the provisional to the final system alters the market situation in such a fundamental way that it is unlikely that agreements limited in point of time can have any effect in the future. Similar considerations are submitted by *Industria degli zuccheri.*

Cavarzere points out that the agreements, which were entered into between Italian sugar factories before the period covered by the decision, and part of which relate back to the past, are irrelevant in this case, as these agreements were not prohibited by any Community or national law. It could at most be said that the history traced by Union shows that the complaint that Italian producers, by means of the course of conduct to which exception is taken, aimed at adversely affecting competition is unfounded.

By blaming producer-importers for having competed with consumers at the invitations to tender Union argues as if the latter alone benefited from Community regulations and it admits by implication that there was competition.

If sugar undertakings had competed with each other at the invitations to tender, the result would have been that a single one of them could have been awarded the entire quota and, since this quota was fixed in advance, dictated the market laws for meeting the entire national requirement Similarly, if only the large consumer undertakings had been the successful tenderers, the result would have been that the smallest consumer firms would have had to obtain sugar from abroad, by paying the whole of the 'sovraprezzo', which would have had an adverse effect on their trading balances. All this shows that the Commission and Union have proceeded on the basis of an incorrect concept of competition.

So far as the packers are concerned the sugar imported through the invitations to tender was for the most part intended for industrial use and did not therefore need to be packed. Further, according to Italian law, the producer is responsible if the product does not correspond to the description on the package and does not comply with the conditions laid down by law; therefore the manufacturer only allows the product to be packed by traders whom he can trust. The statement that the packers unsuccessfully attempted to obtain sugar in Italy and abroad is not supported by any evidence. Finally the notices of the invitations to tender for imports for industrial use did not allow potential packers to participate.

By appearing to regard it as desirable to prevent Italian producers from importing

sugar Union forgets that, up to 31 December 1972, Italian law favoured direct commercial relations between consumers and national producers of sugar by applying to these direct sales the tax known as 'Imposta generale sull'entrata', at a rate of 2·30 % instead of 5·30 %.

Cavazere develops in detail the evaluation which in its view should be given to the contracts entered into by producer-importers and sweet manufacturing undertakings in Italy. It states that the charges made by Union go further than those made by the Commission, since the latter no longer blames the applicants for having standardized the clauses of the said contracts, but only for having incorporated terms which fettered unduly the parties' freedom. This complaint too is not well founded, as such clauses are in accordance with the custom of the trade.

The complaint directed against Italian producers that they wanted to protect the market in their country and to maintain their position of strength is not in accordance with common sense. In substance it consists of blaming them for having wished to obtain in their foreign trade the amount necessary to make good the difference between national supply and demand. Moreover such efforts have nothing to do with any wish for 'protection' or 'consolidation', but are only intended to be a way of 'participating in the great game of economic competition'.

The Ferrero company, which is extremely powerful, undoubtedly has the right to attempt to avoid payment of commission by buying all its raw materials without using a middleman, but it can attain this objective by having recourse to the normal methods of economic competition, for example by instructing its subsidiaries, which it has established in almost every European country, to purchase sugar on its behalf.

Industria degli zuccheri states that wholesalers could import sugar, even sugar intended for industrial uses — some of them moreover did so —, but only in limited quantities either because their capacity was less than that of consumer industries, or because supplying the consumer industry direct by sugar factories was favoured by the fiscal advantages granted to industrial purchasers who bought direct from the sugar industry. The aim of the Italian fiscal system was in practice to do away with the commercial middleman for sugar sold to consumer industries. The wholesalers' trade association itself stated that 'the majority of wholesalers prefer to make use of the customary markets for obtaining supplies and therefore to buy sugar from abroad from the suppliers which procure domestic sugar for them.'

It is to be expected that producers-importers adopt a uniform course of conduct when they participate in the invitations to tender, as they have to sell throughout Italy at a uniform price, adopted as a reference by the authorities for fixing the 'sovrapprezzo'.

The contracts for sale are uniform, because it is the common commercial procedure to standardize them.

The Ferrero company is not one of the retail consumers which Union is called upon to protect.

With regard to the invitations to tender referred to by Union, Industria degli zuccheri submits observations similar to those of Eridania mentioned above. It also asks why consumers did not tender a higher 'sovrapprezzo' than that offered by the sugar manufacturers, which they were easily able to do.

The packers could not take part in the invitations to tender for sugar for industrial use, either because the sugar had to be imported in large amounts, or because sugar imported for industrial purposes could not be used for food without contravening the conditions in the notifications of the invitations to tender.

SADAM states that Union wrongly places all the applicants upon the same footing and fails to pay attention to the argument developed by SADAM relating to the individual situation of this company.

The similarity of the sales contracts entered into by Italian producers with their customers is not evidence of a concerted action. Union moreover only produced a single contract entered into by SADAM.

With regard to the other matters SADAM repeats certain statements mentioned in its previous pleadings.

(b) Générale sucrière, Say, Béghin, RT, Sucres et Denrées, Eridania, Industria degli zuccheri et Cavarzere:

Infringement of Article 38 et seq. *of the Treaty, of Regulation No 26, of Regulation No 1009/67 and its implementing regulations*

Cf. also a 1. (aa), (bbb) and (ccc) above and the corresponding arguments repeated under (2), (3), (4) and (5).

(1) Summary of the applications

(aa) The first exception provided for in Article 2 of Regulation No 26 (Article 85 of the Treaty does not apply to agreements etc. 'which are an integral part of the national organization of the markets')

According to *Générale sucrière, Say, Béghin, Sucres et Denrées, Eridania and Industria degli zuccheri,* the Commission is wrong (cf. decision p. 42, Rt. Col.) to refuse to bring the course of conduct to which exception is taken within this exception on the ground that the common organization of the market 'left no place for national organizations of the market'. Taken as a whole the argument of these companies can be summarized as follows:

The Italian regulations amount to a national organization of the market — or, at least, to 'internal regulations having equivalent effect' within the meaning of Article 46 of the Treaty — of which the said course of conduct was the inevitable result and therefore forms an integral part of it in particular for the following reasons:

- The Italian regulations, considered together with Community regulations, aim at supervising and regularizing the market in order to guarantee the employment and standard of living of producers. In addition they make it possible for distribution to be supervised by the large Italian undertakings, in order to prevent the pressure of competition by foreign producers making prices fall below regional intervention prices. Italy in fact compelled Italian producers to group their imports.
- The said regulations include, *inter alia,* a system of customs or charges having equivalent effect, a fiscal system which applies specifically to imported sugar, fixing of a maximum consumer price, an intervention price differing from that fixed for the other Member States, a system of aids, an equalization fund ('caisse d'égalisation') intended to provide the money for these aids and financed by the payment of the 'sovrapprezzo', a system of limiting and sharing out imports and the equalization of transport costs.
- The beforementioned measures are likely to lead to 'the progressive integration of the Italian sugar economy into that of the Community' (cf. Order No 1195 of CIP, I-2.B.b. above).

Sucres et Denrées requests that Professor Albertario, former director at the Italian Ministry of Agriculture and Forests who, having been responsible for all matters arising out of the importing of sugar and the invitations to tender, is particularly well placed to evaluate the objectives pursued by the Italian or public authorities, be heard as a witness on certain questions which it has framed.

(bb) The second exception provided for in Article 2 of Regulation No 26 (Article 85 of the Treaty does not apply to agreements etc. 'which are necessary for attainment of the objectives set out in Article 39 of the Treaty')

Générale sucrière,' Say, Béghin, RT, Sucres et Denrées, Eridania and Industria degli zuccheri consider that the two grounds put forward in the decision (page 43, Lt. Col.) for not applying the said exception, are wrong. They are 'that the practices in question... are not part of the means... provided by Community regulations' for guaranteeing the employment and standard of living of beet and cane sugar producers in the Community and that they 'were adopted for purposes which have nothing to do with these objectives'. The arguments of these companies looked at as a whole may be summarized as follows:

The effect of the Commission's attitude is to remove any possibility of applying the exception in question. In fact, the latter — as emerges moreover from the wording of Article 2 of Regulation No 26 — can only, by definition, be applied to practices which differ from the means laid down by Community regulations; a practice which is designed only to enforce compliance with these means has no justification. The Commission's view is also contradicted by the examples enumerated in the second sentence of the said Article 2 in favour of certain agreements, etc. of farmers.

The third recital of Regulation No 26, repeating the idea mentioned in Article 42 of the Treaty, states that the rules of Article 85 are only to be applied 'in so far as their application does not impede the functioning of the national organizations of agricultural markets or jeopardize attainment of the objectives of the common agricultural policy'. It follows that the objectives referred to in Article 39 of the Treaty have priority over the need to ensure competition; this priority is also the basis of Regulation No 1009/67 and its implementing regulations, which restrict freedom of competition.

Unlike the considerations which apply to the other economic sectors the applicable provisions in the case of agriculture protect not only the consumer but also the producer.

Competition should procure for the consumer not only the lowest possible price, but 'reasonable prices' (Article 39(1) subparagraph (e) of the Treaty). On the other hand as is admitted in the decision (p. 22, Lt. Col.) the reasonable price is the target price, which moreover has never been achieved by the sales in question; any measure forcing producers to sell below this price is contrary to the Treaty.

Even if it was assumed — *quod non* — that the Italian regulations left some opportunity for competition which was likely to lower prices, such competition would be contrary to the objectives of the Italian regulations and also Article 39. In fact it would lead to carrying out sales below the target price and even below the intervention price; however, according to the spirit of Community regulations the latter price must be reached to enable sugar producers to pay beet farmers the minimum price laid down by these regulations.

The object and effect of the Italian regulations and therefore the practices to which exception is taken, is to guarantee the employment and standard of living of beet and sugar cane producers — objectives which are given prominence by Regulation No 1009/67 —, to stabilize the market, to guarantee security and continuity of supplies and also reasonable prices, that is to say prices which do not fall below the regional intervention price or exceed the ceiling fixed by the Italian Government; *Industria degli zuccheri* states however

that, because of the said practices, Italian consumers paid a price which, except during a short period, only left the sugar industry 'a return equal to and indeed lower than ... the minimum Community return'. The said practices were necessary to avoid 'a deterioration in the supply of sugar', because of the obligation to distribute rationally the deliveries of the amounts which were estimated to be indispensable by the Italian authorities.

(2) Summary of the statements of defence

The Commission states that the exceptions in question should be considered in the context of the Community regulations for the market in sugar, which:

- aim at removing all obstacles to the movement of sugar within the common market;
- left undertakings free to take advantage of the guarantees provided by the said regulations or not;
- allowed competition to continue except in the case of the provisions relating to the minimum beet price and of production quotas.

to 1. (aa)

It is clear from Articles 43 and 45 of the Treaty that the common organization of the markets replace the national organizations. The Court held that from the beginning of the entry into force of the common organization it is for the Community alone to decide whether to maintain, provisionally, any system relating to the products in question (Order of 21 March 1972, No 82/71, Department of the Public Prosecutor of the Italian Republic (Ministère public de la République italienne)/SAIL, Rec. 1972-1, p. 119). The Community decided not to retain the Italian regulations after the entry into force of Regulation No 1009/67; for this reason alone the said regulations cannot be regarded as a national organization of the market.

It is also clear from Articles 39, 40 and 43 of the Treaty that three conditions must be fulfilled before there is a national organization of the market:

- The national regulations in question must be a combination of provisions relating to the sale of a specific agricultural product in a Member State.
- The said regulations must guarantee the employment and standards of living of the producers concerned.
- For this purpose the sale of domestic production and a stable level of prices must be protected and guaranteed not only against the effects of imports but also against the consequences of fluctuations in output or of domestic demand.

The second and third conditions have not been fulfilled in this case, as the Italian regulations do not protect beet producers against the beforementioned consequences.

These findings are relevant irrespective of the question whether the Italian regulations are or are not compatible with the Treaty. In any case, the most crucial aspects of these regulations are based on the common organization of the market.

The uniform system of prices relates to the consumer price and not the production price. It is therefore a guaranteed price which benefits the consumer and not the producer.

The regulations concerning the equalization of transport costs ceased to remain in force from 1968; the system of equalization which is now applied is based on the initiative of Italian producers.

The Italian provisions do not lay down that there must be a grouping of supply.

The Italian regulations allowed opportunities for competition (cf. above, (2), (4)).

Even if it is assumed that the Italian provisions amount to a national

organization of the market, the concerted practices in question would not be an integral part of it. For this purpose it is not enough that the practices are the inevitable result of the said provisions (which moreover is not the case); they must be indispensable for their functioning, a condition which has not been fulfilled. The Commission emphasizes in particular that Italian undertakings could attend the invitations to tender and that the Italian regulations do not themselves secure the protection of the Italian market against imports.

to 1. (bb)

So far as the second exception provided for by Regulation No 26 is concerned, the third recital of Regulation No 1009/67 shows that it is only intended to apply in so far as the application of Article 85 of the Treaty jeopardizes attainment of the objectives of the common agricultural policy. The necessary means of attaining these objectives have been laid down by Regulation No 1009/67 and its implementing regulations. The practices in question are in no way indispensable for attainment of the said objectives; on the contrary, since their aim is to restrict competition, they run counter to these objectives.

It is not correct to claim that the argument put forward by the Commission removes any chance of the exception in question being applied. The Commission enumerates certain circumstances in which, in its opinion, the exception may apply.

The argument relating to the price level at which the persons concerned sold in Italy fails to take into account the nature of the infringement alleged. The decision is not aimed at the effects which the concerted practices may have had on prices, but at the concerted action relating to the protection of the Italian market. Moreover the market price which is slightly higher than the intervention price proved to be profitable as emerges from the arguments of the applicants themselves.

There is no point in maintaining that the object of the practices to which exception is taken was to maintain prices in Italy at the regional intervention price. Community regulations themselves supply the essential foundation of the guarantees from which Italian beet and cane sugar producers benefit.

(3) Summary of replies

Preliminary considerations

Eridania and Industria degli zuccheri infer from Articles 42 and 43 (2) and (3) of the Treaty that under the latter there is a close relationship between the implementation of the common agricultural policy and the application of the rules of competition, so that the application of these rules to the agricultural sector should take place at the same time as the establishment of the said policy and more particularly as the adoption of the basic regulations relating to the different agricultural sectors. If the said policy is not established and in particular if the national organizations are not replaced by a common organization of the market, the application of the rules of competition cannot be ordered by the Council. This interpretation is confirmed by Article 38 (4) of the Treaty.

In these circumstances, the fact that the Council adopted Regulation No 26 in 1962, at a time when a common organization had not yet been established for most agricultural products, contravenes the principle of interdependence between the establishment of a common agricultural policy and the application of the rules of competition to the agricultural sector, a principle derived from the said provisions. Therefore Regulation No 26 should be declared to be inapplicable in accordance with Article 184 of the Treaty.

The objection cannot be raised that the original invalidity of Regulation No 26 was rectified by the entry into force of Regulation No 1009/67, since the latter has not established a common organization of the market in sugar.

— It established side by side with definitive arrangements transitional provisions intended to remain in force until 1 July 1975. These transitional arrangements restrict appreciably free intra-Community trade. In particular the system of import quotas and the specific provisions adopted for Italy tends to place a limit on the amounts produced by each State and, within each Member State, by each operator and therefore to discourage the increase of beet and sugar production. The main purpose of all these provisions is to keep the various domestic markets, at any rate to a certain extent, separate from each other.

— Thus Article 43 (3), subparagraph (b), of the Treaty states that a system cannot be regarded as a common organization of the market unless it 'ensures conditions for trade within the Community similar to those existing in a national market'. Now the before mentioned restrictions on intra-Community trade in sugar make it impossible to speak of a single market covering the entire territory of the Community during the period when the transitional rules of Regulation No 1009/67 are in force. That is confirmed by the fact that a national organization of the market in sugar exists in Italy (cf. infra, to 1. (aa)) and also by Article 22 of the said regulation, which after defining the rules in Articles 23 to 33 as transitional, provides that the definitive arrangements 'shall not involve any discrimination between Community producers', in this way making it clear that such discrimination is the consequence of the before mentioned transitional provisions. Moreover, under Article 40 (3) of the Treaty, the common organization provided for by this Article 'must exclude any discrimination between producers or consumers within the Community'.

In short, the Community regulations relating to competition do not apply during the transitional period.

Cavarzere submits considerations which for the most part are similar to those reproduced above and supports them by quoting several extracts from the case-law of the Court, the opinions of the Advocates-General and of statements of the Commission ir its members. It calls attention in particular to the fact that the implementation of a common policy for sugar was postponed until 1975, so that, until then, a common market did not exist for this product.

to 1. (aa)

The replies of the applicants Générale sucrière, Say, Béghin, Sucres et Denrées, Eridania and Industria degli zuccheri may together be summarized as follows:

Within the meaning of the eighth recital of Regulation No 1009/67, 'the establishment of a single market... implies the removal, at the internal frontiers of the Community, of all obstacles to the free movement of the goods in question'. Therefore, when there are such obstacles, there is no single market, but there is a separate market which is not organized in the same way as the common organization, and is consequently a national organization of the market. In these circumstances it is essential to know whether Italian regulations permit the free movement of goods and, as a result, whether they conform to Community law or not.

The argument that the Community did not decide to 'retain' Italian regulations is irrelevant, since almost all the provisions which together make up these regulations were issued after 1 July 1968.

The Commission cannot submit that these regulations had no purpose after the establishment of the common organization. The aim of Order No 1195 of CIP is 'the progressive integration of the Italian sugar economy into that of the Community', which shows that the common organization has not yet been established in Italy; Regulation No

1009/67 itself states moreover that the ultimate objective had not yet been attained. If the Community authorities left the Italian regulations in being the reason could only be they are regarded as a national organization of the market — or at least as being regulations having equivalent effect as such an organization —, which for the time being is absolutely necessary. *Eridania* and *Industria degli zuccheri* recall that, in their opinion, Regulation No 1009/67 did not establish a common organization of the market (cf. the preliminary considerations above) and, for this reason, left open the possibility of establishing or retaining national organizations remaining in being. Moreover it emerges from Article 43 (3) of the Treaty that the common organization may, but does not have to, replace national organizations.

The Court's judgment of 21 March 1972 does not help the Commission. In fact, it emerges from this judgment that a national organization of the market and a common organization of the market can co-exist. The judgment finds that, from the moment when such a common organization enters into force, it is for the 'Community authority to decide whether to retain on a provisional basis any national system of organization or intervention or supervision relating to the products in question'. This shows that the co-existence of the two systems can continue in the absence of any contrary decision by the Community authority. The judgment neither says nor implies that the retention of a national organization depends upon an express decision by the Community.

The Italian regulations fulfil exactly the three conditions which, in the view of the Commission, must all exist to create a national organization of the market.

— They comprise a combination of strict provisions, which are adapted to Italy and binding.
— They limit imports and national demand, by reference to national production, with the object of protecting Italian beet producers.
— The revenue from the 'sovrapprezzo' has been appropriated to aids intended, for the most part, to benefit these producers.

The objection cannot be raised that the establishment of a single and a maximum consumer price does not amount to a guarantee of the standards of living and employment of beet producers and the beet processing industry. This system of prices cannot be severed from the other measures taken by the Italian authorities, and in particular from the system of invitations to tender. The aim of the latter is not only to maintain the level of national production and secure regular supplies for the Italian market and therefore indirectly to guarantee the standards of living and the employment of beet producers and the beet processing industry, but also to provide direct aid to beet farmers and the beet processing industry. So far as the single consumer price is concerned it protects these operators from the risks of the market, enables them to plan ahead and prevents them from being placed at a disadvantage owing to their geographical situation. Further, it guarantees a fair standard of living to the agricultural population and enables the market to be stabilized.

In this connexion it is necessary to mention that the regulations in question:

— guarantee beet producers minimum prices higher than those applicable in the other Member States, owing to a higher intervention price and the aids which the Italian Government was authorized to grant;
— guaranteed the sale of domestic output by the equalization tax of 3·6 % (Law No 570 of 31 July 1954), applied to imported sugar until 1 January 1973, and also by the system of invitations to tender which enables imports to be supervised and restricted with a view to preventing sales effected abroad under normal market conditions from creating disturbances on the national market.

It is unnecessary to know whether, among the provisions applicable to the Italian market, the most important are those contained in Community provisions. In its judgment of 13 November 1964 (Joined Cases 90 and 91/63, *Commission* v *Luxembourg and Belgium*, [1964] ECR 634), the Court said that a national organization of the market consists of 'a combination of legal institutions and measures on the basis of which appropriate authorities seek to control and regulate the market'. Such a combination could very well consist of Community regulations only applying to a specific Member State and of national rules; this kind of combination would be even more likely to amount to a national organization of the market if, as is the position in this case, the national regulations take precedence over Community regulations and combine with the latter to seal off the market in question.

Sucres et Denrées adds that it is not necessary, in order to establish that a national organization of the market exists, to show that Community and domestic rules are incompatible.

Community and Italian regulations have the same object, namely to regulate the movement and the price of sugar by a combination of provisions providing for protection at the frontiers. It is therefore illogical to hold that one of these two sets of regulations amount to an organization of the market.

The existence of a national organization of the market is not revealed by the extent of the provisions in question but by their nature and their effect.

So far in particular as the aids authorized by Community regulations are concerned it must not be forgotten that their grant is in the discretion of the Italian Government.

When the Commission emphasizes that the Italian system of uniform prices relates to consumer prices and not to producer prices, it overlooks the fact that the unification of the former affects the latter.

The fact that the equalization of transport costs is in fact based on the initiative of Italian producers does not mean that it should not be taken into account in order to decide whether there is a national organization of the market, in particular as it has been carried out with the tacit consent of the Italian Government.

The practices to which exception is taken were necessary for the functioning of the Italian system. But even this factor is not determinative. If a practice is to be regarded as an integral part of a national organization of the market it must either have been 'ratified' by the Member State concerned, or there must be a causal connexion between the organization and the practice. It is unrealistic to require in addition that the practice is absolutely essential for the functioning of the organization, since the latter is in any case administered by the official authorities. In this case the fact that the said practices were absolutely essential, or at least the casual connexion between the Italian regulations and them, is based on the following facts:

- These regulations have as their object and effect the grouping of demand; the unavoidable result of this has been the grouping of supply, encouraged or at least approved by the Italian authorities.
- In order to be able to take part in the invitations to tender and to abide by the sale price laid down for the domestic market, the producers-importers had to have in their possession firm offers, at a reasonable price, from foreign producers. It was therefore necessary to negotiate contracts for large amounts and to offer a reduction of the 'sovraprezzo' likely to cover the difference between the cost of the imported sugar and the sale price on the

domestic market. The similarity of the reductions tendered was necessitated by the fact that Ccz fixed a 'prezzo congruo' ('an appropriate price') which left a very small profit margin for the importer.

— Sales from producer to producer depended upon the size of the amounts put up to tender and the financial guarantees which had to be given.

— In conformity with the wishes of the Italian authorities the price of sugar in Italy had to be uniform and fixed. Sugar had therefore to be handed over to a limited number of large undertakings, acting together towards the same objectives; this is the reason for the establishment of the system of invitations to tender, which implies that demand is centralized, on behalf of all producers, through one single undertaking.

— the resale of sugar on identical terms was only the result of the strict regulations to which producers were subject.

— The so-called 'IGE' tax was levied on sugar sold to wholesalers at the rate of 5 %, whereas, in the case of the sale to consumers, the rate was 2·3 %. Italian legislation therefore benefits trading operations which Italian producers had traditionally carried out.

— The conclusion with customers of contracts under which suppliers could be replaced was caused by the system of invitations to tender. The object of this clause was to guarantee regular supplies in particular to small consumers which normally obtained their supplies irregularly and in small quantities from sugar producers. Even consumers who were not interested in the origin of the product asked that the clause be incorporated in their contracts; on the other hand, it was absolutely necessary for producers, who were under a contractual duty to effect the promised deliveries even if there was a temporary shortage of the product.

— The lump sum for transport costs was made necessary by applying a single price for the whole of Italy; it was one of the factors for the fixing by the Fund of the 'prezzo congruo'.

Some opportunity for competition is not incompatible with an organization of the market; the Commission itself asserts that the common organization of the market in sugar leaves some scope for competition.

Cavazere puts forward similar arguments to those of the other undertakings. It adds that, in order to establish that there is a national organization of the market, it is necessary to ascertain whether there are any obstacles to the free movement of the goods and whether the regulations in question secure for the particular trade conditions similar to those derived from the Community system. It can be conceded in this case that the application of Community rules of competition do not impede the functioning of the Italian organization so far as supplying consumers is concerned; but, to the extent to which the supplying of all consumers and meeting the entire deficit of domestic demands is concerned, the situation is quite different. In this connexion the operations of sugar factories are an integral part of the Italian organization, since they provide the opportunity of obtaining more favourable prices and therefore make it possible to obtain the award of import quotas put up to tender.

The fact that the disputed practices are closely linked to Italian regulations is moreover shown by the date when the Commission reckons that they entered into force, which coincides with the date when the system allowing the reduction of the 'sovraprezzo' for imported sugar was introduced.

Only the award of large quotas to producers-importers and not the imports affected directly by consumers guaranteed that domestic prices remained stable

and that all the regions in the peninsula were supplied regularly.

to 1. (bb)

RT merely states that it confirms the arguments in its application. So far as the arguments developed by *Générale sucrière, Say, Béghin, Sucres et Denrées, Eridania and Industria degli zuccheri* are concerned, they may together be summarized as follows:

The statement that the object of the practices to which exception is taken was not to guarantee the employment and standards of living of producers is difficult to reconcile with the principles of Community regulations as understood by the Commission, and in particular with the fact that the intervention price — to which the prices applied were always very close and below which they sometimes fell — is the basis of the minimum price for beet.

It is evident from Article 42 of the Treaty and the recitals of Regulation No 26 that the objectives of Article 39 of the Treaty take precedence over the concern to guarantee competition.

It is clear from Article 40 (3) of the Treaty that the common organization of agricultural markets does not necessarily have to include all the measures which are necessary to attain the objectives laid down in Article 39. As the implementation of the common policy is not therefore necessarily the same as the pursuit of all these objectives, direct reference must be made to the objectives referred to in Article 39, and not to the measures taken by the institutions, in order to determine whether a practice is necessary for the attainment of these objectives. In this case, it is for example doubtful whether Regulation No 1009/67 was intended to increase agricultural productivity. It may be that some agreements or practices, while they pursue some of the objectives indicated in Article 39, are not in keeping with the principles derived from Community regulations establishing the common policy, as the latter may be directed towards the attainment of different objectives. It is also conceivable that some of the objectives in question can be better attained by agreements or by concerted practices. In this case the actions to which exception is taken were necessary in order to attain at least two of the objectives mentioned in Article 39, namely to stabilize markets (cf. above, to 1. (aa)) and to assure the availability of supplies; they guaranteed the latter through the clause in the agreements permitting another producer to supply some of the sugar and the purchase by agreement of the necessary amounts to meet domestic requirements.

If, as the Commission has stated, the prices applied on the Italian market have nothing to do with the present complaint, it follows that the Commission considers the competition which, in its opinion, should have developed on the said market 'in abstracto', that is to say independently of its possible consequences. However the purpose of the prohibition in the Treaty of practices restricting competition was to compel undertakings to sell at lower prices. To admit that the conduct to which exception is taken had no effect on the price level in Italy, amounts to an acknowledgement that the Italian regulations do not permit any real competition.

(4) Summary of the rejoinders

to (3) Preliminary considerations

The *Commission* replies that it is contrary to the spirit and letter of Article 42 of the Treaty to regard the rules of competition, on the one hand, and the common agricultural policy, including the common organization of agricultural markets on the other hand, as separate entities. On the contrary this provision makes the application of the rules of competition a part of the common agricultural policy. It follows that any discussion to decide whether the application of these rules should precede,

follow or accompany the establishment of the common agricultural policy is based on false premises. The Council could legitimately consider, as far back as 1962, that 'certain rules of competition must forthwith be made applicable to production of and trade in agricultural products, in order to eliminate practices contrary to the principles of the common market and prejudicial to attainment of the objectives set out in Article 39 of the Treaty and in order to provide the basis for the future establishment of a system of competition adapted to the development of the common agricultural policy' (Regulation No 26, second recital).

The system established by Regulation No 1009/67 is without question an organization of the market in sugar. Although under this system some obstacles to the complete establishment of a single market are not removed during a transitional period, Article 39 *et seq.* of the Treaty do not however require that the single market must be completely established before it can be referred to as a common organization of the market. On the contrary Article 39 stipulates expressly that 'in working out the common agricultural policy, ... account shall be taken ... of the need to effect the appropriate adjustments by degrees ...'. The next point is that the transitional arrangements established by Regulation No 1009/67 are not 'discriminatory'. In fact, to the extent to which this regulation applies a different treatment to different situations, this distinction, far from being arbitrary, is justified by the fact that the situations are not comparable. Finally, it is from the point of view of the adjustment by degrees to the conditions of a single market that the opportunity given to Italy — within the limits fixed by Regulation No 1009/67 — to grant aids must be evaluated.

to 1. (aa)

The *Commission* takes the view that even if some of the provisions of the Italian regulations may be an obstacle to intra-Community trade, the existence of a national organization of the market is not thereby established.

It emerges from Article 43 (3) of the Treaty that, when the conditions set out in (a) and (b) of this paragraph are fulfilled, the common organization is deemed to have replaced the national organizations. That is the position in this case. The Italian regulations cannot therefore be regarded as a national organization of the market; in any event the Commission did not acknowledge that they were such an organization. Such an acknowledgement could not even be inferred from proceedings which the Commission might consider it was obliged to take against the Italian State under Article 169 of the Treaty.

It is incorrect to say that the aim of the common organization of the market in sugar and of the Italian regulations is the same. This argument moreover conflicts with the statements of some of the applicants, that the said regulations are incompatible with Community rules.

The fact that no national organization of the market exists is also shown by the fact that Italy encouraged the import of Community sugar, although it could have been very much in its interests to obtain supplies instead on the world market where, at that time, the price of sugar was appreciably lower than inside the Community.

The applicants cannot either base any arguments on the introduction of the 'sovrapprezzo', as the latter, *grosso modo*, promoted imports and did not prevent them.

The guarantees of the employment and standard of living of Italian beet producers (a higher regional intervention price; aids) are based on Community provisions and are therefore part of the common organization of the market.

The Commission repeats the argument that there is only a national organization of the market if the aim of the system in question is to protect the sale of home production and a stable level of prices against both the effects of fluctuations of production or national demand. Moreover, for reasons which the Commission states in detail, none of the provisions of the Italian regulations quoted by the applicants fulfil this condition.

In any case the practices to which exception is taken are not an 'integral part' of Italian regulations, since it cannot be maintained that in the absence of these practices, sugar would not have been exported into Italy. Furthermore the applicants fail to understand that the said regulations did not in any event provide for the grouping of supply, 'which in fact fell right outside their provisions'. — Further, although in the mind of the Italian legislators the system of invitations to tender provided for a 'war between competitors', the applicants in fact created a 'united front of non-competitors'. — Finally, it is difficult to understand why the resale of imported sugar on similar terms, which were moreover particularly unfavourable to purchasers and consumers, constitutes an essential factor in a system of fixed consumer prices.

to 1. (bb)

The objectives of Article 39 of the Treaty are only attained through the provisions of Community regulations giving the necessary guarantees concerning the employment and standard of living of beet producers. The practices in question are opposed to these objectives: they have tended to partition markets, to make it more difficult to supply consumers, to restrict competition and to increase prices.

It cannot be maintained that it is contrary to the policy of Article 39 to use competition in order to keep the sale price below the target price. If, since the entry into force of the common organization of the market, the price of sugar has always been below the target price, that is due to the fact that there are surpluses in the Community and not to the application of the rules of competition in the Treaty of which the contested decision, adopted more than four years after it entered into force, is the first example.

(5) The argument between the intervener and the parties to the main action

Union — and, consequently, the *applicants* in their replies to Union's written submissions, — only define their position on the question whether the first of the two exceptions laid down by Regulation No 26 applies (cf. 1. (aa) above, and the corresponding sections of chapters 2 to 4).

Union repeats in essence the Commission's argument. Further it gives full particulars of the facts which show that the Italian regulations are contrary to the Treaty (cf., for the statements of Union and the parties to the main action on this point, a 5., to 1° (aa) (ccc) above). It adds that Regulation No 26 cannot be interpreted as authorizing cartels based on a series of illegal national measures.

Générale sucrière, Say and Sucres et Denrées together point out that the arguments from which Union infers with justification the illegality of the Italian system show at the same time that this system is a national organization of the market, which may be absolutely necessary having regard to local factors. The fact that the Commission has not initiated the procedure against Italy referred to in Article 169 of the Treaty amounts to a tacit retention of the said organization.

Cavarzere states that the existence and the nature of Italian regulations, in particular so far as the quota restrictions

on imports and the system of aids are concerned, show that Regulation No 1009/67 has not in fact set up a common organization of the market in sugar.

Industria degli zuccheri states that the Italian Government thought that it could retain 'under Article 34 of Regulation No 1009/67, a legislative system, which has an equivalent effect to an organization of the market, however it is defined'. The recitals of the orders adopted by CIP show that Italian authorities aimed at severing the Italian market from the Community market, that is to say at eliminating, during the transitional period, the consequences which could arise if the imports were not restricted by quota or subject to invitations to tender.

Article 34 of Regulation No 1009/67 authorized a national organization of the market or regulations having equivalent effect. The existence of a national organization of the market merely depends upon national authorities exercising on the market for a specific product, powers likely to differentiate this market from that of the other countries of the Community. It does not matter very much whether these powers are only based on Community rules, or whether they derive simultaneously from national regulations. The object of Regulation No 1009/67 is simply to prepare the setting up of a common organization for the final period. Italian regulations do not allow the free movement of goods which, under the provisions of Article 43 (3), is the condition precedent to a common organization of the markets.

Eridania maintains in particular that the concept 'of a national organization of the market' expresses, according to the Treaty and Regulation No 26, a concept which is economic rather than legal and that the question whether such an organization exists depend on the question whether the measures concerned are incompatible with Community regulations or not.

2. The complaint of a concerted action engaged in by SU, CSM, RT and Pfeifer & Langen for the protection of the Netherlands market

A — Preliminary submission: before 2 January 1971 an undertaking within the meaning of Articles 85 and 86

(a) Summary of the application

SU states that it only commenced trading on 2 January 1971 having been formed on 16 July 1970, and that it could not therefore be responsible for infringements 'since the 1968/69 marketing year'.

There was certainly a company called 'Coöperatieve Vereniging Suiker Unie', formed on 12 August 1966 by cooperatives which produce sugar and have as their task the coordination of the trading operations of their members, leaving to them however the task of selling their own products. This company was however dissolved on 1 June 1971 after having changed its name on 16 July 1970 to 'Suiker Unie Beheer' and after having ceased carrying on business on 2 January 1971. SU did not acquire any business property or cash, as 'Suiker Unie Beheer' did not have any to transfer. The transfer of the whole of business property is moreover not known under Netherlands law.

By imposing a fine on SU the Commission therefore infringed Regulation No 17 of the Council, and in particular Article 15 (2) thereof.

(b) Summary of the statement of defence

The *Commission* replies that the annual report of the Cooperatieve Vereniging Suiker Unie Beheer UA, of 1969/70, states as follows:

'The Board of Directors of Suiker Unie presents its report and that of the management for a period of 15 months, that is to say from 1 October 1969 to 31 December 1970 inclusive. This period includes the last phase of the merger

between the four sugar cooperatives in the Netherlands. In 1966 these companies appointed the cooperative company Suiker Unie to be the main cooperative. In the first stage beet producers remained members of one or more of the associated cooperatives. The ultimate objective, which has been stated publicly, is to replace, before the expiry of a specific number of years determined in advance, the principal cooperative by a cooperative company in which beet producers will have a direct stake as individual shareholders. This objective was able to be attained during the period covered by the report. The principal cooperative Suiker Unie has changed its name to Cooperatieve Vereniging Suiker Unie Beheer UA.'

In a report of the Cooperatieve Vereniging Suiker Unie UA the following is contained:

'The present report relates to the first accounting year of the „Cooperatieve Vereniging Suiker Unie UA", formed in Rotterdam on 16 July 1970; it refers to the period from 16 July 1970 to 30 June 1971 inclusive. During this period through an offer for the exchange of shares Suiker Unie acquired all the shares of the cooperative companies which were members of the Cooperatieve Vereniging Suiker Unie UA. These companies were put into liquidation on 31 December 1970 and, by notarial act of 28 May 1971, transferred the whole of their assets and liabilities to Suiker Unie. Thus the merger of the sugar cooperatives which began in 1966 has been completed.'

In the monthly 'Suiker Unie', this situation was described as follows: 'The cooperative company Suiker Unie has acquired all the rights and has accepted all the liabilities of the four cooperatives as at 1 January 1971'.

The name 'Suiker Unie' therefore still covered the same undertakings. The latter were managed to a great extent by the same persons, and had their registered office at the same address. The change in the legal form of the cooperative cannot relieve SU's liability for acts of its predecessor, namely Suiker Unie Beheer UA.

(c) Summary of the reply

SU submits that, when the decision claims that it engaged in the course of conduct to which exception is taken, it relies on facts which are incorrect and the reasons upon which it is based are at the very least inadequate. It is wrong to regard 'Suiker Unie Beheer' as the legal predecessor of the applicant.

Even if SU had acquired all the rights and had accepted all the liabilities of 'Suiker Unie Beheer', it is in any case not liable for the acts of the latter. For the obligations derived from the decision were not the liability of 'Suiker Unie Beheer' when it was in existence before the winding up of this company was completed, but, according to the decision, the direct liability of SU.

(d) Summary of the rejoinder

The *Commission* maintains that Community law is based on the realities of economic life; the successive modifications of the legal form of the undertakings concerned brought about by the concerted practice have nothing therefore to do with the matter.

B — Formal and procedural submissions

(a) SU, CSM and Pfeifer & Langen: premature publication a breach of the principle that everyone has the right to a 'fair trial'

(1) Summary of the applicants

SU, CSM and *Pfeifer & Langen* blame the Commission for having infringed the principle of the right to a 'fair trial' by issuing public statements making it appear that the existence of infringements by the applicants had been established and what is more by doing so

at a time when the latter had not even had the opportunity of defining their position. CSM and Pfeifer & Langen call special attention to the fact that the Commission issued a communication to the press and Mr Borschette held a press conference on 24 July 1972, even though they were not informed of the complaints formulated against them until 26 or 27 July. Therefore when the Commission adopted its decision it was not in position to evaluate the facts and the arguments of the applicants with complete impartiality.

(2) Summary of the statements of defence

The *Commission* replies that the statements given to the press in no way influenced its decisions which were taken in complete independence, after a thorough examination of the arguments submitted. The objectivity of the Commission when it adopted the decision is shown by the fact that, after hearing the persons concerned, it decided not to impose fines on some of them and modified its argument on one crucial issue, namely proof of a concerted practice between all the sugar producers of the Community.

(3) Summary of the replies

SU considers that it is unrealistic to claim that the statements made to the press did not influence the Commission's final decision.

CSM maintains that it was impossible to tell from the Commission's communication that it was giving a preliminary opinion, since the communication stated that the matter is 'crystal clear'.

Pfeifer & Langen add that, under all advanced legal systems, it is a well-established principle that the judge may not give any publicity to pending actions, if he wishes to avoid the risk of being challenged on the ground of presumed bias.

(4) Summary of rejoinders

The *Commission* states that the only substantial difference between the notification of objections and the decision is that the latter now assumes that it was not the entire sugar industry of the Community but a certain number of smaller groups which engaged in a concerted practice.

The complaint by Pfeifer & Langen is not moreover based on the infringement of an essential procedural requirement but refers to the infringement of a legal principle which the applicant did not take the trouble to define.

(b) SU, CSM and Pfeifer & Langen: unduly short time limits for the submission of observations

(1) Summary of the applications

SU, CSM and *Pfeifer & Langen* submit that when the Commission fixed the time limit laid down in Article 2 (4) of Regulation No 99/63 at two months, it infringed the principle laid down in Article 11 of this Regulation that regard shall be had to the time required by the party concerned. This time limit of two months was too short having regard to the fact that the Commission took two to three years to conduct its inquiry and, furthermore, part of the period coincided with the holiday season. The requests for an extension made by SU and CSM were not granted.

SU complains that, contrary to what is stated in the second recital of Regulation No 99/63, the Commission, instead of keeping in 'close touch' with it, never heard its views before the notification of the communication.

(2) Summary of the statements of defence

The *Commission* replies that as the administrative procedure was concerned with the actual conduct of the applicants who can be presumed to be acquainted with it, a period of two months was more

than enough. The time required to collect all the material to enable objections to be directed against a great number of undertakings is much longer than the time which each of these undertakings needs in order to submit its observations on the results of the inquiry. CSM moreover was given a further time limit of three weeks in which to prepare supplementary oral submissions.

(3) Summary of replies

SU regards the Commission's reply as evidence that the latter considered *a priori* that the objections were proved.

SU adds that the actual wording of the communication deals not only with SU's own conduct, but also with that of 'producers, consumers of and dealers in sugar in the EEC' and contained 83 pages of 'background information' ('d'arrière-plan'), which had no connexion at all with SU's conduct. Further, the Commission's argument overlooks the applicant's right to challenge the legal arguments of the Commission.

CSM takes the view that the Commission's reply that the applicants were in a position to be aware of their own conduct is illogical, since the conduct was controversial.

(4) Summary of the rejoinder 40/73

The *Commission* takes the view that SU's grievance that it had insufficient time is exaggerated. There is hardly any qualitative or quantitative difference between SU's reply to the notification of objections and its submissions during the procedure before the Court.

(c) Pfeifer & Langen: infringement of the right to be heard on the matters at issue

(1) Summary of the application

Pfeifer & Langen complains that the communication did not distinguish clearly between the statement of the facts and the Commission's considerations, and that this prevented it from defining its position, to the extent to which it was necessary, on the facts upon which the Commission based its argument. The company gives the following examples:

- It stated (p. 103 to 104) that Pfeifer & Langen's sales are arranged and coordinated by WZV and that intra-Community sales cannot take place without the latter's consent. Now, this statement is not based on any established fact: the oportunities for Pfeifer & Langen to export are not in fact in any way restricted.
- It alleged (p. 113) that, were it not for the deliveries from producer to producer, manufacturers would distribute their products individually; the distances are no obstacle, since there are often favourable transport conditions ('return freight') The Commission (cf. decision, p. 36, Lt. Col.) has not produced any facts to prove this allegation and it is moreover untenable.

Far from taking into account the objections submitted by the applicant, the decision repeated its statements in an even more general form.

(2) Summary of statement of defence

The *Commission* replies that the main purpose of this submission is to challenge the facts found by the Commission and, to that extent belongs to the substance of the case. According to the case-law of the Court the Commission does not have to refute, in the statement of the grounds upon which a decision is based, all the arguments put forward by the persons concerned.

(d) Pfeifer & Langen: infringement of Article 4 of Regulation No 99/63

(1) Summary of the application

Pfeifer & Langen submits that the decision contains complaints of which it

was not given notice, and which it cannot therefore validly invoke. The complaint, which was not notified, is that it also engaged in a concerted practice with RT for the purposes of preventing competition on the Netherlands market.

(2) Summary of the statement of defense

The *Commission* replies that, in the communication (p. 113) it regarded deliveries from producer to producer as evidence of a concerted practice. Pfeifer & Langen therefore could defend itself; moreover it mentioned the deliveries in its written observations and supplied a list of them.

(3) Summary of the reply

Pfeifer & Langen replies that the communication only referred to deliveries from producer to producer in general and, so far as the deliveries to the Netherlands are concerned, to those made by RT. There was all the more reason for the applicant not to expect the Commission to complain about the deliveries to Limako, because this undertaking, although tied to a producer, only deals in exports and the sugar in question was intended for export to third countries.

(4) Summary of the rejoinder

The *Commission* retorts that Pfeifer & Langen knew that Limako is a subsidiary of SU and that it had no reason to suppose that RT, but not itself, would be blamed for such sales. Pfeifer & Langen moreover recognized the importance of these deliveries by mentioning them in its written observations.

(e) SU: failure to take into account the facts put forward by the applicant

(1) Summary of the application

SU takes the view that the Commission infringed Article 19 (1) of Regulation No 17 and Article1 of Regulation No 99/63, because Mr Borschette, a member of the Commission with special responsibility for competition, stated, at a press conference held on 18 December 1972, that none of the undertakings affected by the decision had submitted that it fixed the price of sugar in agreement with the competent ministry in its country. However SU stated both in its written reply and also at the hearing that this was exactly what happened in its case.

(2) Summary of the statement of defence and the rejoinder

The *Commission* replies that any mistakes which may have been made in its communiqués in no way affected the validity of the later formal decisions. SU approved the minutes of its hearing and can hardly complain that it was not heard.

(f) SU: infringement of Article 4 of Regulation No 99/63

(1) Summary of the application

SU refers to the finding in the decision (p. 32, Rt. Col.) that 'the concerted practice concerning deliveries of sugar on the Netherlands market ... lies in the fact that Netherlands producers bought sugar directly from Belgian and German producers and resold it at the same prices and subject to the same conditions of sale as home produced sugar' and submits that the Commission has treated these purchases, not as evidence of a concerted practice, but as an infringement in itself. This complaint was not mentioned in the communication and by treating it as the basis of its decision the Commission has infringed Regulation No 99/63, Article 4.

(2) Summary of the statement of defence

The *Commission* replies that the deliveries were mentioned in the communication (cf. p. 48, 84, 112 *et seq.)* and were treated, just as they were in the decision, as evidence of the existence of a concerted practice.

(3) Summary of the reply

SU replies that, neither on page 48, nor on page 84 of the communication is there any reference to deliveries of German sugar.

On pages 112 *et seq.* there is only a legal evaluation of the facts mentioned earlier. There is moreover no mention of the concerted practice for which the 'Netherlands producers' and the 'German producer' are blamed, nor of the evidence put forward in the decision in support thereof. The communication was only concerned with deliveries by RT to SU, and makes no reference at all to deliveries by Pfeifer & Langen.

(4) Summary of the rejoinder

The *Commission* replies that the applicant's observations cannot affect the substance of the findings in the pages quoted in the notification of objections.

(g) Pfeifer & Langen: infringement of the established principles for the taking of evidence

(1) Summary of the application

Pfeifer & Langen state that another and much more credible interpretation, based on different reasons, can be given of the facts treated as evidence in support of the complaints made against it. Therefore the Commission either had to continue its inquiry or to stop the procedure. To the extent to which the Commission based the grounds of its decision on the written statements, it must be borne in mind that the latter were made by persons who were scarcely able to give evidence as to the facts but who expressed their opinion on events which took place but which they did not witness.

(2) Summary of the statement of defence

The *Commission* replies that it had to take into account the documents found at Export's offices, since they were directly relevant to the conduct of the persons involved in the procedure.

(3) Summary of the reply

Pfeifer & Langen maintain that when the Commission admits as evidence the assumptions of persons without either first or secondhand knowledge of facts upon which they give their views, it unlawfully shifted the burden of proof to the prejudice of the applicant. Moreover these assumptions do not even relate to Pfeifer & Langen's conduct.

(4) Summary of the rejoinder

The *Commission* takes the view that the present complaint refers to the evaluation of the evidence and that the question raised must be discussed when the substance of the case is examined.

(h) SU and CSM: adoption of a single decision in four languages

(1) Summary of the applications

SU and *CSM* protest against the adoption of a single decision which of necessity contains a large number of facts and accusations which have nothing to do with the applicants. This has made it difficult for the applicants to prepare their defences, as they did not know on what points they had to define their position.

SU goes on to say that it received in addition to the Dutch version of the decision the German, French and Italian versions in breach of Article 3 of Regulation No 1.

(2) Summary of the statements of defence

The *Commission* replies that the decision dealt separately with the facts used against each undertaking and that the positions taken up by the applicants show that the latter had no difficulty in identifying the facts which affected them.

With regard to the language of the decision all that need be said is that the Dutch version was served upon SU.

(3) Summary of the applications

SU emphasizes that the Dutch version does not indicate that it is (in the case of the applicant) the only authentic version and it submits that the Court of Justice should annul the versions drawn up in the other languages.

SU takes the view that the Commission 'oversteps every conceivable limitation on the legal protection of the individual against the administration', when it adopts a single decision with a view to buttressing its argument that the European sugar industry conspired on a large scale to avoid the provisions of Article 85 of the EEC Treaty.

CSM asserts that the decision does not state which arguments it regards as decisive in establishing the specific accusation against this company.

(4) Summary of rejoinders

The *Commission* claims that the fact that the versions in the three other languages were annexed to the decision in no way affects the validity of the service of the Dutch version.

CSM's written statements refute its claim that it was unable to identify the complaints affecting it.

(i) CSM, SU: absence or inadequacy of the statement of their reasons upon which the decision is based

(1) Summary of applications

CSM submits a separate plea, based specifically on the infringement and incorrect application of Article 190 of the Treaty by the Commission, and maintains that it failed to give the grounds upon which its decision was based in such a way as to enable the Court to perform its task of reviewing it and to enable the applicant to produce its defence with full knowledge of the facts and the circumstances forming the basis of the complaints against it. Therefore the statements that 'the Netherlands producers threatened' (decision, p. 26 Lt. Col.) that 'these procedures were adopted during the marketing year 1971/72' (decision, p. 25, Rt. Col.), or the finding that 'from the beginning of the next marketing year (1970/71), the Netherlands producers made the Netherlands dealers parties to their agreement with RT' (decision, p. 26, Lt. Col.) suffer from uncertainty. In several places in the decision the Commission is content to make findings which are vague; it hardly mentions, for instance, what 'business correspondence' in its opinion provides evidence of the concerted practice between Netherlands producers and RT (decision, p. 32, Rt. Col.) and does not quote any specific case while at the same time it asserts that CSM refused to deliver sugar to customers established 'in the country of its competitors' (decision, p. 25, Lt. Col.)

SU without referring to Article 190 of the Treaty also protests against what it describes as 'a technique of accusations based on unknown facts', which makes it impossible for the company to deliver an effective defence. It quotes the statements that 'dealers and the processing industry complained of the trend of intra-Community trade' and 'certain restrictive measures' had been 'noticed on different national markets' (decision, p. 22, Rt. Col.) and also that 'during the 1969/70 marketing year the principles of sale ... were worked out on more general lines' as these principles 'were no longer only concerned with relations between certain Member States but in general with cooperation between sugar producers, in particular with regard to deliveries from producer to producer' (decision, p. 23, Lt. Col.).

SU also submits that the Commission repeats in Part II of the decision (p. 30 *et seq.)*, in different wording, what it has already stated in Part I, section C, (p. 22 *et seq.)*, and that, by using such an ambiguous technique, it is in breach of its obligation to state clearly the grounds upon which its decision is based.

(2) Summary of the statements of defence

The *Commission* replies that Part I of the decision describes facts whereas Part II contains the legal evaluation; a certain amount of repetition has therefore been unavoidable. However this does not give rise to any ambiguity.

The actions attributed to the undertakings are clearly set out both in the communication and in the decision. By reason of the very nature of the subject matter of the decision the Commission felt it was bound to describe and to evaluate as a whole the mutual relationship of the various elements of the concerted practices between several undertakings.

The evidence that these practices exist is found mainly in the economic effect which it has been possible to determine. In these circumstances it is unnecessary to know, either the time or the place of the transactions, or the names of the persons.

(3) Summary of the replies

CSM replies that the nullity of the decision because the grounds upon which it is based are inadequate, which it alleges, cannot be made good by supplementary explanations which the Commission submits during the present proceedings.

The evidence of the practices infringing Articles 85 and 86 put forward by the Commission in its statement of defence ('is found mainly in their economic effect') is different from the evidence adduced in its decision ('business correspondence'). Therefore the Commission replaces an argument which it should have buttressed with facts by another argument.

(4) Summary of the rejoinders

The *Commission* rejects the criticism concerning the grounds forming the basis of the decision which establishes that the deliveries between producers constitute the concerted practice (decision, p. 32, Rt. Col.). It referred to the additional measures taken by RT to make sure that the dealers operations did not generate on the Netherlands market the competition which it endeavoured to avoid by supplying the Netherlands producers itself.

(j) SU, CSM and RT lack of clarity in the operative part of the decision

Preliminary observation:

To the extent to which the present submission is put forward by RT it is at the same time directed against the complaint concerning the protection of the Italian market. Reference must therefore be made to chapter 1, A h, above.

(1) Summary of the applications

SU states that the Commission has infringed essential procedural requirements and the principle of legal protection by not indicating in the operative part of the decision (subparagraph 2 of Article 1 (1)) the course of conduct which constitutes the infringement and to which the applicant is required to put an end under Article 2. Even if the Court were to hold that the operative part of the decision may refer back to the grounds, their wording does not enable SU to discover what it must do in order to comply with the decision.

CSM puts forward a similar argument against Article 2 of the decision. It defines its submission as infringement of the Treaty or of some of its implementing regulations, in particular of Article 3 of Regulation No 17.

(2) Summary of the statements of defence

The *Commission* replies that the grounds upon which the decision is based and the

operative part thereof together form a whole. The infringement committed by the applicants has been clearly described in pages 32 to 34 of the decision. The protection of a market against competition from abroad is a clear-cut operation:

(3) Summary of the replies

SU replies that 'the protection of a market against competition from abroad' is not a measure, but rather the designation of certain measures. Moreover it is possible to imagine methods of protecting a market against competition which would not fall within the infringements provided for by Articles 85 and 86. Taken as whole the Commission's statement of defence, because of its ambiguous nature and its varying choice of words had made it even more difficult to understand what the concerted practice for which the applicant was blamed in fact consists of.

CSM submits that, in spite of the explanations given in the statement of defence, the decision is not always sufficiently clear. The Commission cannot forbid undertakings to take advantage of — this expression of the Commission is moreover vague — measures adopted by other undertakings including the decision not to compete with them (Statement of defence 42/73, p. 38).

(4) Summary of the rejoinders

The *Commission* refers to the decision which indicates that SU must put an end to its cooperation with RT and Pfeifer & Langen, which took the form of transactions between producers and which aimed at the walling up of the Netherlands market in sugar. In a similar way CSM must put an end to the concerted practice found to exist, the aim of which was to isolate the Netherlands market or which had this effect. The decision is therefore clear and valid.

C — Submissions on the substance of the case

(a) SU: Infringement of Article 85 of the Treaty

(1) Summary of the application

SU states that the Commission came to its conclusions on the strength of simple statements, supported by no actual facts, or based conclusions which are incorrect and tendentious on the facts. In the first recital of Part II of the decision a course of conduct such as the purchase of sugar from another manufacturer by a producer which cannot meet its orders from its own production and the sale of this sugar at the price prevailing on the market when it is sold, which is in itself lawful, is presented in an unfavourable light and as being an instrument for a conspiracy by the sugar industry. SU denies that it participated in 'a general agreement relating to the sale of sugar intended for human consumption on the various national markets and for the sale of large surpluses, particularly on the markets of third countries' (cf. decision, p. 22, Rt. Col., paragraph 12 of Part I of Section C) SU states that it cannot define its position on a large number of the facts mentioned in the decision, which only concern other undertakings, but which the Commission, by adopting the inadmissible technique of issuing a collective decision, seems to use also against SU. Owing to its lack of information SU finds that it has no option but to deny all these facts.

SU gives detailed reasons why, in its opinion, the description of Community and national regulations for the sugar market, given on pages 21 and 22 of the decision, is incomplete and in part incorrect.

SU takes the view that the complaint made against it comes down in the end to one actual complaint, namely that 'Netherlands producers bought sugar direct from Belgian and German

producers and resold it at the same prices and subject to the same conditions of sale as home produced sugar' (cf. decision, p. 32, Rt. Col., paragraph 1 of Part II Section B).

SU denies that it bought sugar from Pfeifer & Langen to resell it at the same price and subject to the same conditions of sale as the sugar which it produces itself in the Netherlands. It bought from this undertaking, through Limako SA, in 1971/72, 14 990 metric tons of white sugar, with a view to reselling it outside the Community. This sugar was in fact exported to third countries with the exception of 4 950 metric tons which was spoilt. SU also denies that it obtained supplies direct from RT, apart from small quantities of some special grades. It admits, on the other hand, that it bought from RT via Jacobson and Limako, 22 500 metric tons of sugar in 1971/72; through the same undertakings the Netherlands cooperative sugar factories bought 20 000 metric tons from RT during the marketing year 1970/71.

SU states that there is no agreement and never has been any between 'RT and the Netherlands producers' and that *a fortiori* the Commission is wrong when it states that 'Belgian and Netherlands dealers' were later made parties to this agreement. SU denies that RT's conduct at any time towards Export and Hottlet was caused by 'producers' (and therefore also by the applicant) being animated 'by their concern not to disturb the pattern of the Netherlands market'. SU states that it has no knowledge of the alleged grant according to the decision, by RT of the exclusive right to sell in the Netherlands to Export and Hottlet; it is therefore in no way concerned with any restrictions which may have been agreed and with the reasons for them. Finally, SU challenges everything which has been said in the decision in connexion with its alleged right to 'supervise' or consent to the import of sugar into the Netherlands; no one ever asked it for any such consent.

SU states that it purchased sugar from foreign manufacturers in order to make good its deficit and denies that it carried out any transactions which correspond to the policy of 'everyone in his own home' ('chacun chez soi').

Correcting the figures given by the Commission in its decision, SU states that imports for the account of the Netherlands cooperatives went up from 7 009 metric tons in 1968/69, to 2 769 metric tons in 1969/70 and to 24 399 metric tons of sugar (of which it imported 17 142 metric tons itself) in 1970/71.

Before the entry into force of the common organization of the markets the entire home demand for sugar was reserved to the Netherlands industry. SU had in the Netherlands a sales network capable of covering about 70 % of the domestic consumption of sugar. In order to make the best use of this sales network which was large and costly and in order to be able to look after its own customers, SU had to buy from abroad sugar which could be sold within the EEC.

Article 85 does not prohibit the purchase of this sugar direct from foreign producers (and these purchases moreover only covered small quantities of special grades of sugar, the rest being imported through importers) or the sale of this foreign sugar in its own packages and at the highest possible price.

It is impossible to infer from the business correspondence exchanged between RT and Belgian dealers and from the behaviour of RT towards the latter (cf. decision, p. 32, Rt. Col.) that this practice which is criticized, to the extent to which SU is also alleged to have engaged in it, does in fact exist. The Commission's case against SU does not include any evidence that RT effected 'any delivery in the Netherlands without the consent of the Netherlands industry' (cf. decision, p. 32, Rt. Col.) Export's

statements do not provide such evidence, are purely speculative and do not mention any specific facts. It is incorrect to state that 'all the other supplies of Belgian sugar to the Netherlands were by common accord between producers only delivered to specific purchasers (the Netherlands milk products industry)'. The statement in the telex message from RT to Export (mentioned in p. 33, Lt. Col. of the decision) that SU and CSM 'do not want to do anything which would disturb us' is a simple conjecture made by RT.

The Commission's claim that 'normally it is not in the interests of a producer to sell large quantities of his products to one or more competitors and ... he can obtain larger profits by supplying the dealers and interested consumers concerned direct' (cf. decision, p. 33, Rt. Col.), is an accurate generalization. As none of the Netherlands importers has a department to deal with customers, nor a production capacity enabling it, for example, to convert solid sugar into liquid sugar, to store sugar which has been spoilt or to improve sugar of poor quality, and as none of the Netherlands importers are in a position to guarantee regular supplies or have their own Netherlands trade mark, it was hardly in the interests of foreign producers to sell to these dealers rather than to Netherlands producers. In any case, the argument in the decision (cf., p. 33, Lt. Col.) that foreign producers who were geographically the best placed, in the case of the amounts sold to their competitors, had given up independent commercial operations on the Netherlands market, does not affect the applicant.

It is tendentious to claim that SU 'refused to deliver sugar to customers established in the countries of its competitors' (cf. decision, p. 25, Lt. Col.) SU could not have customers in Belgium or in Germany so long as the Council retained a regulation making the Netherlands a country with a sugar deficit.

Article 85 does not prohibit the sale of sugar at a price 'based on competitors' prices' (decision, p. 23, Rt. Col.) and it is wrong to call this price an 'increased' price. The Commission failed to mention that, not only in Italy but also in the Netherlands, it is the national authorities which fix the consumer price on the basis of the intervention price and after determining all the other elements in the price which are added to it, such as packing, transport costs and the profit margins. Maximum prices which the applicant undertook to charge were higher by about 1/3 to 5/8 % than the intervention price; however, it was not in a position to apply such prices in practice.

SU denies the statements that 'the dealers and the processing industry complained of the trend of the intra-Community market' and of 'certain restrictive measures noticed on various national markets' (decision, p. 22, Rt. Col.). It also denies, so far as it is affected, the statement that 'since Community rules came into force sugar producers in the Community have attempted to bring about the conclusion of a general agreement ...' (decision, p. 22, Rt. Col.).

SU states that there was undoubtedly competitive pressure from abroad on the Netherlands sugar market. Whereas it only produced sugar of No I quality the condensed milk industry habitually used quality No II the production of which was not so difficult and to which a lower intervention price applied; sugar of quality No II is imported — mainly from Belgium — by a pool of Netherlands dealers.

(2) Summary of the statement of defence

The *Commission* states that, since it is unable to produce any evidence, it no longer claims that the preparatory work on the agreements between European sugar producers was carried out after the Munich meeting and reached a successful conclusion. However, it continued to be

in the interest of the sugar producers to confer together concerning their sales policy. The practices found to exist should be considered from this standpoint, in particular in order to understand the significance of the restrictions on the destination of the sugar sold by producers to the trade and also of the many refusals to deliver to dealers and consumers of other Member States.

The Commission then summarizes the main evidence upon which its decision is based:

Sugar prices differ from one Member State to another. For example, in 1971/72 the prices applied in Belgium did not exceed the intervention price by more than 3 %, whereas in the Netherlands they were about 3 to 7 % above this level and this difference could not be explained by differences of quality. In these circumstances there had to be competition in the normal course of events.

Regular deliveries from producer to producer, together with the restrictions on the ultimate destination of surpluses sold through the trade, produced, in the Member State having a deficit where the producer-purchaser is based, an effect which is so much against competition that it ought to be accepted that it was intentional.

If on a specific market a producer offers his products exclusively to another producer established on the same market, he guarantees that this producer can sell his products and allows him to determine his share of that market. The restriction of competition on the Netherlands market caused by deliveries from Tirlemont to SU arises out of the common intention of the two undertakings and this concerted practice cannot be considered as spontaneous parallel conduct explained by the advantages which these two undertakings derived from it. RT's resolve not to take any commercial initiative on the Netherlands market and SU's decision to sell on this market quantities over and above its own production, are complementary, as the concerted action consists in the knowledge which the two parties had of the complementary nature of this arrangement.

In the opinion of the Commission the operations between RT, on the one hand, and SU and CSM, on the other hand, can, having regard to their size, regularity and to the situation obtaining on the Netherlands market, be considered as sufficient evidence of the existence of a concerted practice having as its effect the restriction of competition. To this evidence must be added the fact that deliveries to non-producers were either refused, or made subject to the condition that the purchaser does not sell the sugar to customers of the Netherlands producers without the latters' consent. Similarly RT granted two Belgian exporters the exclusive right to export to the Netherlands, on condition that the deliveries were subject to the consent of Netherlands producers. On several occasions RT called the attention of Belgian dealers to the fact that their operations on the Netherlands market must not disturb the sales of Netherlands producers and the prices applied by them. Finally the reason given for the refusal to sell on some occasions was a shortage of goods, which obviously does not hold water having regard to the pattern of the market in Belgium which normally has a surplus. All these practices resulted in the absence of direct contacts between Belgian producers and Netherlands purchasers who were customers of SU and CSM, whereas such contacts are not only normal but also necessary for attainment of the objectives of the Common Market.

As additional proof of the deliberate influence the Netherlands producers had on competition the Commission refers to the extract of the minutes of the meeting of the Management Committee of 'Nederlandse Suiker-Raad' of 13 February 1969.

In order to adduce evidence of the infringement the Commission does not have to produce express statements of the representatives of each member of the concerted practice which prove that each of them was aware that its conduct was against competition.

SU wrongly severs the various elements in its policy aimed at the isolation of the Netherlands market, whereas the infringement consists of certain courses of conduct adopted by various undertakings considered in their relation to each other. Conduct which is permissible in normal conditions of competition does not necessarily remain lawful if these conditions have been deliberately distorted.

The course of conduct to which exception is taken cannot be justified by the fact that the undertakings concerned are anxious to defend a sales territory created by the system of walling off national markets. The very object of the common organization of the markets in the sugar sector is to open up domestic markets, the 'traditional sales areas' of certain producers. As the Court has already held, the Treaty prohibits the consolidation of situations which have been established to the prejudice of free trade in the common market and of free choice by consumers of their suppliers.

The Commission stresses that it does not consider that every sale from producer to producer comes within Article 85. But the situation is different if such transactions are considered together with the refusal to sell to third parties or with the restrictions relating to such deliveries. In a way the effect of the transactions between RT, on the one part, and SU and CSM, on the other hand, is that the latter are in those transactions RT's exclusive respresentatives in relation to their own customers. The repeated refusals by RT to sell to third parties without making them accept the clauses relating to the resale price and the destination of the sugar, are tantamount to the prohibition of parallel imports.

The Commission then deals with certain specific arguments put forward by SU.

Certain documents establish that the processing industry complained of the trend of intra-Community trade and of the agreement between the producers in question to find solutions enabling them 'to secure for themselves the sale of their entire production both on the domestic and the export market'. The actual conduct of SU was consistent with this objective.

SU is very well placed to sell sugar in Germany and Belgium, as some of its sugar factories are very favourably situated and have first class communication with some of the frontier regions of Belgium or Germany.

SU's statements contradict each other. On the one hand it states that it neither can nor wishes to have customers in Germany or in Belgium and cannot afford to sell to purchasers, who are not traditional customers of the cooperatives; on the other hand it claims that it has quantities of sugar which can only be sold to the milk products industry and at the same time states later that the offers it made to this industry were the consequence of the vigorous sales policy directed by dealers to purchasers who normally obtain their supplies from SU.

The concerted action is also proved by a note from Export to RT of 31 August 1970, quoting a statement by the Chairman and Managing Director of RT to a colleague who was experienced in this matter and who could scarcely have failed to understand the expression 'undertaking'.

By admitting on several occasions that it objected to supplying Belgian sugar to its traditional customers SU admits that it consented to the deliveries which in fact took place.

(3) Summary of the reply

SU states that the Commission is wrong to proceed on the basis that 'conscious

parallelism' implies that there is a concerted practice even if there was not any closer coordination and even if uncertainty with regard to the future conduct of each undertaking had not been removed. In the case of a concerted action it is presumed that in addition to a plan, 'there is a form of coordination ... which, although it has not been taken to the stage of an agreement properly so-called, knowingly substitutes practical cooperation ... for the risks of competition'. The object of this coordination must be to 'eliminate in advance ... uncertainty with regard to the reciprocal behaviour' of the undertakings engaging in the concerted action. This presupposes an objective act of communication having as its object the furtherance of a common way of thinking, the coordination of the operations of the undertakings and the elimination of uncertainty concerning their future reciprocal conduct. If the Commission's argument that the concerted action may lie in the parties' awareness of the necessarily complementary nature of their respective decisions has to be accepted, it amounts to penalizing any unilateral attempt by the parties to react as intelligently as possible to anticipated unilateral actions of competitors by considering their own interests without damaging the interests of competitors. In fact it is not the consensus which is prohibited but a certain way of achieving that consensus.

It is true that the Court has held, that, if it is impossible to prove strictly by which concerted actions the conduct of the participants was coordinated, reliance can be placed on arguments taken from economic doctrine that, having regard to the existence of the specific market patterns, it is unthinkable that the undertakings operating on the market managed to adopt a parallel (or complimentary) predetermined course of conduct, without there having been any preliminary coordination. But the principle that everyone is innocent until he is proved guilty must be observed.

The indirect evidence produced by the Commission is inadequate, because it cannot prove that, having regard to the market situation SU's conduct could only possibly be explained by coordination. The Commission cannot either prove what concerted actions SU performed or to which of the concerted actions of its alleged competitors it reacted.

SU's conduct was caused by independent considerations. In fact when the frontiers inside the common market were opened, it decided not to pursue an active policy on the markets of neighbouring countries, because its distribution network in the Netherlands was very well developed and the penetration of foreign markets would have entailed additional distribution costs. An even more compelling reason was that the sugar quota for the Netherlands created an artificial deficit there.

The only transaction with Pfeifer & Langen cannot be regarded as coming within the alleged concerted practice, as it was an export to third countries. The Commission's argument that this export does not prove that Pfeifer & Langen were in continual and active competition with SU's customers, is beside the real problem, which is to determine whether the absence of competition by Pfeifer & Langen was due to a concerted action.

RT's conduct can also be explained by decisions taken unilaterally by this undertaking. The setting up by this company of a distribution network was too expensive and in particular too risky, because the additional distribution costs would have probably left it with a lower profit margin than that available toits Netherlands competitors. In addition the oligopolistic character of the European sugar market might cause RT to behave in a somewhat 'friendly' way towards Netherlands producers, lest agressive conduct provoked a similar reaction if Netherlands manufacturers receive a larger quota.

Nor has the Commission produced direct evidence of the alleged concerted

action. It emerges from the minutes of the meeting in Munich that sugar producers had in mind organizations of the market governed by national public law. Further, although the Commission claimed that exporters had to seek SU's consent if they wished to obtain supplies of Belgian sugar for the purpose of exporting it to the Netherlands, it could not produce any specific evidence that SU gave its consent or refused to do so.

SU adheres to its assertion that Netherlands prices only exceeded the intervention price by 1/3 to 5/8 %. Moreover, even if it is correct to say that Netherlands prices were 4 % higher than Belgian prices, such a difference is not important.

With regard to the argument that RT, when it sold to SU, 'guaranteed' the sale of this latter's products, it is necessary to point out that it is only possible to talk about a 'guarantee' — and, as a result, of a concerted action — if RT make known to SU that it would behave in the same way in the future; however it never did so.

SU denies the Commission's statement that it decided, in agreement with RT, to do business with it 'in preference to any other undertaking'; it supplies figures relating to the amounts brought by the Netherlands cooperative in 1968 and 1971 from RT (direct and through Jacobson), from Sucre-Union and from another French undertaking.

By relying on a series of unilateral actions (refusal to sell, deliveries subject to a destination clause) performed by persons other than SU, as proof of the participation by the latter in a concerted action, the Commission fails to distinguish between the exact nature of certain courses of conduct and the question whether they are the consequence of a concerted action.

After having first of all accused SU of having taken part 'in the setting up and retention of a non-competitive pattern of trade on the Netherlands market', the Commission admits, in its statement of defence, that organizations of the market based on national requirements and interests had been an obstacle to the establishment of a common market in sugar. The retention of a non-competitive pattern of trade, as opposed to the establishment of a common market, does not necessarily presuppose a concerted action.

With regard to the opportunities available to SU to compete with Netherlands importers in supplying the milk products industry there is no contradiction. In fact the sale of 70 000 metric tons of French sugar to traditional customers of SU caused it to sell corresponding amounts to new customers such as the milk products industry, which it had not been in its interest formerly to supply because of the price then in force.

Export's note of 31 August 1970 is a 'testimonium de auditu' which is not admissible as evidence. Further, even if the conversation reported in the said note were confirmed, that would not prove that the undertaking in question in fact existed. To do so Mr Rolin must not only confirm this alleged conversation on oath before the Court, but his evidence must also be corroborated, because 'unus testis nullus testis'.

SU denies that together with CSM it was the first undertaking to have sold sugar to the Netherlands, and mentions many undertakings which offered large amounts of Belgian sugar.

With regard to the complaint that it did not supply the frontier regions of neighbouring countries, the Commission is not fully aware of the pattern of trade and its influence on the distribution of sugar. In fact local grocers and small branches of chain stores do not buy direct from producers but from wholesalers or from purchasing centres

which, as a general rule, are established in the middle of the country in question. SU in fact sells to the Netherlands province of Limbourg but these are deliveries effected under the terms of contracts concluded with the head office of the firm in question, whose registered office is at Zaandam; these contracts provide for all the branches of this firm throughout the Netherlands to be supplied with sugar.

(4) Summary of the rejoinder

The *Commission* states that SU's argument that RT only had the choice of either doing no business on the Netherlands market or setting up a distribution network covering the whole of the market is incorrect. RT can supply practically the whole of the Southern part of the Netherlands by using its Belgian distribution network. It could also rely on the Netherlands trade instead of cutting it off from access to Belgian sugar.

Contrary to the opinion expressed by SU it is sufficient to prove that the concerted action of the producers caused the isolation of the Netherlands market and, thereby distorted the pattern of supply on this market, without it being necessary to show that there was an additional concerted action or co-ordination between RT and SU, to implement a 'plan'. SU's policy as a whole was aimed at preventing competition on the Netherlands market and SU informed RT of this 'by means of transactions carried out with this undertaking'. Conversely it emerges from the statements made by RT that the latter interpreted all these transactions in the same way.

The Commission disputes the value of comparing the prices applied in the Netherlands, supplied by SU, because they were retail sale prices and not producer prices (ex works). It itself produces a table of prices applied by SU, CSM and the Netherlands trade compared with the intervention price.

Each sale of sugar from RT to SU gave substance to the concerted action. For this reason the question whether the concerted action relates to future conduct is irrelevant.

The Commission produced the documents which show that a large part of the sales of sugar between Belgium and the Netherlands consisted of transactions carried out between producers or subject to destination clauses.

Transactions between producers are, as such, the material form of the concerted practice and at the same time evidence of the practice. Further there are numerous indications of a deliberate effort to keep the Belgian and Netherlands markets separate.

There is no contradiction between, on the one hand, the Commission's explanations that SU 'established' with RT a non-competitive pattern of trade on the Netherlands market and, on the other hand, the fact that the Commission concedes that the national organizations of the market were an obstacle to the establishment of the common market in sugar. This latter consideration refers to the moment when the entry into force of the common organization of the markets made the free movement of sugar possible.

By way of additional evidence of the efforts made by SU to restrict the freedom of dealers who import sugar, the Commission produces statements made by the Jacobson firm of Rotterdam before one of the Commission's inspectors. The price at which the dealers had to sell the balance of French sugar to producers show that these transactions could only have taken place as a result of illegal pressure.

The Commission did not intend to define SU's conduct as being in law that of an exclusive representative, but simply to make a comparison.

The Commission is of the opinion that it is unusual for SU to sell in Limbourg in the Netherlands but not in West Flanders, a province which is much nearer. This anomaly can in no way be explained by centralized purchases made by large consumers; further the argument put forward by SU does not apply to industrial consumers.

There is a contradiction in SU's explanation of its attitude to the condensed milk industry. In fact SU claims, on the one hand, that it had surplus sugar because of the amounts of sugar purchased in France by importers and, on the other hand, that it is not in a position to satisfy the requirements of its customers out of its own production. The documents produced by way of evidence by the Commission, namely the documents containing Mr Rolin's statements, are not anonymous.

The Commission considers that if a producer wishes to defend itself against a decrease of its share of the market with the help of a competitor, it closes the market to direct access of the goods of this competitor. The Commission quotes several passages from SU's pleadings in which it admitted that it adopted such a course of conduct.

Even the transaction carried out by SU and Pfeifer & Langen was, so far as its final outcome is concerned, a form of cooperation between undertakings which were at least potential competitors, which had as its effect the distortion of competition on the Netherlands market.

Neither the decision, nor the statement of defence says that only SU and CSM imported Belgian sugar into the Netherlands. Nevertheless it is clear from the documents produced by the Commission that a large proportion of the imports of Belgian sugar (and also of German sugar) to the Netherlands was effected on the basis of transactions between producers or was subject to destination clauses.

(b) CSM: Infringement of Article 85 of the Treaty

(1) Summary of the application

CSM states that none of its acts or things justify the finding of an infringement of Article 85 (1). The alleged concerted practice between CSM and SU on the one hand, RT and Pfeifer and Langen, on the other hand, which is said to be established by the fact that 'the Netherlands producers' purchased sugar direct from 'Belgian and German producers' and sold it then at the same prices and subject to the same conditions as apply to domestic sugar, and thereby restricted competition, does not exist. Since there can be no question of an agreement between the undertakings affected by the decision, if Article 85 (1) is to apply, these must be parallel courses of conduct which were prearranged and through these practises competition within the common market must be restricted to such an extent that trade between Member States is affected.

CSM states that it has no commercial relationship with Pfeifer & Langen and has not consulted SU on the question of its imports; there have never therefore been any practices involving the four undertakings mentioned in the decision.

The conduct of CSM as a sugar producer, was in no respect parallel to the conduct of the sugar producer known as RT. The Commission disregards the fact that in its capacity as a dealer CSM always purchased sugar from foreign producers in order to resell it in the Netherlands, often for the account of the Netherlands Government.

The statement that 'Netherlands producers bought increasing amounts of white sugar from their competitors especially those in Belgium and in Germany' (cf. decision, p. 24, Rt. Col.) is partly inaccurate. In order to cover its deficit CSM never purchased from Pfeifer & Langen but had recourse exclusively to

RT, the sugar it bought from this undertaking amounting however to only 4 to 10 % of Netherlands imports.

The Commission does not seem to object to CSM purchasing raw sugar from foreign producers (cf. decision, p. 25, Lt Col.). Moreover CSM used granulated sugar, purchased from RT, almost entirely as a raw material for the production of cassonade.

The commercial relationship between CSM and RT corresponded to CSM's legitimate interest in purchasing sugar to meet the requirements of its customers itself, and also to RT's legitimate interest in selling its surplus production to the Netherlands without having to establish there a sales and distribution network before knowing what the situation would be in 1975 at the end of the transitional period. The Netherlands dealers do not possess the requisite storage facilities or distribution network to enable them to sell sugar to the average purchaser. So far as deliveries of lump sugar are concerned they enabled RT to sell on the Netherlands market without establishing a sales network; moreover there was nothing to stop the Netherlands consumers from buying lump sugar also from SU.

If there was any parallel conduct, it only comes within Article 85 if it is the consequence of a common design or of a coordinated policy. In order that the existence of this additional element can be accepted there must be a strong presumption of fact, such for instance as is raised by the adoption of a uniform prices policy; however this condition precedent is lacking in this case.

With regard to the various statements quoted by the Commission in its decision, referring to the adoption of the rule 'everyone in his own home' ('chacun chez soi') by European sugar manufacturers, they cannot be used against CSM. The principle 'everyone in his own home' was the substance of an agreement between Belgian and Netherlands producers at the beginning of the thirties. The fact that the formula is sometimes still used does not mean that the agreement was performed. Since in both countries there are similar guarantees, a system of fixed import quotas, a price level which is almost the same and public authorities having a profound influence on prices, such a concerted action is unnecessary. The facts that RT ensures that the sugar which it manufactures is only exported to the Netherlands through sales networks which it chose itself only concerns this company. There is no reciprocal undertaking; RT is entirely free to modify its export policy, and CSM can always decide to cover its deficit by purchasing elsewhere.

The Commission has not clearly explained how CSM's purchases from RT can restrict competition on the Netherlands market. Even the Commission's figures show that large quantities were imported by independent Belgian producers and German dealers; there was therefore always the pressure of competition from abroad.

CSM suggests that the Commission provides information concerning the amounts imported and the respective proportions of exports passing through the various import channels; it estimates its own share of imports at 10 % at the most.

In order to determine whether there is an actual and perceptible influence on conditions of competition the price trends in particular must be examined. If the Commission had not failed to do this, it would have found that the ex-works prices varied exclusively in relation to the target and intervention prices fixed by the Council. Moreover the influence of public authorities on price formation means that unjustified increases are out of the question.

With regard to the question whether trade between Member States was

affected the purely commercial relationship between CSM and RT in no way restricted their freedom to trade or influenced the pattern of trade.

So far as exports are concerned, there is no incentive for CSM to export sugar, since its own production is not sufficient to supply its customers in the Netherlands, where it has a distribution network. Moreover it has never been asked to deliver sugar to customers in Belgium and cannot therefore have refused to do so (cf. decision, p. 25, Lt. Col.).

So far as imports are concerned the deficit in the Netherlands is only met to a limited extent by CSM's imports, the remainder being imported by SU, the three Netherlands dealers and third parties.

(2) Summary of the statement of defence

The *Commission's* reply consist of a pleading similar for the most part to its pleading in Case 40/73 and which is summarized earlier; cf. (a) (2) above.

The Commission defines its position on CSM's specific arguments as follows:

The fact of having been both producer and dealer in a system of partitioned domestic markets is no justification for making efforts supported by the practices of a competitor, to consolidate the economic effects resulting from a previous fragmentation of the market. It is precisely these practices known to and encouraged by CSM, which enabled it to take appropriate action to prevent the sale of French sugar (cf. below, 6).

If Belgian sugar had been able to compete freeely with Netherlands sugar the prices would have dropped in the Netherlands and the Netherlands authorities would have raised no objections.

CSM has not denied that it felt it was in a strong position, because RT had guaranteed its supplies, and also refused to sell to dealers who did not undertake not to supply CSM's traditional customers.

Whereas the import of raw sugar intended to be refined at a later date can possibly be justified by the problem caused by the need to distribute the work between refineries having different kinds of industrial plant, the import of white sugar by a producer would have the effect of securing existing outlets. In fact even if the amount imported was processed into cassonnade, other quantities of white sugar remain available for the traditional customers of the producer-importer.

Imports of sugar intended for non-producers were subject to restrictive conditions relating to their ultimate destination so as to ensure that they do not compete with CSM's sales.

(3) Summary of the reply

CSM takes the view that the present proceedings relate only to deliveries by RT, since the Commission no longer claims that there is any link between CSM and Pfeifer & Langen. CSM admits that it has up till now obtained from RT additional supplies, which are moreover small in both absolute and relative terms, needed to meet the requirements of its Netherlands customers. These purchases however are based on a unilateral decision by CSM founded solely on commercial considerations.

The complaint of not competing with other producers on their domestic market cannot be raised against CSM since it had too little sugar at its disposal. So far as RT's conduct is concerned it is based on a unilateral decision by this undertaking and not a concerted practice with CSM.

With regard to the alleged refusals to supply and to the restrictions relating to the ultimate destination of the sugar it is necessary to consider Export's letters,

produced for the Court's file by the Commission, in the light of the well known strained relations between this firm and RT in 1970/71. Export seems to have intended to collect evidence which would be overwhelmingly against RT. Therefore to base a case exclusively on Export's documents is out of the question.

Further these documents only deal with RT's sales policy which it adopted unilaterally in its own interests and in this connexion there are not and never have been any agreement or concerted practices between RT and CSM. As the Netherlands are a region which owing to its structure always has a deficit an agreement of this kind would only further the interests of Netherlands sugar producers. Moreover it is unthinkable that RT would come to an agreement with producers without obtaining a *quid pro quo*. The Commission however has not given any indication that this is what happened.

The argument underlying certain documents produced by the Commission, namely that under the terms of an agreement or concerted action with CSM or SU, Belgian sugar could only be exported to the Netherlands with the consent of Netherlands producers, has no foundation at all. Even if RT made a statement to this effect to Export it would have done so to mislead the latter undertaking.

With regard to the statement that the attitude of the persons concerned showed that RT 'guaranteed' CSM and SU the sales of their products in the Netherlands, the word 'guarantee' is deceptive since there was not in this connexion legally any binding promise.

CSM explained why it is wrong both in law and, on the facts, to compare CSM's position with that of an 'exclusive representative' of RT.

Neither is there any other evidence of the existence of the practices to which exception is taken. The Commission did not refer either to the abnormal conditions on the market or to an abnormal price structure. In particular so far as this price structure is concerned, CSM refers to its reply to the notification of objections in which it explained why these prices were, in its opinion, still below the target price if account was taken of certain costs which are not incurred in the case of a sale to the intervention agency. Faced with these detailed arguments it is not enough for the Commission to maintain that the prices ruling in the Netherlands are 3 to 7 % above the intervention price. CSM moreover challenges the accuracy of the figures submitted by the Commission and states that, insofar as the prices it applied were above the intervention price, the explanation is found in the factors mentioned in its reply to the notification of objections.

Even if it is assumed — *quod non* — that the conduct of CSM and RT stemmed from a concerted action, it nevertheless has neither restricted competition within the common market, nor affected trade between Member States. Purchasers who do not wish to obtain their supplies from CSM can always approach other factories in Belgium, West Germany or Northern France. CSM invites the Commission to produce all the figures for the trade in sugar between the Netherlands and the other Member States; they would show in particular that there is in fact 'free' trade in the frontier region of Belgium and the Netherlands, that is to say trade in which RT, SU or CSM does not take part.

So far as trade between Member States is concerned, CSM states that its share of imports into the Netherlands only amounts to 4 to 10 % and that there is undoubtedly competition between the various import channels. In this connexion it should provide it with particulars of the distribution of imports. If the volume of trade between Member States remained limited, that is a logical

consequence of the fact that national manufacturers had, in their own countries, a strong position which the applicant has already analysed in its reply to the notification of objections.

(4) Summary of the rejoinder

The *Commission* submits that, just as Article 85 prohibits agreements, whether these have as their object the distortion of competition or whether they have this effect although they have a different object, it suffices, in order to find that there has been an infringement of Article 85, to establish that there are in fact concerted practices without having to establish any intention to restrict competition. Commercial transactions between competitors are by far the best method of reaching agreement on the course of conduct to adopt on the market. CSM is not punished for having been 'in collusion' with RT but because it engaged in a concerted practice which is mainly embodied in the transactions with this undertaking. CSM at least knew the broad outlines of the additional measures taken by RT (refusal to supply to the Netherlands and incorporation of destination clauses in the contracts entered into with Belgian exporters), without which it would have been too risky, even for Netherlands producers, to buy from RT. RT decided not to compete on the Netherlands market, and CSM offered to cooperate with RT in the implementation of this intention, and RT in turn accepted this offer. Transactions between producers combined with additional measures are a sufficiently coherent, complete and permanent system to justify the claim that the persons concerned intended to influence the pattern of supply and that they in fact succeeded in doing so.

Purchases from RT are not based on a simple unilateral decision of CSM because the deficit which this undertaking is alleged to have only exists on paper. In a competitive economy a producer only sells his own production; if, for some reason or another, there is a fall in production, he should be content with a smaller share of the market. However CSM wished to retain its share of the market which is called the traditional market, and for that reason approached the competitor whose sugar surplus should have found a natural outlet on the Netherlands market owing to the opening of the frontiers. The price differences between the Belgian and Netherlands markets meant that this was a profitable operation for both parties: CSM bought sugar and at the same time peace on the Netherlands market, whereas RT sold sugar without any competitive exertion.

CSM's statement concerning the relations between RT and Export have no foundation and cannot affect the evidential value of the facts produced by the Commission.

In order to prove that the practices which are blamed existed it is unnecessary to show that the prices were higher than they would have been had it not been for these practices. In any case the deliveries by RT enabled CSM to cover completely the requirements of its so-called 'traditional' customers, and at a price which was fixed not by RT but by itself. In order to support the statements concerning the price level in the Netherlands the Commission produces a comparative table of ex-works prices of CSM, SU and the Netherlands trade and also of intervention prices. It states that CSM moreover is to treat its sugar as being sugar in category 1 and that, on the other hand, buyers are rather showing a preference for sugar in categories 2 and 3.

The Commission producers figures relating to trade between the Netherlands and Belgium and states that, although the volume of trade between the undertakings in question was relatively low in absolute figures, it amounted to a large proportion of the total volume of this trade, in particular because it is necessary to include the transactions subject to destination clauses.

(c) RT: Infringement of Article 85 of the Treaty

(1) Summary of the application

RT's arguments relating to this submission also deal partly with the complaint of protecting the Italian market. To that extent reference must be made to the summary under III-1.B.a above.

RT states that the Commission cannot blame it for having stressed the fact that sugar which it sold for denaturing, is in fact used for this purpose (decision, p. 25, Lt. Col.); because the distinction between the market in sugar for human consumption, on the one hand, and the market in sugar for export or denaturing, on the other hand, springs from various community and domestic administrative measures. Since the basic quota and *a fortiori* the maximum quota exceed Community requirements for human consumption, a part of the maximum quota has to be exported to third countries or sold for feeding-stuffs or to the chemical industry. Moreover the effect of Regulations Nos 766/68 and 2049/69, which establish systems of invitations to tender for the amount of the export refund and of the denaturing premium has been to abolish in these two sectors the guarantee provided by the intervention price. As it is only the market for human consumption which from now on guarantees a return equal to the intervention price, it is natural for a vendor who parts with his sugar at an excess price, to take measures to prevent a purchaser, in breach of the provision in the contract for sale specifying the destination, from competing with him by making use of a price concession granted because of the destination clause and offering an unfair price on the market for human consumption. Article 19 of Regulation No 100/72 provides moreover for supervision to make sure that the denaturing in fact takes place.

It is necessary to add that there were practically no opportunities of selling to the Belgian intervention agency because of the somewhat unfavourable attitude of the Belgian authorities which were afraid that this would entail administrative complications and cash advances.

RT does not have a department for the sale of white sugar abroad. It came to the conclusion that it did not have to establish such a department, having regard to the opportunities it had for placing large amounts of white sugar with foreign purchasers, which meant that it had no advertising, transport, or financial problem. Since this policy was dictated by its own interest, it did not ask for or receive any consideration at all from foreign producers.

The decision (p. 25, Lt. Col.) blames RT for having refused to sell sugar to customers in the Netherlands 'in spite of the fact that there were large surpluses ... in Belgium'. In the notification of objections this complaint is supported by two letters from RT, dated August and September 1968; however, at this particular time, sugar had to be imported from the Netherlands as is shown by the figures produced by the Commission and l'Institut national (belge) de statistique (Belgian National Institute of Statistics).

RT, with figures in support, sets about disproving the finding that, by selling to Netherlands producers, it made just as large a profit as it could have made by selling direct to consumers (decision, p. 33, RT. Col.).

RT takes the view that the main evidence of a concerted action produced by the Commission, namely the correspondence and memoranda of Export, ceases to be conclusive as soon as it is examined in the light of the relationship between the applicant and Export: as the two firms are controlled by the same shareholders, it was decided, at the end of the war, that in future RT would only be a sugar producer and Export would only be a sugar merchant. This separation of functions gave rise to a dispute

concerning Export's wish to be granted the exclusive right to sell the applicant's sugar. The replanning of exports, following the establishment of the common market in sugar, led the applicant to make direct commercial contact with large scale purchasers, thereby emphasizing that its interests conflicted with those of Export. In these circumstances Export sent certain telex messages and the fact that the contents were very damning for RT, was due to its wish to make up a case against it. RT however admits that the contents of these documents are based on statements which it in fact made to Export. In fact as it did not wish to explain frankly to Export that its own commercial interest required it to cut out middlemen in certain transactions, it appeared to it to be more appropriate, from the commercial point of view, to shelter behind arrangements it alleged it had made with its foreign associates.

(2) Summary of the statement of defence

The *Commission* replies in a statement of defence which is for the most part similar to the one delivered in Case 40/73 and which is summarized above, cf. a(2).

The Commission then gives the most important facts upon which it based its finding of a concerted practice between RT, Pfeifer & Langen and the Netherlands producers.

A series of letters exchanged by RT and Export in August and September 1970 show that RT did not wish to supply sugar for export to the Netherlands without the consent of the Netherlands industry. This commercial policy was later the subject matter of a contract for sale entered into between Export and a Netherlands importer.

It appears from other documents that, in many cases, Netherlands consumers who tried to obtain their supplies from RT, met with a refusal on the pretext that they did not have any sugar available.

Other documents prove that, in some cases, RT only agreed to supply Belgian dealers with sugar for export to the Netherlands on conditions stipulating the destination (the Netherlands milk products industry, denaturing) or excluding human consumption. These letters moreover reveal that RT exercised pressure on the Belgian trade to make it accept the control of the Netherlands market by Netherlands producers (cf. also 6 below).

The Commission produces detailed figures on the trends of the trade between Belgium and the Netherlands, which show that exports of white sugar from Belgium to the Netherlands increased from 9 700 metric tons in 1967/68 to 99 200 metric tons in 1971/72 whereas, during the same period, deliveries from the Netherlands to Belgium dropped from 4 000 metric tons to 200 metric tons. The Commission produces figures to support its view that, concurrently, deliveries from Belgian producers to Netherlands producers (or, with the latter's consent, to the Netherlands milk products industry) went on increasing until they reached almost 75 % of total deliveries during the last two marketing years. During the same period deliveries from French producers to the Netherlands fell, to such an extent that they were minimal during the fourth marketing year (500 metric tons).

If RT's deliveries are examined together with all the other measures and courses of conduct adopted by RT they cannot be explained on the ground that they represent a more advantageous commercial policy. When it sold direct to the Netherlands industry RT abandoned an independent commercial policy and, in agreement with producers of the Netherlands, prevented Netherlands consumers and dealers from obtaining their supplies freely in Belgium.

The Commission also points out that RT's deliveries to the Netherlands

producers cannot be justified by any technical reasons (the absence of any refining capacity) and that deliveries of raw sugar, from Belgium to the Netherlands, dropped from 1 000 metric tons in 1967/68 to 0 from the beginning of 1970/71.

Finally, the Commission submits observations on specific arguments put forward by RT:

The separation of the market for human consumption and the market for 'surpluses' is not derived from Community regulations. On the contrary, some documents, including the minutes of the meeting in Munich on 30 May 1968, prove that it was used by undertakings engaging in the concerted practices as one of the means of walling off domestic markets. RT preferred to export sugar to third countries or to sell it for denaturing, with the object of relieving the intra-Community market of amounts which could influence the price level of sugar for human consumption. It was this preference, and not the attitude of the Belgian authorities, which explains why RT never offered its 'surpluses' to the intervention agency.

It is not correct that at the beginning of the 1968/69 marketing year RT had to have recourse to Netherlands sugar. At that time Belgian producers had re-exported the sugar purchased from SU. During the 1968/69 marketing year RT sold more than 4 000 metric tons to Netherlands producers.

RT is wrong to attack the finding in the decision that 'it is not normally in the interests of a producer to sell a large quantity of sugar to one or more competitors' and 'he can make a larger profit by delivering direct to the dealers and consumers concerned'. The prices quoted by RT have no significance, since they reflect the condition of a market where there is no competition owing to the concerted actions to which exception is taken.

(3) Summary of the reply

RT submits that the Commission adopts a purely theoretical view of matters when it states that RT could require the Belgian authorities to accept the sugar offered to the intervention agency. Since in many respects it is dependant on its government it was forced to take account of the wishes expressed by the competent officials.

RT brings up again the question of the evidential value of the documents quoted by the Commission and points out that they are based solely on Export's own statements. With reference moreover to its application RT submits that the documents produced by the Commission show that, during the period in question, there was a clear conflict of interest between the applicant and Export relating mainly to prices. Finally the statements made by RT to Export are inconsistent with the fact that RT at the same time sold direct to consumers as is shown by a series of contracts produced in the annex to the application.

So far as what the Commission wrongly describes as 'refusals to sell' are concerned, RT submits that its reply to a request for supplies depends, *inter alia,* upon the price offered and the amount of stock available at the date of the request, account being taken of the sugar reserves intended for long established customers and export contracts already entered into. Consequently a negative answer can only be provisional.

The refusal to accept Export's offer is explained in addition by the wish to be able to conclude certain transactions on more favourable terms and direct with the consumer.

The statements denying that RT had little surplus sugar at the beginning of 1968/69 marketing year confuse the sugar at the beginning the meaning of Community regulations (1 July to 30 June) and the actual sugar marketing

year which runs from October to September. The requests from the Netherlands to which the Commission refers covered granulated sugar. Now, stocks of granulated sugar on 30 September 1968 did not exceed 5 360 metric tons, a very small amount for the purpose of bridging the gap between the two marketing years, bearing in mind that the consumption of granulated sugar in Belgium increased to 14 925 metric tons in the month of October. By refusing to accept the requests from the Netherlands in August and September 1968 RT therefore displayed elementary prudence. A detailed examination of the documents which the Commission produced in order to prove that the exports to SU and CSM are evidence that there were stocks available for delivery in August and September 1968 shows that these exports took place after the 1968 harvest. Moreover these exports were simply barter transactions and transactions for improvement by processing.

The separation of the market for human consumption from the market for surpluses, is in no way artificial. Whereas the sugar for human consumption at least fetches the intervention price, this cannot be said of sugars for denaturing, which face competition from substitutes. If a producer, for reasons which it is for him alone to determine, takes the view that he must sell specific amounts of sugar for denaturing, at a price below the intervention price, he is entitled to prohibit his purchaser from changing the agreed use of the goods sold unless he accepts the risk that this sugar influences the price of sugar for human consumption.

The system of invitations to tender relating to the amount of the denaturing premium (Regulation No 2049/69) is a speculation on producers' storage and cash difficulties, and its aim is to force producers to sell below the intervention price; that is why RT asks the Court to declare that the regulations establishing this system are null and void under Article 184 of the Treaty.

RT's transactions on the Netherlands market stemmed from the company's own commercial judgment and not from any concerted action. The company's conduct on the Netherlands market was in any case the same, because of the problems caused by the existence of large surpluses of raw sugar and of the absence of any commercial organization outside Belgium. RT cannot be blamed for partitioning the markets at a time when exports of Belgian sugar to the Netherlands increased more than ten times from 1967/68 to 1971/72. The drop in exports of Netherlands sugar to Belgium and of French sugar to the Netherlands is the logical consequence of the fact that RT was the producer most favourably placed to take an interest in the Netherlands market. It is moreover technical reasons, such as, for example, supplying CSM with lump sugar because it did not have the requisite machine tools, which account for the supplies of special grades of sugar. Granulated sugar was only supplied to CSM and SU in 1970/71 and 1971/72 and the amount did not exceed 25 000 metric tons per year.

(4) Summary of the rejoinder

The Commission replies that RT did not insist on the basis of Regulation No 1009/67 that the Belgian intervention agency should accept the sugar offered to it, because it did not want to run the risk that these sugars would be resold on the market for human consumption, and would thereby depress the price levels within the Community and because it wanted to prevent independent dealers from having access to these amounts.

The destination clauses must be understood in the light of the other measures taken by RT to protect the markets. Thus RT insisted on a denaturing clause for a certain amount of sugar sold in Germany, even after the abolition of the denaturing premium (Regulation No 356/69). Relying on the commercial correspondence between RT

and Hottlet the Commission maintains that the price demanded by RT by way of a penalty in the event of this sugar being sold for a normal industrial use was 4·6 % higher than the intervention price.

It cannot be accepted that mere commercial considerations (the absence of any commercial organization abroad, surpluses of raw sugar) determined RT's conduct. It is on the contrary the concerted action which explains why an undertaking having the economic strength that RT possesses did not consider it necessary to set up a commercial network on its competitors' territory.

The Commission does not consider that the explanation of the refusal to supply sugar in Holland in the autumn of 1968 is convincing. Having regard to Belgian consumption which increased in 1968/69 to 139 000 metric tons, stocks on 1 July (107 000 metric tons) amounted to one third of the annual consumption in Belgium and therefore were more than sufficient to meet requirements until the middle of September, since the new marketing season commenced in September 1968.

Finally the applicant puts forward the argument that the delivery of lump sugar is explained by the small sales capacity of the corresponding Netherlands market, which did not justify the setting up of the necessary plant, for the purposes of these legal proceedings and has not proved it.

(d) Pfeifer & Langen: Infringement of Article 85 of the Treaty

(1) Summary of the application

Pfeifer & Langen infers from an analysis of the effects of the previous organization of the market in sugar in Germany and of Community regulations that the movements of goods and the conditions of the market in the territory where it operates are explained in the last resort by the traditional commercial relations between the processing industry and German sugar producers, by the requirements of the German processing industry that the quality be maintained and continuous supplies guaranteed, by the part played by the intervention price as a legally guaranteed minimum price and also by transport costs and other factors (parities of currencies, compensatory monetary levies) impeding the free movement of goods. In particular the German processing industry depends upon continuous supplies and in the short term on sugar complying with very precise but often very different standards of quality. However, the experience gained by purchasers at the time of the German organization of the market in sugar showed them that they could be certain of being supplied efficiently by the applicant. For these reasons to begin with their attitude to new Community sources of supply was very guarded.

The argument that, had it not been for the practices to which exception is taken, the sugar could have been sold, at least now and then, below the intervention price, so that consumers would have suffered considerable damage, is based on a misunderstanding of the function of the intervention price. In fact its effect is that it performs the function of a legally guaranteed minimum price.

According to the Commission's view the target price is the ideal sale price, since it alone is likely to secure for beet producers a fair reward, without nevertheless being an unnecessarily heavy charge on consumer's income. However the prices applied, with few exceptions, did not reach this price, which shows that there was very great competition.

It is wrong to state that intra-Community trade was slack and mainly restricted to sales from producer to producer. In support of its rejection of this statement

Pfeifer & Langen produces a table of imports to the Federal territory and in particular to North Rhine Westphalia.

It also produces a table setting out particulars of its exports to Common Market countries and third countries. So far as trade with the Netherlands is concerned, this table only includes two large transactions, concluded with the Netherlands exporter Limako and covering a total of 15 000 metric tons; according to the confirmation of this order and of the offer to sell produced by the applicant for the Court's file this amount was intended for re-export to third countries. This destination is also proved by the fact that the sugar was offered in a special packaging. Pfeifer & Langen admit that 2 000 metric tons of this consignment were later processed into liquid sugar and sold within the Common Market.

Pfeifer & Langen emphasizes that it never sold sugar for denaturing and that it cannot therefore be blamed together with the producers for asking prices which vary according to whether the sugar was intended for human consumption or denaturing and export to third countries.

In another section of its application, Pfeifer & Langen analyse the facts and points of law which in its opinion show that the finding that it infringed Article 85 cannot be upheld. So far as the relations between the applicant and CSM and RT are concerned the decision is not based on any specific fact. With regard to the relations between the applicant and SU the Commission could only rely on the beforementioned transactions with the Limako firm. Pfeifer & Langen contracted with this undertaking, not because it was a Netherlands undertaking, but because it offered a more satisfactory price than German exporters. In order to prove that these statements are well founded, Pfeifer & Langen asks that a witness nominated by it should be heard.

(2) Summary of the statement of defence

The *Commission* states that, contrary to what could be expected, the applicant, which is still the principal manufacturer of sugar in western Germany and has refineries not far from the frontiers, scarcely increased its deliveries to the Benelux countries. Its deliveries to the Netherlands were almost all intended for manufacturers.

The Commission produces a series of documents from RT and Export which, in its opinion, show that there was an agreement between them not to interfere with national domestic markets.

The Commission also produces a series of letters from companies purchasing foodstuffs which, in its opinion, discloses refusals to supply because of an alleged shortage of stock, and also cases of aligning prices on those applied in the country of destination. One of these letters refers to the fact that Pfeifer & Langen informed one of the said companies of the existence of territorial agreements ('Gebietsabsprachen') with Netherlands producers. The manufacturers were said to have partitioned the various national markets by limiting the operations of dealers, either by imposing restrictions upon them, or by preventing them from selling the production of the said manufacturers; it quotes by way of example destination clauses imposed by RT and by a Belgian manufacturer controlled by RT on its purchases.

The Commission refuses to regard the persistent influence of national regulations for sugar markets as the only reason why Pfeifer & Langen did not deliver in regions bordering on Member States.

Pfeifer & Langen is wrong to treat the function of an intervention price in the same way as that of a legally guaranteed minimum price, because there is no reason why manufacturers should not sell

below the intervention price. It is equally wrong to regard the fact that sugar manufacturers have not succeeded in reaching the target price as evidence of the existence of intense competition. This argument is founded on a misunderstanding of the function of the target price, which is to supply a base for fixing the threshold price, but not to indicate the necessary price level to enable processing undertakings to obtain an adequate profit margin; the marked increase in production since the establishment of the European organization of the market in sugar proves that the intervention price already allows them such a margin.

With regard to transport costs the map produced by the applicant giving the geographical situation of the sugar factories shows that Pfeifer & Langen's factories are from the economic point of view very favourably placed for the delivery of sugar to the frontier region of the Netherlands. Experience moreover provides examples of deliveries over longer distances and transport costs cannot therefore explain the limited volume of deliveries in the sales areas of competing producers.

(3) Summary of the reply

Pfeifer & Langen then challenges the evidential value of the letters produced by the Commission of companies purchasing foodstuffs. The letter from the EDAH firm, of Helmond, to the Groupement européen des maisons d'alimentation et d'approvisionnement (the European Association of food and provision merchants) in Brussels, refers to the fact that Pfeifer & Langen attributed its lack of interest to the impossibility of obtaining better export prices to the Netherlands. The Commission, instead of going into the merits of this argument, relies on another passage of this letter in which EDAH speaks — without any justification — of an agreement between Pfeifer & Langen and Netherlands manufacturers for the partitioning of sales areas. The letter of Rewe-Zentralimport, of Cologne, to Général Biscuit, of Herentals, simply mentions the existence of long-term contracts entered into with all the large German consumers 'in order to control the consumption of sugar'; all this is mere conjecture.

A more detailed examination of the letter of the GEDELFI, of Cologne, to GEMAS, of Brussels, even discloses that the sender attributes the 'partitioning into areas' which it mentions, not to an agreement, but to the advantages arising out of the actual location of the factory in question.

Pfeifer & Langen denies that it ever refused to supply a dealer, if it had sufficient quantities of sugar available and the terms offered were as good as those offered by other purchasers. It is located in an area having a deficit of which production has only once shown a small surplus. In these circumstances it preferred the maintenance of its long-standing business relations with its traditional customers to the conclusion of occasional contracts. There is even less justification for using the before-mentioned letters as evidence of a 'refusal to sell', since they clearly show that the writers hoped to obtain better terms than those prevailing on the market.

The Commission is wrong to minimize the problem of transport costs, for they are the determining factor when sale prices are approximately the same and when deliveries are very large. It cannot refute this argument in the case of long-distance deliveries because the distance might be about the same for all competitors as it is in Italy, where on the whole the most important consideration is that supplies are guaranteed.

(4) Summary of the rejoinder

The *Commission* maintains that the arguments put forward by Pfeifer & Langen concerning the importance of transport are irrelevant. The Com-

mission's finding that there were no large sales of sugar across the frontiers of West Germany, Belgium and the Netherlands, cannot be validly attributed to the effect of transport costs.

The applicant's statements relating to refusal to sell and operations between producers are simply intended to reduce the importance of these measures. The applicant must not merely consider the documents which are evidence of its own refusals to sell. In effect the refusals of its partners to accept requests for supplies from the applicant's sale area are no less apt to prove the existence of a concerted action. The documents quoted by the Commission show that all the producers taking part in the concerted action continually refused the requests for supplies from their partners' markets.

The applicant passes over in silence the fact that, in the beforementioned letter, the GEDELFI firm referred to the impossibility of importing sugar from countries in the EEC.

(e) CSM and RT: Infringement of Regulation No 26

RT's arguments which also deal with the complaint of concerted actions for the protection of the Italian market have been summarized; cf. III-1.B.b.

(1) Summary of CSM's application

CSM infers from the spirit of Regulation No 1009/67 and from the situation before it entered into force, that the exceptions to Articles 85 to 90 of the Treaty, specified in Regulation No 26, apply to this case. In fact had it not been for its purchases from RT it would not, having regard to its inability to exploit fully its production and distribution capacity, have been able to pay beet producers a price higher than the minimum price. Further, the effect of the nature of the product and of Community regulations is to persuade each factory to remain as far as possible 'at home' ('chez soi').

(2) Summary of the later pleadings

The Commission only defines its position on the present submission in the rejoinder, by submitting, on the one hand, that CSM has not supported its statement with any specific fact and, on the other hand, that the payment of a price above the minimum price fixed by the Community after taking into account the various objectives of Article 39 of the Treaty, cannot, by definition, be regarded as 'necessary' for the attainment of these objectives.

3. Complaint that Pfeifer & Langen and RT engaged in a concerted practice having as its object the protection of the market of the Western part of the Federal Republic of Germany

A — Pfeifer & Langen and RT: Formal and procedural submissions

The submissions put forward by *Pfeifer & Langen* and referred to above under 2.Ba.-c. and g relate in essence also to the present complaint. The same applies to the submission of *RT* repeated above under 1.A.h. Reference therefore must be made to these sections.

B — Submissions on the substance of the case

(a) Pfeifer & Langen: Infringement of Article 85 of the Treaty

Pfeifer & Langen puts forward this submission to counter both the complaint relating to the protection of the Netherlands market and also the present complaint. To the extent to which the arguments put forward by the parties within the context of this submission relate to both complaints, reference must be made to chapter 2.C.d. above. The facts relating specifically to the present complaint may be summarized as follows:

(1) Summary of the application

Pfeifer & Langen submits that the documents produced for the Court file show that, having regard to the distances, if French and Belgian producers supplied the main sales area of Pfeifer & Langen, they had to incur fairly high transport costs compared with those which Pfeifer & Langen had to pay.

Pfeifer & Langen challenge the Commission's argument that trade in sugar between Member States was only on a reduced scale and that the competitive effects of sugar actually imported were neutralized by the fact that for the most part they were deliveries from producer to producer. With figures in support Pfeifer & Langen submits that large amounts of sugar were imported into the Federal Territory and in particular to North Rhine Westphalia. The German producer's share of these imports was, from the beginning of the 1968/69 sugar marketing year to the 1971/72 marketing year, 6 %, 3 %, 29 % and 20 % respectively. The relatively high percentage of 29 % is explained by the fact that in 1970/71 German producers were bound by contracts for the sale of sugar which, having regard to the bad harvest, they could only perform by importing sugar.

The Commission included the import market in raw sugar with the import market in white sugar and stated 'that after processing by the national industry', raw sugar is 'sold on the same market' (decision, p. 26, Rt. Col.), in order to support the argument that Pfeifer & Langen had a very large share of the total volume of imports. Moreover raw sugar is an intermediate product which can only be stocked to a limited extent and is intended, with a few unimportant exceptions, to be processed into white sugar, whereas there is no limit to the time during which white sugar can be stocked and it is multi-purpose. Raw sugar can therefore only be sold to refiners, either direct or through the trade. Moreover when the Commission blames Pfeifer & Langen for having restricted competition, it refers unequivocally to the market in white sugar.

In these circumstances deliveries of raw sugar from one producer to another cannot have any restrictive effect whatsoever on competition; in determining the volume of sugar imported by Pfeifer & Langen these deliveries must therefore be left out of account. Furthermore, purchases of raw sugar in Belgium are explained by the fact that Pfeifer & Langen always purchased very large quantities of sugar and that its traditional suppliers, in particular those established in Lower Saxony, found it more and more difficult to sell it the required quantities. Supplies had to be obtained from the nearest factory, not far from Liège, in order to cut down transport costs.

So far as imports of white sugar are concerned, Pfeifer & Langen makes a closer analysis of its share in 1970/71 and 1971/72. With figures in support it submits that in 1970/71 a large proportion of its imports was defective sugar, which is cheaper than best quality sugar, as it can be transported at low cost by inland waterway and is intended for the manufacture of liquid sugar, a product unsuitable for human consumption. Out of a total of imports of 22 900 metric tons it only resold 5 101 metric tons which had not been processed, that is to say 3 % of total imports into Germany during this marketing year. In 1971/72 out of 21 905 metric tons of white sugar imported to the Land of North Rhine Westphalia, Pfeifer & Langen were responsible for 3 574 metric tons, including 1 000 metric tons from France which were processed into liquid sugar.

Certain documents quoted by the Commission are not conclusive, at least as against the applicant. Thus the notes and telex messages of Export quoted on

page 23 of the decision only express the opinion of this undertaking and do not contain any statement relating to the facts within the direct knowledge of Export. The applicant moreover never had any commercial contact with Export and is nowhere mentioned in these documents. The same applies to the letter from RT to Export mentioned on page 47 of the communication; moreover, this letter speaks of 'our policy' — that is to say RT's policy — on the German market and in no way refers to a concerted action. The letter of one German trader quoted on page 50 of the communication does not either make it clear whether any reference is made to Pfeifer & Langen. With regard to the Moerbeke-Waas contract (decision, p. 34, Rt. Col.), the clause making exports to Germany subject to Pfeifer & Langen's consent is not based on any agreement between these two undertakings and is all the more difficult to understand as Moerbeke-Waas regularly export large amounts of sugar to Germany.

RT's sales policy, which Pfeifer & Langen never attempted to influence, is explained by objective facts and in particular by its need to export more and more raw sugar, whereas Pfeifer & Langen's refining capacity was much greater than the amount of raw sugar it had available. As the continuous sale of raw sugar is RT's most urgent problem, sales of white sugar surpluses became of secondary importance if only because there were better opportunities for storage. These circumstances caused RT to behave on the German market with a certain reserve, which was the consequence of straightforward commercial calculations and not of a cartel. In fact RT could foreseee that, if it delivered large quantities to Pfeifer & Langen's customers, the latter would be bound to reduce its purchases from RT, as no trader wishes to build up the position of its competitor.

Pfeifer & Langen had nothing to do with the drafting of the minutes of 20 April 1970 referred to on page 64 of the communication, which only records the finding that RT proposed to adopt a specific policy; the text does not state what must be understood by 'RT's obligations'.

The operations which were in fact carried out on an international level with the trade and other purchasers refutes the statement that RT and Pfeifer & Langen had entered into a reciprocal exclusivity agreement (communication, page 65).

RT had to attempt to use its best endeavours to persuade the sugar trade to adopt its sales policy for the German market, which could give the impression that there was a cartel. Having regard to RT's policy which included restrictions of its trade with free traders, and in particular with Export, the assumption cannot even be dismissed that, with the object of making RT believe it had infringed the European rules of competition, Export, in the case of its purchasers, was able to enlarge the presumed agreements entered into between RT and Pfeifer & Langen by giving free rein to its imagination. The Commission cannot be allowed to deduce from a telex message sent on 14 September 1970 by Export 'to a German wholesaler' the tenor of a telephone conversation which took place between RT and Pfeifer & Langen on 11 September 1970, so long as the identity of the persons taking part in this conversation has not been disclosed, and there is nothing to show that there was any similarity between the content of the conversation and the telex message. If it is assumed that the conversation relating to prices reported in this telex message in fact took place, the consequence of this meeting — as is shown by the telex message itself — was not a refusal by RT to sell in Germany but the offer to supply sugar intended to be exported to this country.

Another telex message of Export, of the same date and sent to RT (com-

munication, page 73), shows that, when the opportunity presented itself, RT was ready to supply Pfeifer & Langen's customers. Contrary to Export's statements repeated on pages 71 to 73 of the communication RT gave its consent to the conclusion by Export of agreements with German dealers.

(2) Summary of the statement of defence

The *Commission* states that RT to a great extent kept out of the German market, although Belgium was an area having a surplus and Germany one having a deficit. Deliveries by RT to Germany, after being insignificant during the 1968/69 marketing year, increased from the beginning of 1969/70, most of these exports consisting of white and raw sugar purchased by Pfeifer & Langen.

The Commission produces a series of documents which contain facts directly conforming the existence of an agreement relating to non-interference in Pfeifer & Langen's national market and also RT's intention not to disturb this market. Thus an internal memorandum of Export of 23 April 1970 states that 'Tirlemont has entered into a reciprocal exclusivity agreement with the other refiners in common the market, from wich it appears that marketing in the country of destination is reserved to the refiners of that country'. A letter from the Großeinkauf Deutscher Lebensmittel-Filialbetriebe company of Cologne of 10 March 1972 indicates that requests for deliveries addressed to manufacturers established in other Member States without exception met with refusals. It appears from other documents that RT only supplied Germany at prices aligned on the higher German prices. Finally the Commission refers to the contract of sale of 15 September 1969 between Moerbeke-Waas and Export, and also to the two telex messages of Export of 14 September 1970 to a German dealer and to RT respectively, which are mentioned earlier under 1.

Deliveries of white and raw sugar by RT to Pfeifer & Langen are mainly explained by their concern to avoid competition on the German market. This is as much a consequence of the size of these deliveries as of their economic context. It cannot be overlooked that there were also deliveries, on a large scale between other producers in the Community, which can be shown to have been dictated by the intention to exclude reciprocal competition. The Commission does not deny that, in some circumstances, it can be in the interest of a manufacturer to sell to a competitor, but there are no such circumstances in this case. It is remarkable that in September 1972, that is to say at a time when there was a sugar shortage in Germany, RT entered into an agreement providing for the sale of large quantities at a price below that at which Export could sell in Germany and which RT however considered was inadequate (cf. communication, page 75).

Certain arguments put forward by Pfeifer & Langen to justify its purchases from RT appear to be artificial. The question must be asked what interest RT could have in supplying the applicant with raw sugar on terms which the latter found advantageous at a time when it could process its raw sugar into white sugar and sell it, in partial satisfaction of the import requirements of the Federal Republic, on more favourable terms. Further, deliveries of raw sugar exceeded by a large extent 10 000 metric tons, which is the annual capacity of the nearest factory (at Lierse near Liège), and this fact destroys the validity of the argument based on economizing costs. Finally Pfeifer & Langen buys large quantities of raw sugar manufactured in Lower Saxony at distances varying between 350 and 400 kilometres; it cannot therefore agree that such distances are an insuperable obstacle to deliveries of white sugar by foreign manufacturers in its sales area.

So far as the distinction drawn by Pfeifer & Langen between raw and white sugar is concerned, it does not have to be

determined whether there is a single market for these tow products or whether two distinct markets exist. On this point the wording of the decision (page 26, Rt. Col.) is perhaps ambiguous. Since raw sugar has to be refined and sold on the market as white sugar, it does not matter whether a manufacturer sells a competitor raw or white sugar. By supplying a competitor with raw sugar when he still has the necessary refining capacity, it knowingly abandons the opportunity of selling on the competitor's market a corresponding quantity of white sugar.

According to the spirit of the decision the question whether sales of raw sugar from producer to producer are carried out directly or through dealers has no importance.

So far as the evidential value of Export's documents are concerned the Commission submits that this company had very close contacts with RT and that the documents provide clear evidence of RT's conduct towards Pfeifer & Langen. It is not difficult to explain why there is a clause subjecting the destination of the sugar to the restrictions in the agreement of 15 September 1969 between Moerbeke-Waas and Export; it conforms to the sales policy adopted by RT towards Pfeifer & Langen.

Pfeifer & Langen's construction of this policy, the starting point of its argument — namely the alleged need for RT to export more and more raw sugar — is not convincing. RT delivered to Pfeifer & Langen in 1970/71 and 1971/72, 24 800 and 23 500 metric tons of raw sugar respectively. These amounts, which show a drop from the one marketing year to the other, are relatively small if they are compared with the stocks of raw sugar held by RT during these marketing years (186 000 and 287 000 metric tons). On the other hand these stocks did not increase between the 1968/69 and 1970/71 marketing years. RT itself had sufficient capacity to refine the raw sugar it produced, which it did during certain earlier years, for example in 1967/68, when stocks, amounting to 222 300 metric tons, were higher than the stocks of 1970/71.

Even if it is assumed that RT had to export raw sugar, the inferences drawn by Pfeifer & Langen from this are not convincing. Deliveries of raw sugar from RT to Pfeifer & Langen also accorded with the latter's commercial interest for reasons connected with transport costs; it was therefore reasonable for RT to conclude that it was not jeopardizing its sales to Pfeifer & Langen by selling white sugar to this firm's customers. If it nevertheless decided not to do so, the reason could only be that Pfeifer & Langen undertook on its part to refrain from carrying out any operations in RT's sales area (east of Belgium and Luxembourg).

(3) Summary of the reply

Pfeifer & Langen replies that an evaluation of all the facts makes it clear that the argument that the markets were partitioned cannot be maintained for economic reasons.

Every cartel is presumed to procure reciprocal advantages for its members. However, Pfeifer & Langen's 'abandonment' of any intention to penetrate the Belgian market cannot even be regarded as consideration of approximately equal value, because it was never in a position to export sugar to Belgium on economically acceptable terms. In fact it neither had the necessary stocks nor the opportunity of increasing the volume of its production limited by the areas available for beet cultivation, the quality of the harvests and the Community organization of the markets in sugar. Further, selling to Belgium would have of necessity entailed losses; an example of this is shown by the attempt to sell made in September 1969. Finally its special situation prevented it from concluding any chance business

deal and on the contrary impelled it to look for and maintain close and lasting commercial relations at advantageous transport rates with large purchasers.

The Commission has not succeeded in refuting the arguments in the application that RT's attitude was caused by its concern to ensure the sale of its raw sugar.

The statement that RT could obtain in Germany better prices than in Belgium disregards the difference between a 'short term maximization' of profits due to a few chance sales and the 'optimum implementation' of the entire sales policy, which was to establish and consolidate long term commercial relations. The difference between the prices in force on the German market and those applied on the Belgian market were never sufficiently large to enable RT to sell in Germany at a profit, if account is taken of transport costs. Moreover, in those areas where the advantages which Pfeifer & Langen gained from the situation of their respective factories cancelled each other out (the frontier area between Belgium and Germany), only the intervention price could be obtained. These considerations would have applied *a fortiori*, if RT had supplied white sugar to Germany processed from raw sugar; having regard to the processing costs RT could not have regarded such deliveries as being worth while.

The argument that RT could make a larger profit by selling white sugar to Pfeifer & Langen's customers instead of supplying the latter with raw sugar disregards the sensitivity of prices in Germany. The Commission itself confirms in its statement of defence that a delivery of 10 000 metric tons could lower the price level. RT also had to bear in mind that white sugar intended for human consumption could not be transported by the cheap methods of transport used for raw sugar.

Pfeifer & Langen gives an example in June 1970 to prove that the difference in the prices obtained by RT respectively for raw and white sugar was appreciably lower than the processing margin fixed by the Commission itself. Pfeifer & Langen could only make a profit from raw sugar purchased from RT by processing it into sugar of particular qualities (liquid sugar, candy, granulated, lump sugar, etc.), which RT could not sell on the German market as it did not own a German trade mark.

Pfeifer & Langen concedes that production of white sugar of category II only enabled it to make a profit by means of an integrated processing cycle beginning with the sugar beet and ending with the finished product. However it preferred to produce without making a profit rather than lose money by bringing production in its factories to a halt.

The refining capacity of RT did not enable it to process all its raw sugar. However, even if RT had not exhausted all its opportunities for refining sugar, the Commission cannot base any of its argument on this fact because RT would have had to process the raw sugar into special qualities of sugar which it could not sell on the German market. Nor could RT sell special kinds of sugar through the trade. In fact orders for sugar to export to Germany sent to RT by Belgian dealers only covered current products, which were consumed on a large scale and were intended for the processing industry, and there was no demand in Germany for special Belgian sugar because of the differences in consumer habits.

With regard to the evidential value of the documents upon which the Commission relies Pfeifer & Langen states that it is Export — and not a sugar producer — which invented and used the formula 'everyone in his own house' ('chacun chez soi') (cf. communication, page 66).

The Commission, having discarded the argument that there is a single market in

raw and white sugar, seeks a way out by stating that a producer, who sells raw sugar to a competitor, gives up the opportunity of processing this raw sugar into white sugar and of competing with this competitor for the sale of this white sugar. Although RT sold raw sugar to the applicant it always had white sugar which could be exported on the German market and this is proved by its exports to other Member States of the Common Market and to third countries.

During a period of five years, Pfeifer & Langen bought only 3 500 metric tons of white sugar from RT, that is to say a negligeable amount. There is no justification for adding to this amount purchases from WZV in which company Pfeifer & Langen only owned 20 % of the capital and which it could not influence in a decisive way. The Commission cannot continue to claim that the bulk of the sugar trade between Belgium and Germany was carried out between producers, so long as it has not challenged the figures put forward in the application showing that the dealers' share of sugar imports was not less than 70 % even during the year 1970/71.

It is not surprising that RT dealt tactfully with Pfeifer & Langen so as not to run the risk of losing an important long-term outlet for about 10 % of its raw sugar. That is all the more true because the deficit in Germany was not sufficiently large for RT to expect to be able to sell sugar there at increased prices.

On the other hand the prices at which RT could sell its raw sugar to Pfeifer & Langen, after taking into account the processing margin, were well above the intervention price. The applicant nevertheless found these prices interesting as the freight rates were clearly lower than those applying to raw sugar from Lower Saxony. The Commission's arguments suggesting that Pfeifer & Langen should have obtained their supplies in Lower Saxony, rather than in another Member State, lead to a denial that there is a common market.

(4) Summary of the rejoinder

The *Commission* takes the view that the argument based on the absence of any 'consideration' is invalid; to put it at its highest there are grounds for discussing whether, having regard to the facts, a concerted action between Pfeifer & Langen and RT with the object of partitioning the national markets offered any advantage at all. None of the arguments submitted by Pfeifer & Langen can satisfactorily explain why this company did not supply either Belgium or Luxembourg with any sugar (except for small quantities) in spite of the favourable geographical situation of some of its factories.

The argument that the policy adopted by RT on the West German market was due to 'its concern to secure sales of raw sugar' is not convincing. Both Pfeifer & Langen and RT avoid any discussion of RT's refining capacity. In fact RT even buys additional amounts of raw sugar, for example from Lierse; on the other hand Pfeifer & Langen was not in a position to process the raw sugar delivered by RT immediately, but had to store it for several months as a contract dated 25 August 1969 discloses.

The favourable freight rates have only been proved in the case of deliveries from the Lierse factory, that is to say in respect of 10 000 metric tons, an amount less than one half of total deliveries in 1970/71 and in 1971/72. When Pfeifer & Langen stated that it could not make any profit from the processing of raw sugar purchased from RT into white sugar of category II, it admitted that it paid unduly high prices in order to ensure that RT did not compete with it in the sale of white sugar in the Western part of the Federal Republic of Germany.

With regard to the argument that only Pfeifer & Langen was in a position to make a profit on the German market by processing raw sugar into special sugar, the Commission submits that RT is a

large producer of special sugars and delivered large quantities of them to Netherlands producers CSM and SU. It is impossible to believe that RT could not sell such sugar in Germany under its own trade-mark. Moreover it emerges from the documents produced by RT that the latter undertaking delivered special sugars to the Federal Republic, although in reduced quantities.

It is a waste of time to discuss the question whether raw and white sugar belong to one or to several markets, having regard to the fact that according to the statements of Pfeifer & Langen and RT there was a close connexion between the deliveries of raw sugar and the decision by RT not to deliver white sugar to Germany. The argument that the dealers' share of imports was never less than 70 %, even in 1970/71, has no relevance because the applicant only took into consideration the relatively small imports of white sugar.

With regard to the evidential value of the documents produced, the Commission submits that commercial undertakings must be regarded as the most appropriate witnesses if the conduct of producers has to be evaluated.

(b) RT: Infringement of Article 85 of the Treaty

RT puts forward this submission in answer both to the present complaint and to those relating to the protection of the Italian and Netherlands markets. For the arguments submitted by the parties within the context of the present submission and which apply to the three complaints, reference must be made to chapters 1 B a and 2 C c above. The specific submissions relating to the present complaint may be resumed as follows:

(1) Summary of the application

RT submits that the sole explanation of its sales of raw sugar to Pfeifer & Langen is the interest which this undertaking had in obtaining its supplies in Belgium, because of the lower transport costs compared with those applying to any purchases this undertaking might make in Lower Saxony. As the German market on the other hand is very important for the disposal of RT's surplus sugar, it was natural for the latter to decide, independently and not as a result of any concerted action, to make sure that Belgian traders which it supplied should not block this outlet by systematic sales to Pfeifer & Langen's customers.

The correspondence reproduced on pages 71 to 75 of the communication relating to negotiations for the sale to one German consumer show that RT was simply anxious to obtain a price as near as possible to that which it could get in Belgium, and not to protect the price level of German producers. When RT was able to obtain a satisfactory price, it in fact sold to Export sugar intended for Germany. If RT happened to refuse to accept an offer made by Export this must in no circumstances be interpreted as a refusal to sell direct to German consumers. Such sales in fact took place as the 14 contracts which RT produced for the Court file prove; these sales enabled the company to obtain a higher price than that which it could have asked for if it had dealt through a business house.

(2) Summary of the statement of defence

The *Commission* replies that RT avoided any deliveries of sugar which might disturb Pfeifer & Langen's market as is shown by a telex message sent by Export to a German dealer on 14 September 1970 and also by two telex messages from Export to RT of 14 and 17 September 1970.

RT refused to sell to dealers wishing to obtain supplies from it or made offers to them with the object of fixing prices at the level obtaining in the country of destination, which meant that dealers in

this country were not interested in the purchase. That emerges in particular from a purchase contract entered into between Export and the Couplet firm on 17 September 1969 and from certain letters exchanged in September and October 1970 between Export, on the one hand, and the applicant and the Raffinerie Notre-Dame, on the other hand.

RT made Export, Hottlet and other Belgian traders accept obligations restricting their commercial freedom and designed to protect Pfeifer & Langen's market. Thus a contract for sale entered into on 15 September 1969 between Moerbeke-Waas, a manufacturer dependent on RT and Export, made any resale for human consumption in Germany subject to Pfeifer & Langen's consent. In a letter of 24 July 1969 RT insisted that Export should put an end to certain sales, of which German producers strongly disapproved, because of their low prices.

Supported by figures the Commission states that between the 1968/69 marketing year and the 1971/72 marketing year deliveries from Belgium to Germany went from 3 400 metric tons to 45 300 metric tons, the deliveries of RT to Pfeifer & Langen increasing at an even larger rate, namely from 800 metric tons to 29 800 metric tons. Some of these deliveries, which were not very large, were for WZV controlled by Pfeifer & Langen. Looked at in the light of the other measures adopted by RT deliveries from producer to producer can only be explained by the existence of a concerted action. It was normally in RT's interest to export to Pfeifer & Langen's sales area, which was geographically near and an area having a deficit where the price level was favourable. Moreover it was between 1970 and 1971 that deliveries from RT to Pfeifer & Langen increased, a period during which RT had the best opportunities of penetrating the market of the German undertaking.

The documents produced for the Court file by RT do not support the finding that this company did not seek to maintain the price level of German producers. The prices in the sales contracts produced in Annex II of the application were at least the same as or greater than Bfrs 1 100 per quintal, that is to say a price which does not call into question Pfeifer & Langen's level of prices as emerges from telex messages exchanged in September 1970 between RT and Export and also between the latter and a German dealer. Further the purchase contract entered into by Export with Moerbeke-Waas and Couplet, as well as the letter sent by the Raffinerie Notre-Dame to Export on 7 October 1970 show that sales to Germany for human consumption and at a price lower than Bfrs 1 100 were dependant upon Pfeifer & Langen's consent. So far as the contracts set out in Annex 10 of the application are concerned, there must be added to the price of Bfrs 1 100 quoted therein freight charges (for example Bfrs 35 per quintal from Tirlemont to Cologne), with the result that the sugar covered by these contracts cannot be offered on the German market at a price which does not protect Pfeifer & Langen.

With regard to the correspondence reproduced on pages 71 to 75 of the communication, RT's consent to the sale on the German market at Bfrs 1 100 was given too late, so that this operation was never in the end carried out.

(3) Summary of the reply

RT states that the figures produced by the Commission are suspect, as is shown in particular by the disparity between the figures put forward respectively in the communication and in the statement of defence for deliveries of Belgian sugar to Germany. For example in 1968/69, the volume of these deliveries is stated to be 23 800 metric tons in the communication and 3 400 metric tons in the statement of defence.

RT maintains that, whether it was in contact with producers or not, its

conduct on the German market was the same, taking into account the existence of large surpluses of raw sugar and the absence of a commercial set-up outside Belgium. Deliveries from producer to producer moreover do not in themselves amount to evidence of a concerted action. RT had to be able to dispose of its surpluses by concluding transactions with large purchasers without having to deal with the problems of finding and looking after customers and transport.

With regard to the need to break down the deliveries in the evaluation of the deliveries to other producers into raw sugar, special grades of sugar or granulated sugar, cf. 2.C.c. (3) above.

RT's reserve on the German market is explained by the policy, adopted without consulting anyone else, that it was undesirable to upset Pfeifer & Langen by an aggressive policy as this firm is the largest purchaser of raw sugar from RT at a favourable price.

(4) Summary of the rejoinder

The *Commission* takes the view that the variation between the different figures for the volume of exports from Belgium to Germany is explained by the fact that the periods for the performance of the contracts and the periods required for customs clearance diverge, because the time for delivery sometimes covers a long period.

To grasp the real significance of the clauses relating to the destination of the products supplied they must be assigned their proper place in the context of the other measures adopted by RT to protect the German market. Thus RT insisted that Hottlet complied with a denaturing clause in their agreement, to the extent of requiring payment of a penalty of Bfrs 50 for every 100 kg of sugar delivered to Germany and not yet denatured at the date when the denaturing bonus was abolished, which brought down the price of this sugar to 4·6 % above the intervention price. By way of evidence the Commission produces correspondence between RT and Hottlet from March to December 1969.

(c) RT: Infringement of Regulation No 26

This submission put forward by RT and referred to under 1.B.b. above also refers to the present complaint. Reference must therefore be made to this chapter.

4. Complaint that SZAG and Béghin have engaged a concerted practice having as its object the protection of the market of the southern part of the Federal Repulic of Germany

A — Formal and procedural submissions

(a) SZAG: Illegality of the policy adopted by the Commission for informing the public; defects in the communication; infringement of the rules of procedure of Regulation No 26: unduly short time-limits for the submission of observations

SZAG puts forward these submissions against this complaint and also the complaint relating to the protection of the Italian market. Reference therefore must be made to chapter 1.A., a., b., d., e. above.

(b) Béghin and SZAG: Infringement of Article 19 of Regulation No 17 and of Articles 1, 2 and 4 of Regulation No 99/63

(1) Summary of applications

Béghin and *SZAG* blame the Commission for having based its decision on facts which were not in the communication and thus to have infringed all the before-mentioned provisions (Béghin) or, at least, Article 4 of Regulation No 99/62 (SZAG).

Béghin submits that the Commission both in the communication and during the hearings before it, merely blamed the companies producing sugar in general,

that is to say without expressly referring to Béghin, for not having sold white sugar in the southern part of Germany. However, the decision (page 28, 36 to 37 under D) directed against Béghin a different complaint, namely that it sold raw sugar to German producers, whereas it could refine it and send it direct to consumers of this country.

SZAG gives the following examples:

- The statement that 'the numerous requests which were usually turned down from customers in the southern part of Germany', showing 'that there is an economic interest in importing sugar from other Member States' (decision, p. 37, Lt. Col.) is neither in the communication, nor in the documents therein quoted. At the time of the hearing of 17 October 1972 the Commission did not either refer to such requests. The Commission cannot rely on anonymous letters quoted on pages 92 to 93 of the communication as they are quoted in the context of the complaints made against SZV and not against SZAG. Nor can it rely on the two letters reproduced on page 50 of the communication, because they at the most enable the findings to be recorded that two German dealers wished to purchase French sugar, but not that there were 'numerous requests'.
- The decision (page 36 to 37 under D) asserts that there was a concerted practice between SZAG, of the one part, and Béghin and Sucre-Union, of the other part. However the communication (in particular pp. 108, 113 to 114) did not mention the other undertakings with which SZAG acted in concert and thus deprived the latter of the opportunity of going over the specific facts again and defending itself selectively against the accusations made against it.

(2) Summary of the statements of defence

The *Commission's* reply to Béghin is that the latter undertaking is mentioned among the undertakings set out on pages 1 and 2 of the communication and is one of the 'Belgian and French parties concerned', mentioned on page 101. The decision does not distinguish between raw and white sugar (cf. p. 36, Lt. Col., first paragraph under D; p. 44, Rt. Col., paragraph referring to Béghin), as the Commission considered that all Béghin's deliveries fall within the scope of the concerted practice to which exception is taken, that this company, whether or not it refines its sugar itself, competes with SZAG on the market for refined sugar, and that the two types of sugar together form one market. The object of the information given in the decision (p. 28, section 16), was simply to give particulars based on accurate data of the deliveries by Béghin to German producers. In its letter to the Commission of 25 September 1972 Béghin defined its position, with full knowledge of the facts, on the complaint relating to the deliveries.

The Commission's answer to SZAG is that it appears from the arguments developed by the applicant that the requests from the southern part of Germany were mentioned in the communication. If that had been done in connexion with SZV's conduct it would have been necessary to call attention to the fact that SZAG is part of SZV and had assigned to it the task of marketing its production in the southern part of Germany.

With regard to the claim that the communication did not mention undertakings with which SZAG acted in concert, it is enough to refer to the third indent of page 101 of the communication from which it clearly emerges that, in the opinion of the Commission, direct deliveries from French producers to producers in SZV's sales area, of which SZAG was aware, were intended to protect the sales area from the latter undertaking.

(3) Summary of replies

Béghin replies that pages 1 and 2 of the communication confine themselves to

enumerating the parties to whom it was addressed and do not mention any delivery or any specific complaint. The fact that it referred to 'the Belgian and French parties concerned' cannot lead Béghin to the conclusion that it was affected by the procedure relating to the market in the southern part of Germany. It was not mentioned by name in any part of the communication relating to the German market and therefore cannot possibly give an explanation of the contracts forming the basis of the alleged concerted practice which it entered into with SZAG and Franken.

SZAG does not define its position on the present submission.

(4) Summary of the rejoinders

The *Commission* replies that Béghin had a further opportunity of submitting its observations on the contracts which it entered into with SZAG and Franken. In fact when the applicants were heard on 17 an 18 October 1972 SZAG defined its position on the deliveries from producer to producer in the presence of the applicant.

(c) SZAG: Infringement of Article 190 of the Treaty

Under different headings ('the taking of evidence by the Commission'; 'defects in the operative part of the decision'; 'the alleged general cartel relating to the sale of sugar'; 'part of the decision relating to France'); SZAG puts forward, *inter alia*, certain submissions which can be understood as complaints that the statement of the grounds upon which the decision is based is defective. Some of these submissions deal at the same time with the complaint relating to the protection of the Italian market; to that extent, reference must be made to 1.A.g. above.

(1) Summary of the application

(aa) SZAG submits that the statements 'were it not for these sales between producers, RT would market its sugar independently on neighbouring markets' (decision, p. 35, Lt. Col.) and 'it is not normally in the interest of a producer to sell its products to a competitor instead of marketing them itself' (loc. cit.) — assessments which also form the basis of the complaints made against SZAG — are pure assumptions for which there is no evidence. Moreover, the last assessment does not correspond with the economic facts.

(bb) The operative part refers to an infringement which SZAG and Sucre-Union are also said to have committed in 1970/71. Moreover as the decision (p. 28) itself states, SZAG only bought from Sucre-Union in 1971/72; there is therefore a contradiction between the statement of the reasons and the operative part of the decision.

(2) Summary of the statement of defence

The *Commission* replies:

(aa) The arguments developed on page 35 (Lt. Col.) of the decision and quoted by SZAG do not concern SZAG and have not been used against the latter. With regard to the finding that it is not normally in the interest of a producer to sell to a competitor, that is an argument confirmed by experience, which could be proved by an expert's opinion.

(bb) If the operative part of a decision is to be understood it must be brief and general. If clarification or interpretation is necessary, reference has to be made to its grounds. In this case the latter show the exact duration of SZAG's participation in the infringement found to have been committed and for which it is blamed.

(3) Summary of the reply

SZAG makes no further comment on the submission under (aa) above. With regard to the submission under (bb), it states that the Commission has attempted to

bridge the gap between the grounds of the decision and the operative part by putting forward the claim, which is entirely incompatible with the decision (p. 28, Lt. Col.), that SZAG bought 4 600 metric tons of white sugar from Sucre-Union in 1970 through the 'Grundstücksverwaltungsgesellschaft' at Oberursel (cf. B. a. (2) below). Moreover new facts cannot be introduced during the procedure which are not in the decision.

(4) Summary of the rejoinder

The Commission's reply is to refer to the part of the decision which states that 'SZAG and Franken since the 1970/71 marketing year bought sugar from their competitors in France in increasing quantities' (p. 28, Lt. Col.).

B — Submissions on the substance of the case

(a) Béghin: Infringement of Article 85 Treaty

(1) Summary of the application

Béghin submits that it only supplied raw sugar manufactured in its Sillery factory, except for a small quantity of white sugar (286 metric tons, cf. p. 28, Lt. Col. of the decision). The Sillery production was always sold, either to French refiners or direct to foreign refiners, because the cost of refining raw sugar from Sillery, situated in eastern France, at Thumeries, that is to say in northern France, was too high.

Béghin produces a table showing, for the 1967/68 and 1971/72 marketing years, the production figures of the company's raw sugar and the proportion sent to the various areas where it was delivered. This table makes it clear that deliveries to Germany are due to increased production. The company also produces two contracts for the supply of sugar, entered into with SZAG on 23 September 1970 and 24 July 1974 which, in its opinion, do not contain any clause open to criticism under the EEC Treaty. Béghin's particular interest in these contracts lay in the fact that they enabled it to make daily deliveries which eliminated the cost of storing the raw sugar. This advantage even induced Béghin to agree to a price favourable to SZAG.

When Béghin accepted a purchaser's offer it did not have to concern itself with the economic position of this purchaser or with the commercial policy which it adopted on the German market, of which it was unaware and which it never for one moment thought of promoting.

Béghin submits that it did not compete with SZAG for the sale of white sugar to Germany, because it sold elsewhere all the white sugar in its possession. The Commission's claim that the firm could refine raw sugar produced at Sillery in its refinery at Thumeries and sell it later in the form of white sugar in Germany is absurd, having regard to the transport costs involved in such an operation.

The mistaken finding that French suppliers 'would be quite capable — and were during the two first marketing years — of refining all the amounts of raw sugar themselves' (decision, p. 37, Rt. Col.), disregards the fact that the amount of raw sugar produced at Sillery, totalling 35 000 metric tons in 1967/68, increased to such an extent that during the following marketing years it amounted to between 60 600 and 79 000 metric tons.

(2) Summary of the statement of defence

The *Commission* repeats first of all the argument on page 36 (Rt. Col., first paragraph under 1) of the decision. It adds that French producers continued to supply the Saar, although German factories are nearer to this region. Sucre-Union's deliveries to Germany were mainly limited, in 1968/69 and

1969/70, to sugar for denaturing; in 1970/71 it supplied larger amounts to independent middle-men, but these deliveries fell again in 1971/72. During the marketing years which have to be considered in this case, Béghin did not supply any German dealers or consumers; it supplied raw and refined sugar to SZAG in 1970/71 and to Franken in 1971/72.

The marked increase in exports of white and raw French sugar to the southern part of Germany (29 500 metric tons in 1970/71, 44 500 metric tons in 1971/72), was accompanied by an increase of the German producers' SZAG and Franken share of imports from 54 % to 71 %, without taking into account sugar in fact delivered to producers, for example 4 600 metric tons supplied by Sucre-Union to the 'Grundstücksverwaltungsgesellschaft' at Oberursel, a subsidiary of SZAG.

A series of documents lead to the conclusion that national domestic producers agreed to protect their respective national markets. In this sense the attempt by a trader in the Saar to establish commercial relations with a nearby German customer is significant. At the end of June 1968 this trader stated he was ready to supply French sugar, whereas in August 1968 he had to inform the other contracting party that he could not guarantee the stipulated deliveries, since French producers had agreed with German producers not to operate on the German market with the exception of the Saar market. Moreover this policy of inactivity must be compared with RT's similar conduct on the market of the western part of the Federal Republic (cf. 3.B., a. and b. above), which discloses the general trend of the sales policy adopted by European producers.

The Commission regards the attitude of members of SZV including SZAG as additional evidence of a partitioning of the market. They made their dealers agree not to market sugar from competing producers and tied their purchasers by loyalty rebates (cf., for further details see 7 below). Certain documents relating to Sucre-Union's conduct show that French producers took part in the implementation of this system.

Deliveries of raw sugar to SZAG cannot be explained by economic reasons but solely by the wish of the parties concerned to avoid any competition on the market in the southern part of Germany. The distinction between raw and refined sugar is irrelevant, because by supplying a competitor with raw sugar, Béghin decided not to deliver refined sugar on this competitor's market. Béghin cannot attribute the sales of raw sugar to inadequate refining capacity, because in spite of the continual increase of the production of raw sugar in its Sillery factory, the company always had the opportunity of refining the raw sugar which it produced. The large surpluses at its disposal, its geographical situation and the relatively high prices applied in the southern part of Germany should have provided it with the incentive to meet the requirements of white sugar of customers in the southern part of Germany. However, apart from supplying SZAG direct, it never sold any sugar in this region. If supplies for the southern part of Germany did in fact increase, it is no less true that the bulk of them went to producers. Further the contracts entered into between producers often included option clauses for large amounts, strengthening in this way the position of the producer-purchaser; by way of example the Commission refers to two contracts concluded between Béghin and SZAG.

The conduct of Béghin becomes even clearer if it is placed in the much larger context of the concerted action in which this company and SZAG engaged in connexion with deliveries to Italy (cf. 1 above).

Transport costs were not such as to prevent the sale of French sugar from

Reims to the southern part of Germany at competitive prices. In fact, on the one hand, the distance between Sillery and SZAG's refineries is longer than the distance between Sillery and Thumeries and, on the other hand, German prices are about 5 % above the French intervention price.

(3) Summary of the reply

Béghin replies that the Commission cannot make use of a general argument which does not in any way relate to the applicant. Thus Béghin is not included among 'the French producers' who 'continued to supply the Saar'; therefore the exchange of letters between a trader in the Saar and a German customer cannot affect it. Similarly it is in no way connected with the policy adopted by SZAG towards dealers or with the system of loyalty rebates. Finally the fact that Sucre-Union may have asked a German dealer to send its list of customers to SZV (cf. b. (2) to (cc) below) cannot be used against Béghin, which had nothing to do with this.

By describing the distinction between raw and white sugar as 'unimportant' the statement of defence contradicts the decision, which states that 'a restrictive effect on competition can only be denied in cases where a producer, who does not have his own refining plant, sells raw sugar to a refinery; ... such a producer of raw sugar does not compete with a producer of white sugar' (decision, p. 35, Rt. Col). The statement that Béghin could refine its sugar itself has not been proved and is inaccurate. For technical reasons it could only do so at Thumeries. However the refinery at Thumeries was in full production and could not absorb additional quantities of raw sugar from Sillery without incurring considerable capital expenditure which was not sufficiently justified by the difference between the prices on the French and German markets. Further Béghin's policy has always been to sell the raw sugar produced in its Sillery factory direct to refiners. Finally Béghin never received any offers to purchase white sugar from German consumers.

Even if it can be shown – *quod non* – that the policy adopted by Béghin was not the one which corresponded most closely to its own commercial interests, the only conclusion that can be drawn is that the applicant misjudged them.

The Commission cannot support its decision concerning the German market by considerations relating to the conduct of Béghin and SZAG in connexion with exports to Italy; the respective facts and figures concerning the German and Italian markets no less than the practices adopted on these markets have absolutely no connexion with each other.

With regard to the option clauses they are in general use and there is no reason for thinking that any such clause can enable SZAG to prevent direct deliveries from foreign producers to purchasers of the southern part of Germany. No importance whatsoever can be attached to any such statement, unless it is to show that during the performance of its contracts with SZAG Béghin received offers from German consumers. No such offers were in fact made.

(4) Summary of the rejoinder

So far as Béghin's statement that certain documents do not relate to this company is concerned, the *Commission* submits that the latter cannot sever its conduct from the general context in which the Commission has placed it.

The Commission's statement that it was in the interest of French producers to sell white sugar to non-producers established in the southern part of Germany is corroborated by the fact that Say, Générale sucrière and Lebaudy regularly supplied considerable quantities of white sugar to the German market.

The Commission repeats its submission that Béghin could refine all its raw sugar.

Even if Béghin could not refine this sugar at Sillery, it could store the Sillery production with the object of refining it when the Sillery factory was not working at full capacity. Moreover before and after the two marketing years in question the applicant in fact refined all the sugar which it produced at Sillery.

The argument based on additional transport costs which would have been incurred by refining raw sugar manufactured at Sillery fails to take account of the fact that the Commission never insisted that this sugar be sold to SZAG and that it could be sold to dealers anywhere in Germany, which was what Lebaudy, Say, Générale sucrière and, during the 1971/72 marketing year, Sucre-Union did.

So far as the option clause in the contracts with SZAG is concerned, it is an uncommon clause enabling SZAG to acquire automatically additional quantities at the price already fixed, if this company wanted to put a stop to or cut down any deliveries by its competitors to its customers. The object of this clause was therefore to protect SZAG's market.

(b) SZAG: Infringement of Article 85 of the Treaty

To the extent to which the arguments put forward by *SZAG* under this head also relate to the complaint concerning the protection of the Italian market reference must be made to chapter 1. above.

(1) Summary of the application

(aa) *SZAG* submits that the Commission has not proved the argument upon which the decision taken against it is based, namely that from the beginning of the marketing year 1970/71 there was a concerted practice between the applicant, on the one hand, and Béghin and Sucre-Union, on the other hand. The substance of the Commission's case is (decision, page 36, D, first paragraph) that there was first of all a concerted action between these three undertakings and that later this concerted action was implemented by purchases by SZAG from two French producers (cf. the sentence 'concerted practice ... whereby ...'). As proof of this preliminary concerted action the Commission says 'that this concerted practice is evident from the fact that deliveries from other countries were made between producers with a view to avoiding a loss of customers and of shares of the market', which begs the question: first of all the concerted action is considered as the reason for the applicant purchasing from French producers, then, these purchases are used as a basis for concluding that there is a concerted action.

When the Commission submits later (decision, p. 37, Lt. Col.)

'that if Béghin and Sucre-Union have from the beginning of the 1970/71 marketing year, regularly sold an increasing amount of sugar to their most important competitors in this sales area and thus enabled them to resell the sugar as a domestic product these operations stem from a concerted practice ...',

it only repeats in words, which are hardly different, the claim that there was a concerted action *because* the deliveries took place between producers.

(bb) SZAG challenges the Commission's claim (decision, p. 36, Rt. Col., p. 37, Lt. Col.) that 'French producers, by reason ... of the good prices obtainable would have been well able to market their sugar individually in SZV's sales area'. The failure by the Commission to produce accurate figures prevents the applicant from submitting observations on the Commission's statements relating to the level of prices applied in the south of Germany, which moreover contradict each other ('always close to the target price' — p. 36, Rt. Col. — and 'the target price is applied' — p. 37,

Lt. Col.). Moreover the target price and the intervention price cannot be usefully compared with the market price; on the contrary they should be compared with the net proceeds of sales, converted on a comparable basis. With figures in support SZAG maintains that such a calculation makes it appear that the price applied in south Germany was always either close to the intervention price, or even below it, except during the first two quarters of 1971.

Without saying so in its decision the Commission relied on the agricultural statistics of the Statistical Office of the European Communities (cf. communication page 8); moreover, this Office itself admitted that these statistics were incorrect.

(cc) SZAG takes great exception to the statement (decision, p. 37, Lt. Col.) that the small volume of French imports 'cannot be attributed to transport costs' and 'even over long distances..., these costs do not exceed the difference between the intervention price applied in France and the target price applied in south Germany'. The company produces figures showing, on the one hand, that freight rates for deliveries ex Reims or Tirlemont compare unfavourably with the rates applicable to deliveries from south Germany and, on the other hand, the difference between the intervention price and the average market price. According to these figures, French producers were only able to offset the unfavourable freight rates from the beginning of the 1970/71 marketing year.

SZAG states that imports of white sugar to Federal Republic went up from 43 200 metric tons during the 1969/70 marketing year to 98 200 metric tons in 1970/71, which proves the vital role played by freight rates and the operation of the normal market machinery.

It is misleading for the Commission to claim 'that the quantitative increase of imports during the 1970/71 and 1971/72 marketing years coincides with a remarkable increase of deliveries between producers' (decision, p. 36, Rt. Col.), and it is wrong to say 'that in fact, in comparison with the preceding marketing year' — that is to say 1969/70 —, 'much larger quantities were imported, but of these three-quarters were in the form of deliveries from producer to producer' (loc. cit., p. 27, Lt. Col.). From 1969/70 to 1970/71 the total imports increased by 55 000 metric tons, of which only 27 924 metric tons were deliveries between producers. German operators other than producers increased their imports from 41 861 metric tons in 1969/70 to 68 937 metric tons in 1970/71; they accounted for 70·2 % of the total amount of white sugar imported during the 1970/71 marketing year. The figure of 'three-quarters' put forward by the Commission is not even correct if account is also taken of imports of raw sugar.

SZAG is of the opinion that the argument based on the fact that French manufacturer supply the Saarland (decision, p. 37, Lt. Col.) disregards the special situation of the Saar, which SZAG describes in detail.

Finally SZAG submits that it is illogical to state that 'the many requests made (more often than not without success) by customers in south Germany show that there is an economic interest in importing sugar from other Member States' (loc. cit.), because the extent of the unfavourable freight rates only appears when the price is negotiated. This argument moreover cannot be accepted

because the communication did not refer to any request of this type.

SZAG asks the Court to arrange for some of these statements to be proved by obtaining information from certain named persons.

(dd) There is no evidence to corroborate the Commission's argument that SZAG's purchases from Sucre-Union and Béghin are based on a prohibited concerted practice. On the contrary various facts prove that there was no such concerted practice.

When the Commission referred to a 'remarkable increase' of deliveries from producer to producer (decision, p. 36, Rt. Col.) in 1970/71 and 1971/72, it failed, on the one hand, to state why it considers this increase is remarkable and, on the other hand, gave the false impression that SZAG had bought from French producers during the preceding two marketing years.

The additional purchases from Sucre-Union and Béghin in 1970/71 and in 1971/72 were commercially justified. They helped to make good a short fall caused by the combined effects of the bad harvest in 1970/71 and the increase in demand. Having entered into contracts with its customers for the continuous long-term supply of sugar and seeing that its stocks had dwindled SZAG made direct approaches to producers to obtain the lowest possible prices. Before purchasing from Sucre-Union and Béghin it contacted producers in Lower Saxony, and then foreign producers. These contacts would have been pointless if there had been a concerted action.

Even before the entry into force of Community Regulations SZAG purchased raw sugar from producers in Lower Saxony within the framework of the previous organization of the market in Germany and not therefore pursuant to any concerted action. A comparison between the volume of these purchases and of Béghin's deliveries shows that there was nothing unusual about the latter.

The statement that 'normally it is not to a producer's advantage to sell large quantities of his products to one or more competitors' (decision, p. 31, Rt. Col.) is incorrect to the extent to which it tends to give the impression that such sales can only be explained by the existence of a concerted practice. In this case this argument disregards the fact that the amounts in question were not considered either by the vendor or the purchaser to be 'large' and that such operations enabled the vendor to avoid certain additional marketing costs.

Another reason put forward by the applicant to justify its purchases from other producers is its policy of always maintaining the volume of its sales at a figure above the amount of sugar beet which its beet growers could be expected to produce, so that they do not have to modify continually the size of the acreage used for the cultivation of sugar beet. Deliveries between producers are moreover also customary in other trades.

The statement that Sucre-Union and Béghin sold 'regularly an increasing amount of sugar to their most important competitors' (decision, p. 37, Lt. Col.) is either incorrect or exaggerated. The expression 'regularly' gives the false impression that there were established business relations, whereas SZAG only bought once from Sucre-Union (namely 4 500 metric tons of white sugar in

1971/72) and bought no sugar at all from Béghin in 1968/69 and 1970/71. SZAG is not the 'most important competitor' of Sucre-Union and Béghin, as south Germany only represents one of the many possible markets of these companies and the latter are hardly exposed to competition from the applicant, except perhaps in Italy.

It is incorrect to state that 'the fact that the bulk of the deliveries by French producers covered raw sugar and sugar of inferior quality which had to be processed does not weaken the claim that competition was restricted; the suppliers were well able to refine all the amounts of raw sugar and to process the sugar of inferior quality into liquid sugar and moreover did so during the first two marketing years' (decision, p. 37, Rt. Col.).

— So far as Béghin is concerned this undertaking does not have the requisite plant to produce liquid sugar, and its factory at Sillery, from which SZAG bought raw sugar, because freight rates were the least unfavourable, had no refining plant for the production of white sugar. On the other hand if Béghin had transferred the raw sugar to its factories at Thumeries and then despatched it to Germany, the additional transport costs would only have increased the price of the product by about DM 60 per metric ton.
— So far as Sucre-Union is concerned they could not sell liquid sugar in south Germany at competitives prices, as the unfavourable freight rates were still more important than they were in the case of ordinary white sugar.

SZAG challenges the statements that the purchases which it made 'prevent the direct intervention of French producers on the south German market, so far as the amounts purchased are concerned', by absorbing 'the bulk of the amounts produced by the two French producers intended for the sales area of the southern part of Germany' and by directing them 'to the usual sales channels of the domestic market' (decision, p. 37, Lt. Col. and Rt. Col.). Sucre-Union and Béghin have an annual production of approximately 780 000 and 300 000 metric tons respectively, of which 400 000 and 120 000 metric tons, that is to say about 50 % of the total annual consumption of sugar in south Germany, had to be exported. It is therefore absurd to suppose that the small purchases of the applicant prevented Béghin or Sucre-Union from 'ear-marking' all their surplus sugar to south Germany.

In fact it is certain that Sucre-Union and probably Béghin made a direct appearance on the market like other French producers such as the suppliers of white sugar.

SZAG produces a long list of firms in Württemberg which — according to the information supplied by Mr Fleischberger the SZV representative in Stuttgart, to the Commission by letter of 4 November 1972 — imported altogether about 5 000 to 10 000 metric tons per annum. This list is moreover imcomplete, as the SZAG sales area does not only include Württemberg and Mr Fleischberger is not aware of all the cases which have to be taken into consideration in this case. It is evident from other figures produced by SZAG that in fact direct deliveries from foreign producers were very much larger than sales to SZAG. Further the figures show that the said deliveries increased — in comparison with the 1969/70 marketing year in respect of which, according to the Commission's decision, no concerted practice has been found to exist — from 250 % in 1970/71 and from 300 % in 1971/72. All this shows that there never was a concerted action such as the one alleged.

It is evident from the beforementioned letter that other German undertakings received offers of French sugar which for various reasons were not followed up by purchasers. SZAG produces another list of a large number of German firms to which Sucre-Union and probably also Béghin made offers in 1970/71 and 1971/72. Finally the Commission had to consider that, according to its own findings (decision, p. 45, Rt. Col.), Sucre-Union has 'always, to the extent to which this was possible, played the part of an "outsider" and ... also undertook, in addition to selling direct to foreign competitors, sales to dealers and processing undertakings in the market of the country of destination'.

The inaccuracy of the Commission's additional claim that SZAG had almost achieved 'the complete protection of the market of the southern part of Germany' (decision, p. 37, Rt. Col.) stems from the preceding arguments and also from the extremely small proportion which SZAG's additional purchases bore to the company's own production, namely, in 1970/71 and 1971/72, 0·05 % and 0·8 % respectively in the case of white sugar and 2 % and 3 % respectively in the case of raw sugar.

Finally the statement that 'dealers in the southern part of Germany are not allowed to import sugar from other Member States' (decision, p. 37, Rt. Col.) disregards the fact admitted in the decision (p. 28, Rt. Col.) that SZAG sells its sugar with the help of commercial representatives and not independent dealers. Moreover, the seventeen regional repesentatives were not the only sugar importing undertakings to be reckoned with. SZAG produces a list of German firms not tied to SZAG or SZV which offered sugar in south Germany.

It is wrong to state that purchases by one sugar producer from another *as such* infringe Article 85 (1) of the EEC Treaty. It is quite clear that a vendor cannot sell the same goods twice and the Court has already by implication held that restriction of competition cannot be inferred from the mere fact that no delivery can be made twice.

When the Commission blamed SZAG for having acted in concert with Sucre-Union (decision, p. 36-37, Section D), and at the same time conceded that Sucre-Union's operations were not in accordance with this concerted action (decision, p. 45, Rt. Col.) it is evident that it did not understand the concept of 'concerted practice' which presupposes actual cooperation corresponding to a previously agreed concerted action.

Finally it is illogical to start with the finding that the alleged concerted practice 'is aimed at keeping the market of the southern part of Germany free from the competition of other bidders' and then to conclude that this practice 'may affect trade between Member States' (p. 37, paragraph 3), because that is tantamount to inferring additional objective facts from the description of a subjective aim.

(2) Sum of the statement of defence

The *Commission* replies by arguments some of which are the same as those which it submitted in connexion with Béghin (cf. a. (2) above). It summarizes the facts upon which it relied in its decision and which, in its view, of necessity leads to the conclusion that there was coordination between SZAG and SZV on the one hand, and the French undertakings Béghin and Sucre-Union on the other hand, which knowingly substituted practical cooperation for the risks of competition.

In giving more direct answers to the arguments developed by SZAG the Commission makes the following submissions:

to (aa)

It is necessary first of all to bear in mind that SZAG never supplied sugar to the

Saar or France, although certain factories in the south of Germany are nearer to Alsace than the French factories. So far as French supplies of sugar to purchasers in south Germany other than German producers are concerned, they only represented in 1970/71 and 1971/72 1·5 % of the entire consumption of this region; it is moreover possible that some of them were intended for denaturing or for export to third countries.

to (bb)

The finding that the price level in south Germany was higher than the price prevailing in France (decision, p. 36, Rt. Col.) is based on market prices and not on producers' net return. The application of this method of assessment only makes sense if the net return of SZAG is compared with that of French producers and not with the target and intervention prices. Nevertheless it appears from the figures produced by SZAG that during the first quarter of 1971 SZAG obtained on average net prices which were the same as or higher than the target price.

to (cc)

Even if the argument that transport costs were an important factor is in general correct, it does not nevertheless explain the absence of any imports in the regions near the frontier. The figures produced by SZAG show that, in the case of deliveries from Reims to Koblenz or Freiburg, freight rates were not a serious disadvantage.

It emerges from SZAG's statement that, at least from the beginning of 1970/71, market conditions in every way favoured French deliveries to South Germany. The fact that French producers nevertheless preferred to sell to SZAG and Franken, and — as SZAG even admits — at prices particularly favourable for the purchasers is significant.

With regard to the increase in French imports to south Germany from 1969/70 to 1970/71, the Commission submits that the figures supplied by SZAG do not relate to white sugar and include deliveries to the Saar and to the western part of the Federal Republic. The Commission produces its own figures of imports in the sales area of south Germany which show that in the aggregate they went up from 7 800 metric tons in 1969/70 to 29 450 metric tons (of which 16 100 metric tons were dispatched to SZAG and Franken and to the 'Grundstücksverwaltungsgesellschaft', a subsidiary of the applicant) in 1970/71.

So far as the situation in the Saar is concerned the passage in the decision quoted by SZAG means that, in the opinion of the Commission, the preconcerted, reciprocal agreement to keep out of competitors' sales areas also stems from the fact that French sugar is not dispatched, via the Saar, to the remaining Federal territory and that south German producers, in spite of their favourable situation, do not supply the Saar.

The fact that many requests from non-producers were turned down cannot be attributed by SZAG to prevailing transport costs, when it admits itself that, since 1970/71, they have not been a determining factor. Further French sugar, although in small quantities, was in fact supplied to such operators. The Commission has the evidence to support the fact that south German dealers were in a position to sell French sugar in this region. It recalls that Sucre-Union urged its German representative to send SZAG or SZV a list of its customers.

The evidence proposed by SZAG does not clarify the determinative questions.

to (dd)

SZAG's argument proceeds on the basis that it is for the members of SZV, and not the other producers, to meet the requirements of south Germany. The Commission does not deny that it is in

the interest of the applicant not to lose its customers, but considers however that deliveries from French producers to the applicant amount to clear proof of a concerted action. Deliveries of white sugar appear in the circumstances to be abnormal. Nor can deliveries of raw sugar in the circumstances be explained by the fact that they were in Béghin's interest. This undertaking could definitely process its raw sugar into white sugar and, in order to sell white sugar in south Germany, find a solution which did not entail dispatching the raw sugar from Sillery to Thumeries before exporting it.

The preceding argument shows that the deliveries, to which exception is taken, can only be explained by the existence of a concerted action, so that the Commission need only define its position on the main points raised by SZAG:

The Commission's reply to the argument that the small quantities purchased by SZAG from French producers could not prevent the latter from selling their products in south Germany if such sales appeared to them to be profitable, is that the price level in south Germany was so much higher than the level of French prices that the price difference was such as to offset the unfavourable freight rates. Moreover SZAG construed the passage quoted in the decision (p. 37, Lt. Col.) incorrectly, because all the Commission said was that deliveries from French producers prevented their direct appearance on the south German market 'as far as the purchased quantities are concerned'.

The Commission does not maintain that no French sugar was supplied to purchasers other than sugar producers, but only that the amounts supplied were small. The computation of the volume of French sugar supplied to the processing industry in south Germany by Mr Fleischberger almost tallies with the figures produced by the Commission. The first set of figures (18 247 metric tons for 1970/71 and 21 521 metric tons for 1971/72) are produced by SZAG followed by the Commission's figures for deliveries to purchasers other than SZAG and Franken, namely 13 350 and 13 050 metric tons, after adding deliveries of raw sugar and deducting deliveries from producer to producer.

It is not surprising that offers of French sugar were made to a large number of customers, especially as Sucre-Union for a time had a representative, who was not connected with the SZV network. When SZAG states that it intervened in the competing offers of French producers, it concedes that French sugar was offered at lower prices and is inconsistent with its claims that unfavourable freight rates made it impossible to sell French sugar in south Germany.

With regard to the criticisms of the finding in the decision that 'dealers in the southern part of Germany are prohibited from importing sugar from other Members States', the Commission intentionally used the expression 'dealer' because the 'trade representatives' of SZV and SZAG not only deal in sugar but also sell other foodstuffs. The legal form adopted by SZV and its members, which control the entire supply of sugar in the southern part of Germany, in order to make these operators comply with their directions and to supervise their activities and in particular to make them agree not to work for other sugar producers, was the trade representatives' contract. The economic effect was that the independent trade found it was prevented from selling the sugar of members of SZV. In fact it was not in the interest of the independent trade to obtain its supplies through 'trade representatives' who were not allowed to pass on part of their commission. The 'trade representatives contracts' combined with the loyalty rebate gave SZV and SZAG a complete control of sales of sugar in south Germany; otherwise Mr Fleischberger, SZV's representative and SZAG would not have been able to

supply such detailed data on the customers who received offers of French sugar.

The Commission did not consider that deliveries from producer to producer amount in themselves to an infringement of Article 85. In this case they amount however to substantive evidence of the concerted practice in question. By stating that this practice tends to 'remove from this market ... the competition of other suppliers' the Commission based its case not on the objective which it was intended to attain but on its objective capacity to produce effects which are the opposite of competition.

(3) Summary of the reply

SZAG replies that the facts produced by the Commission can neither justify separately or as a whole the conclusion that a concerted action existed between Sucre-Union and Béghin, of the one part, and the applicant, of the other part, during the 1970/71 and 1971/72 marketing years.

The Commission itself found that consumption and production of sugar were in balance in south Germany, that the latter is not one of those areas where the normal conditions for trade across frontiers are fulfilled and that large imports of sugar to this region cannot therefore be expected. The fact that south Germany does not export much sugar to France cannot either be a matter of surprise for the Commission, having regard to its statement that the price level in south Germany was considerably higher than in France. Moreover when the Commission states that the factories of south Germany are nearer Alsace than French factories it forgets that there is a French sugar factory at Erstein, 20 km from Strasbourg.

With regard to supplies to the Saar SZAG states that in 1968/69 SZV appointed a representative for the Saar and that its share of this market went up from 0 in 1968/69 to 11 % in 1972/73 even though it lost its largest customer in 1971/72.

Sugar was in fact imported chiefly in the regions of south Germany most favourably placed from the point of view of freight rates and these imports had a considerable influence on the market, exceeding much more than 1·5 % of supplies. These deliveries went to the processing sector.

SZAG again challenges the statement that the target price was applied in Germany and the intervention price in France. This statement is based on data which the statistical office of the European Communities itself admitted could not be related to each other. The difference in price amounting to 2·86 u.a. taken from the statistics in question does not in fact exist; the difference is 0·136 u.a. per 100 kg.

If from the beginning of 1970/71 the difference between the intervention price and the market price was sufficient to offset the transport costs for French sugar, this difference did not however always succeed in offsetting the other costs to be borne by French exporters. This is proved by the fact that no French producer other than Béghin and Sucre-Union even exported large amounts of sugar to south Germany. Moreover the Commission did not accuse SZAG of having cooperated with other French producers.

The names were deleted in the documents produced for the Court file by the Commission to prove the circumstances in which SZAG is alleged to have imported sugar, namely the reciprocal acceptance by undertakings of their respective sales areas. They cannot therefore prove the Commission's statements and are not even admissible as evidence. Finally the documents related to the 1968/69 marketing year in respect of which SZAG has not been accused of any infringement.

Neither SZAG nor SZV received from Sucre-Union's representative a list of customers or information concerning the names of customers. Thus it is clear from a letter of Sucre-Union to SZAG of 20 June 1973 that the latter never gave its representative instructions of this kind.

The Commission still fails to understand the sales system of SZAG and SZV. It loses sight of the fact that these firms sell, through their representatives, *inter alia* to independent wholesalers, that is to say to 1 269 dealers who are not subject to any restriction so far as reselling to other dealers, exporting and importing are concerned. It is through this independent wholesale trade that all the sugar ultimately sold by retailers to consumers as well as all the sugar intended for the small processing undertakings, passes.

(4) Summary of the rejoinder

The *Commission* submits that the balance between consumption and production of sugar in south Germany depends upon the result of the beet harvest. During the 1970/71 marketing year the applicant and other members of SZV could not meet all the requirements of south Germany, but French producers did not avail themselves of this opportunity to gain a foothold on this market, preferring to sell large quantities of sugar to the applicant and to Franken.

The Commission takes the view that the price must be a particularly important factor in the sale of sugar, because it is a homogeneous product and its origin is of no significance. That explains why many dealers and consumers in south Germany wanted to obtain cheaper sugar in France. It is true that French producers exported large quantities to third countries; they also disposed of large quantities to the intervention agency (139 400 metric tons in 1970/71 and 119 000 metric tons in 1971/72, the greater part coming from Sucre-Union and Béghin). Bearing in mind the difference between the price in France and south Germany the French producers' disinclination to discuss this market cannot be explained by natural factors.

The Commission takes the view that in an open market there should be sales in both directions across national frontiers, to the extent to which transport costs are no obstacle. There cannot be a 'game preserve' for national producers even in a country having a sugar surplus. For this reason it is unusual that SZAG did not supply any sugar to Alsace. The capacity of the Alsatian sugar factory at Erstein does not exceed 15 000 metric tons which is too small to meet the requirements of Alsace. What however is even more important is the fact that French producers, instead of penetrating the markets of south Germany where they could obtain higher prices in 1970/71 and 1971/72, supplied large quantities to the applicant and to Franken. All this proves that the parties concerned accepted each other's traditional national market by complying with the motto 'everyone in his home' ('chacun chez soi').

The Commission makes no observations on the accuracy of the applicant's statement that SZV acquired a share of the Saar market from 1968/69. It is nevertheless of the opinion that an 11 % share of the market has to be regarded as very small, in view of the unfavourable geographical situation of French producers.

So far as the prices applied in south Germany and France are concerned, the observations made in reply to the communication confirmed the Commission's assumption that the target price was applied in south Germany whereas the intervention price was applied in France.

Contrary to the applicant's statement French producers other than Sucre-Union and Béghin supplied sugar to the

Federal Republic, although only very small quantities were involved, (about 21 000 metric tons in 1970/71 and 10 000 metric tons in 1971/72).

The Commission states that it is ready to produce the originals of the documents from which it had deleted the names, if the Court requests it to do so.

With regard to the handing over of the list of Sucre-Union's customers the Commission makes the formal request that the former representative of this undertaking be heard as a witness.

The Commission denies that it failed to understand the way the distribution system adopted by members of SZV functioned. According to the applicant's own statements the independent wholesale trade is only concerned with supplying the retail trade, whereas the processing industry absorbs approximately 55 % of the sugar and is exclusively responsible for imports. By supplying this sector through commercial representatives, who had to carry out its instructions, SZV appreciably reduced the free wholesale trade's opportunities of selling foreign sugar, because the processing industry had normally to meet part of its requirements from local producers.

The Commission brings up again the problem faced by Béghin of the absence of a refining plant at Sillery. It takes the view that Béghin could sell in France the white sugar refined in Thumeries from the raw sugar from the Sillery factory and supply other amounts of white sugar to the regions of south Germany which are accessible because communications are shorter.

The Commission takes the view that it is wrong to ask the Question what advantages SZAG could offer Béghin and Sucre-Union in exchange for the negative attitude of these firms on the German market. It is hardly to be expected that French producers did not know that the capacity of this market to absorb sugar was limited. The advantage for French producers was probably due to the fact that SZAG and Franken had offered them favourable prices.

5. The complaint that RT brought economic pressure to bear on Belgian exporters

RT, a single submission: Infringement of Article 86 of the Treaty

(a) Summary of the application

RT denies that it 'exercises or is in a position to exercise a decisive influence on approximately 85 % of Belgian sugar production' (decision, p. 19, Lt. Col.). Its share of the Belgian market does not exceed the 65 % of Belgian production which it markets. The undertakings Oreye and Moerbeke-Waas, although they are under its financial control, from 1969 to 1972 supplied large quantities of white sugar to the Netherlands and German consumers. RT requests that Baron Kronacker, the chairman of Export and Mr Adriaenssen, managing director of Suikerfabrieken van Vlaanderen (Moerbeke-Waas), be heard as witnesses to prove that it is false to say that Moerbeke-Waas and Oreye 'only occasionally depart from the sales policy determined by [RT]' (decision, p. 38, Lt. Col.).

Contrary to the statement in the decision (p. 38, Lt. Col.), Belgium, together with Luxembourg, does not form a substantial part of the common market so that Article 86 can be applied 'having regard to the fact that sugar production is not concentrated there but over a geographical area including all Member States'. The Commission itself admitted this concept in its proposals for amending Article 4 of Regulation No 17 (OJ C 92 of 20 July 1970, p. 16 *et seq.*).

The findings by the Commission of a refusal to sell to Export and Hottlet are explained by the fact that no sugar was available (autumn 1968) and that the

price offered by Export was too low (in summer 1970). These two undertakings moreover can scarcely be regarded as victims of economic pressure, as is shown by two letters from Export and from the evidence of Baron Kronacker, chairman of Export, and Paul Hottlet, managing director of Hottlet.

(b) Summary of the statement of defence

With regard to the size of the market of Belgium and Luxembourg in relation to the Common Market, it must be borne in mind that according to the *Commission* production in Belgium and Luxembourg reached 770 000 metric tons in 1971/72, whereas French, German and Italian production amounted to 3 230 000 metric tons, 2 150 000 metric tons and 1 150 000 metric tons and that there is surplus production in Belgium compared with the Netherlands and Italy which depend partly upon Belgian exports to meet their requirements.

An undertaking has a dominant position when it has the opportunity of adopting an independent course of conduct which enables it to act without taking any particular account of its competitors, purchasers or suppliers. Thus there is such a dominant position when an undertaking, because of its share of the market or its share of the market together with for example the technical knowledge, or raw materials or capital at its disposal, can fix prices and control the production or distribution of a significant part of the products in question. RT is in such a situation; its dominant position on the Belgium and Luxembourg market is created by its own share of this market and also by its decisive influence on Moerbeke-Waas and Oreye in which it has controlling interests. Further, five directors of RT were members of the board of directors of Moerbeke-Waas, whereas conversely a director of this firm was on RT's board of directors.

Thus it was only to be expected that the commercial policies adopted by these two firms conformed to RT's policy. Moerbeke-Waas, when selling to Export for a German destination, observed the price level (Bfrs 1 100 at least in the case of sales for human consumption) agreed between RT and Pfeifer & Langen, although the current price was Bfrs 1 086·50 and imposed restrictions with regard to the ultimate destination of the sugar (in particular sales for human consumption were subject to the consent of Pfeifer & Langen). Several contracts with Hottlet contained similar clauses. Oreye, on its part, ensured that this minimum price for Germany was applied, which led Export to state in a letter of 5 October 1970 to Oreye that the proposals of this firm were 'the same as those which the Raffinerie tirlemontoise asks for direct when it negotiates commercial transactions with our firm'. It cannot be inferred from the large amounts supplied to Netherlands and German consumers that there was an independent commercial policy so long as the conditions and the destinations of these supplies are not disclosed.

The Commission, in connexion with the dominant position for which it blames RT, finds that the pressure of which it complains is expressly acknowledged in two passages where RT states — in relation to the German market — that it 'had to ensure that Belgian traders which it supplied with white sugar do not destroy this opportunity by systematic sales to Pfeifer & Langen's customer's (application, p. 16, paragraph 2) and that it 'was compelled, when it had to sell sugar for denaturing at a lower price, to adopt adequate measures to prevent purchasers from breaking their word by reselling this sugar on the market for human consumption at a lower price than the intervention price, which would have disorganized the market' (application, p. 33, paragraph 1).

In order to prove the economic pressure brought by RT, the Commission produces a series of documents. So far as the relations between RT and Export are concerned, — apart from a letter from Export to RT of 20 August 1967 which makes it appear that the pressure

concerning the destination of the sugar sold to Export for export commenced before the entry into force of the common organization of the market – there is a letter from RT to Export of 24 July 1969 requesting that deliveries to the German market for human consumption of amounts 'intended' for denaturing be brought to an end, a series of Export's internal documents covering the period from February to April 1970 – from which it emerges in particular that RT made sure that Export supplied sugar to the destinations fixed by RT – and a series of telex messages from RT to Export covering the months August and September 1970, the content of which is substantially the same; finally, a contract entered into between Export and RT on 5 October 1970 which contains a clause relating to the destination of the sugar upon which RT insisted.

So far as the pressure brought to bear upon Hottlet, also relating to the destination and the price of sugar, is concerned, it is disclosed in a letter from RT to Hottlet of 19 March 1969 and fourteen contracts entered into between these two firms.

RT's policy to Export and Hottlet is very well illustrated by its letter to Export of 24 July 1969 which reads: 'having previously informed you of our policy towards our foreign colleagues and having received your assurance of genuine cooperation ...'.

Finally, the Commission produces a letter from Export and Jacobson of 1 October 1970 relating to a contract in which Export intimates that unless it complies with 'the essential requirements of RT's general commercial policy of which we have been notified ...' it will cease to have the exclusive right, together with Hottlet, to sell sugar intended for export by RT.

(c) Summary of the reply

RT takes the view that even control of 85 % of the Belgium-Luxembourg market – assuming this is proved – hardly amounts to a dominant position within the meaning of Article 86. Because if it is accepted that a Member State such as Germany can comprise a 'substantial part' of the common Market, this cannot however be done in case for Belgium, where, even when sugar production in the year 1971/72 reached a 'historic record' of 770 000 metric tons, it only represents less than 10 % of Community production (8 100 000 metric tons for the said marketing year). Similarly the number of Belgian consumers (10 million) is small compared to the total number of consumers in the Community (180 million before its enlargement).

RT has no such opportunity for adopting an independent course of conduct as the Commission alleges, either towards suppliers who are entitled to the minimum beet price, or to purchasers, having regard to the fact that in Belgium and France, the Netherlands and Italy the national authorities fix a minimum price.

RT states that it is unable to give precise information on the specific transactions carried out by Oreye and Moerbeke-Waas and in addition to the evidence it offers to adduce it requests that the Raffinerie Notre Dame (Oreye) be heard by its chairman, Augustin Roberti, Esq.

RT admits that, at the time when its interests and Export's were in greatest conflict, it notified Belgian undertakings, including Oreye and Moerbeke-Waas and also those in which it had no interest, that, according to its calculations, a price of 11 000 francs for sales to Germany was justified. As a result of this notification other undertakings adopted the same price policy towards Export so far as these sales were concerned. But RT never at any time gave instructions either to Moerbeke-Waas or to Oreye on this point.

In RT's letter to Hottlet of 19 March 1969 it seeks to ensure that this firm

complies with the clause under which it must only resell sugar for denaturing. This conduct is justified; moreover, Article 19 of Regulation No 100/72 provides for measures for checking that sugar is in fact denatured.

(d) Summary of the rejoinder

The *Commission* denies that the 'notification' of prices which are claimed to be justified acquires another meaning because it was also sent to independent refineries.

With regard to the size of the Belgium-Luxembourg market it is not enough to consider the production figures and the number of consumers; account must also be taken of the surplus Belgian production (772 000 metric tons in 1971/72) over domestic consumption (351 000 metric tons for Belgium and the Grand Duchy of Luxembourg) and over the maximum quota (628 000 metric tons). The size of the Belgium-Luxembourg market is increased by the strong position of RT both on this market and on the Community market.

6. Complaint that SU and CSM brought economic pressure to bear on Netherlands importers

A — Preliminary submission: SU had no legal existence during the period to which the present complaint refers

In putting forward this submission (summarized in greater detail under 2.A.a. above) against the present complaint, SU's main argument is that the complaint refers to the 1969/70 marketing year, a period before the formation of the applicant company.

B — Formal and procedural submissions

(a) SU and CSM: Illegality of the policy adopted by the Commission for informing the public; unduly short time-limits for the submission of observations; adoption of a single decision

These submissions, of which the third is only put forward by SU, are summarized above in Chapter 2.B.a., b., h.

(b) SU: Absence or inadequacy of the statement of the reasons upon which the decision is based

Some of the submissions raised under this head by *SU* also relate at the same time to the complaint of protecting the Netherlands market; on this point reference is made to the arguments developed by the parties in Chapter 2.B.i. above.

(1) Summary of the application

SU takes the view that on the following points the statement of the reasons upon which the decision is based is silent or, alternatively, that the reasons are inadequate:

The Commission has not clarified the statement that the Netherlands sugar market 'constitutes a substantial part of the Common Market' (decision, p. 38, Rt. Col.).

When the Commission states that 'the two Netherlands sugar producers, SU and CSM, have a dominant position' (loc. cit.) it fails to go on to say whether it considers these two companies as a single undertaking or whether — and if so why — it adds the respective shares of the market of each of these companies together.

Without giving any reasons the Commission states that SU and CSM 'are able to behave independently and this enables them to act without taking any particular account of their competitors' (loc. cit.).

The statement that the two undertakings 'contrôlent' ('supervise') almost all the

sugar imported into the Netherlands (loc. cit.) can only be understood if the Netherlands verb 'controleren' is given the meaning borrowed from the French verb 'contrôler' and not its normal Netherlands meaning.

Finally the Commission refers to 'threats' which SU and CSM are said to have uttered to some dealers (decision, p. 39, Lt. Col.) without stating what the threats consisted of.

(2) Summary of the statement of defence

The *Commission* states that as the number of the inhabitants of the Netherlands is known and everyone uses sugar to a greater or lesser extent, it did not have to give full particulars of the reasons why it considered that the Netherlands market constitutes a substantial part of the Common Market.

For the rest of its defence reference may be made to the Commission's statement on the substance of the case (see C.a.(2) below).

(3) Summary of the reply

According to *SU* the fact that the population of the Netherlands is known does not absolve the Commission from giving detailed reasons for the interpretation which it gives to a judicial concept which has not yet been examined in detail.

With regard to the question whether SU and CSM must be regarded as a single undertaking for the purposes of applying Article 86 the Commission should have put forward facts which were specific and can be checked.

(4) Summary of the rejoinder

The *Commission* takes the view that the decision focuses clearly on the essential fact, namely that SU and CSM adopted a common attitude towards dealers and that this justifies treating both firms as one for the purpose of applying the concept of 'dominant position'.

(c) CSM: Absence or inadequacy of the statement of the reasons upon which the decision is based

Some of the submissions raised under this head by *CSM* relate also to the complaint concerning the protection of the Netherlands market; on this point reference must therefore be made to the arguments developed by the parties in Chapter 2.b.1. above.

(1) Summary of the application

CSM submits that the statements on page 39 (Lt. Col.) of the decision, which relate to the 'threats' which CSM is alleged to have uttered against the dealers, are incomplete. The Commission fails to give particulars of the content, time, place and persons affected by the measures to which exception is taken.

(2) Summary of the statement of defence

The *Commission* considers that it described with sufficient accuracy the practices which it found that CSM had engaged in. In these circumstances it is unnecessary to know either the time or place of the action, or the names of the persons.

(3) Summary of the reply

CSM submits that, in any case, the Commission has not adequately proved its claim that CSM and SU must be regarded as forming one unit for the purpose of the evaluation of the alleged pressure brought to bear upon Netherlands dealers.

(d) SU: Lack of clarity in the operative part of the decision

(1) Summary of the application

SU states that the Commission infringed the principle of legal protection by not

showing clearly, in the operative part of the decision, under what form and in what manner the company applied the economic pressure for which it is blamed.

(2) Summary of the statement of defence

The *Commission* replies that it emerges clearly from the statement of the reasons upon which the decision is based that SU is accused of having used methods which bear no relation to those adopted in fair competition so as to induce Netherlands importers not to give up supplying SU's customers; the decision describes this method in detail.

(3) Summary of the reply

SU submits that when the Commission states that the company engaged in unfair competition, it limits itself to evaluating a course of conduct. The decision nowhere explains 'in good Dutch' what the Commission regards as 'fair' or 'unfair' ('loyal' or 'déloyal'). Further, it does not describe, 'in a detailed manner' the methods employed by SU.

C — Submissions on the substance of the case

Preliminary observation

The complaint of economic pressure brought to bear upon Netherlands importers is partly based on the same fact as those in support of the complaint of protecting the Netherlands market (cf., on the one hand the decision, p. 25, Lt. Col. to p. 26, Lt. Col., p. 33, Rt. Col., on the other hand, p. 38, Rt. Col. to p. 39, Lt. Col.). Reference must also be made to Chapter 2.C.a. and b. above.

(a) SU: Infringement of Article 86 of the Treaty

(1) Summary of the application

SU blames the Commission for not having produced a single fact in support of the allegation that the Netherlands sugar market constitutes a substantial part of the Common Market. It seems that the Commission regards the concept of 'substantial part of the common market' in a purely geographical sense, whereas there is a case for taking economic factors into consideration as well.

There is no justification for the statement that SU and CSM 'cooperate closely in almost all their operations' and 'have a dominant position . . .'. In contrast to the formula used by the decision according to which SU and CSM 'are able to behave independently and this enables them to act without taking any particular account of their competitors', SU determines its policy independently of CSM and has to take very careful account of the operations of both this society and the exporters of other Member States and of its customers' requirements.

SU denies that it ever, either alone, or together with CSM, made dealers agree to resell sugar at fixed prices, to resell sugar to it and not to continue to import into the Netherlands without its consent; similarly it denies having 'threatened' importers in any way whatsoever. When the Commission says that the 'traditional' imports of its dealers are 'threatened' by the applicant it implies that importers have the right to be sheltered from any competition by SU.

(2) Summary of the statement of defence

Cf. first of all B.b.(2), first paragraph above

The *Commission* replies by submitting substantive considerations on certain submissions put forward under the head of defects in the statement of the reasons upon which the decision is based (cf. B.b.(1) above), and makes the following submissions:

The question whether two undertakings may or must be considered as one unit for the purpose of applying Article 86 must be examined each time in the light

of economic facts. In this case the reasons put forward mentioned in section 8 of the decision (page 19, Rt. Col. to page 20, Lt. Col.) justify the claim that SU and CSM together have a dominant position on the market. More particularly these two companies:

— in practice almost always applied the same prices to the most important products;
— applied to essential trading points conditions of sale which were the same or at least aimed at and achieved the same commercial and economic effects;
— sent, at about the same time, letters in the same terms to retailers, whenever the latter did not abide by the consumer prices applied by SU and CSM.

SU and CSM brought unlawful pressure to bear on independent Netherlands dealers, when it made them accept the obligation not to trade with SU's and CSM's customers and to comply with the latter's price policy. This course of conduct is all the more reprehensible because Netherlands producers knew they could rely on the support of RT, which, on the one hand, was prepared to supply them with the quantities which they needed and, on the other hand, compelled Belgian dealers to cooperate in the beforementioned protection of the Netherlands market. SU and CSM moreover acknowledged that they made isolated price concessions in order to tie their customers, and if such actions are taken by undertakings having a dominant position, they may also infringe Article 86.

In the case of imports of French sugar it is clear that the resale of this imported sugar to domestic producers is a gesture of despair by the dealers who were taken unawares by SU and CSM. This assessment of events by the Commission is shared by certain sugar market experts.

By calling attention to the facts established in the decision and in the statement of defence the Commission has discharged the burden of proof which lies upon it. It does not have to produce as well express statements from the representatives of SU and CSM from which it can be inferred that the latter were aware that their conduct was against competition.

(3) Summary of the reply

SU does not accept the argument that, because the conduct of SU and CSM on the market converges, the influence which these two undertakings exerted on the market can also be examined together. When there is any such convergence it can be explained without recourse to the argument that these two undertakings intended to cooperate; in this connexion the company makes the following submissions:

SU refers first of all to the paragraphs of its application relating to the influence exerted by the Netherlands authorities on the price of sugar (cf. 2.C.a. above). The price of sugar in the Netherlands fluctuated between 1/3 % and 5/8 % above the intervention price, leaving the undertakings with practically no room to manoeuvre. Producers were compelled by the organized retail trade to adhere to vertical price maintenance. The similarity of these two producers' conditions of sale comes as no surprise since a contract for the sale of sugar is relatively simple and its form and content is mainly the result of modifications arising under Netherlands legislation. The prices in the catalogues are in most cases modified by rebates granted to customers. During the period in question, SU and CSM were in lively competition with each other and each of them gained from and had to lose customers to its competitor. With figures in support, SU maintains that it increased its share of the market at CSM's expense.

In the case of imports CSM, a direct importer, adopts a different policy from SU, which imports through dealers and

has recourse to 'option agreements', which enable it to compete actively with producers and foreign exporters.

With regard to the 'threats' which SU is alleged to have uttered against Netherlands importers, it refers to its application and to its statements in reply to the notification of objections. Since SU considers that the Commission does not take adequate note of the arguments developed in these documents it summarizes its version of the facts as follows:

In 1968 a pool of Netherlands importers could buy 70 000 metric tons of French sugar at a price which, having regard to the weakness and the later devaluation of the French franc and the financial measures in support of exports taken by the French government, was very much lower than the Netherlands intervention price. This sugar was offered to long standing customers of SU at lower prices than those applied by the latter. One of its customers, the 'konzern' Van Nelle, dealing in foodstuffs asked the sales director of SU to come and see him and required him to adopt his prices at once and to repay a large sum for sugar supplied in the past. SU had in fact to bring down its prices to those offered by importers. On the other hand Van Nelle accepted the explanation 'that it was only because of the monetary crisis, the measures granting aid for exports and the unlawful refusal by the EEC to take any measures' that importers were able for the time being to offer sugar at a price lower than the intervention price and for this reason the excessive profits earned in the past were out of the question. Other customers of SU also obtained price adjustments.

When SU acted in this way it certainly did not adopt a policy of 'predatory price-cutting' aiming at the complete and systematic elimination of a competitor but it availed itself of its right — acknowledged in fact in Article 60 (2) of the ECSC Treaty — to adapt its prices in accordance with a competitor's offer.

The Commission is also wrong to state that the aim of these concessions was to 'tie its customers'; such an effect could only be produced if SU had granted its customers the right to an adapted price also in respect of later transactions.

As the offers made by SU and importers were at the same price level, importers kept very large quantities in stock. In fact small Netherlands consumers preferred Netherlands qualities and packages and large scale consumers preferred stable commercial relations which guaranteed them regular supplies delivered without delay during relatively long periods to commercial relations of short duration. Faced with this situation Jacobson asked SU to help importers. For personal reasons and as a gesture of goodwill SU took back part of the foreign sugar packed in small bags. Innundated by a flood of complaints SU was compelled to pack the sugar once again in 50 kg bags.

In general SU did not bring any pressure to bear on importers and the anonymous documents produced by the Commission, probably based on incorrect information, contain no evidence to the contrary.

At no time did SU know that it was 'backed' by RT's policy.

(4) Summary of the rejoinder

The Commission takes the view that the arguments put forward by SU divert attention from the real problem, namely the relation of the forces of the Netherlands importers and producers to each other. There was unquestionably a joint dominant position in relation to importers, if the figures quoted in the decisions and the practices in question are considered.

With regard to the economic pressure brought to bear upon importers the facts mentioned by SU are only one half of the truth. The systematic alignment on cheaper offers made by importers

certainly amounts to an abuse of a dominant position, because such an alignment can only be effected by producers if they can be certain of being able to obtain from the nearest region having a surplus all the quantities required in addition to their own production in order to supply the group of long standing customers within the framework of a system of separate markets.

In these circumstances the Commission cannot accept the explanation that SU, as a gesture of goodwill, complied with a request made by importers of their own free will. This version of the facts is moreover inconsistent with some of the documents produced.

(b) CSM: Infringement of Article 86 of the Treaty

(1) Summary of the application

CSM denies that it and SU can be regarded as together forming one single undertaking having a dominant position. SU has only been in existence since 16 July 1970. There was no close cooperation between CSM and SU's predecessors; the Commission makes no reference moreover to them. Since the Commission has reserved evaluation of the agreements entered into between SU and CSM for other administrative proceedings (decision, p. 20, Lt. Col.) the Commission cannot base any argument in this case upon them.

The Commission does not take account of the competition of Netherlands and German dealers and certain Belgian producers. There is therefore all the more reason for being unable to claim that CSM, whose share of the market amounts to about 30 %, has itself a dominant position.

With reference to the abuse for which it is blamed CSM argues that the disputed decision gives no indication of the place and time when it is alleged to have brought these pressures to bear on Netherlands importers. The Commission does not give any specific information on the particular conduct of CSM and, *a fortiori*, does not produce any evidence of any such conduct.

(2) Summary of the statement of defence

The *Commission* submits similar considerations to those put forward against SU (cf. a.(2) above).

It adds that CSM contradicts itself when it confirms, on the one hand, its intention to protect its long standing customers by competing with dealers in the sales to the milk industry and by denying, on the other hand, that it brought illegal pressure to bear on dealers.

(3) Summary of the reply

CSM states that the Commission, having realized that the company's share of the market does not come within the definition of a dominant position under the case-law of the Court, had to invent a dominant position held by CSM and SU together. Moreover these two undertakings are independent both economically and legally. Their cooperation in certain sectors does not extend to their sales policy.

The facts relied upon by the Commission to support the claim that the two undertakings constitute a single group, are not conclusive. The documents produced contain no evidence of parallel behaviour on the market. The uniformity of prices is due to the agreements between the Ministry of Economic Affairs and the Netherlands sugar industry.

The circulars of 2 and 3 April 1969 issued by CSM and SU respectively and produced by the Commission, must be interpreted in the light of the special circumstances of the 'sugar war', which ranged Netherlands retailers against each

other. This war, referred to on page 52 *et seq.* of the communication, no longer has any relevance in these proceedings.

The criteria to be applied in order to treat the two Netherlands producers as being one undertaking, which the Commission fails to mention, should at least include a narrow legal or economic link between the two undertakings. However such a link did not exist. On the contrary CSM endeavours to ward off the attempts by several undertakings, including SU, to secure for themselves a decisive influence by purchasing their shares.

Even if CSM and SU together have a dominant position, this does not mean that CSM is in law responsible for the conduct of SU or of the director of this company.

The expression 'sugar market' used by the Commission is not clear. The Commission fails to say whether it took into account competition from sugar substitutes. It also omitted to take account of the fact that the various qualities of sugar are not interchangeable.

Finally the Commission's statements in connexion with the infringements of Articles 85 and 86 are incompatible, because it is difficult to establish that SU and CSM have a dominant position on the Netherlands market and at the same time to record that they face potential competition from foreign sugar manufacturers.

(4) Summary of the rejoinder

It is the *Commission's* view that, in order to establish a jointly held dominant position, it is only necessary to show that the economic rôle of the undertakings in question, their size, their position on the market and their conduct have sufficient points in common to justify the conclusion that their position in relation to certain suppliers, competitors or purchasers is not occupied by them as individual undertakings but is a position which they jointly hold. Now CSM and SU acted in concert with each other at the time of the 'sugar war' and also when substantial amounts of sugar were imported from France in 1968. Their attitude to Belgian imports was also the same. In this connexion it is significant that a representative of SU could say, in the presence of a representative of CSM and without being contradicted by the latter, 'that it is not in the interest of the sugar industry that cheaper imports of sugar disturb the market', and also that 'it is in no one's interest for the sugar industries to compete with each other'.

The Commission stresses that it regards as unlawful economic pressure, within the meaning of Article 86, the defence of a sales area which is 'traditional', if the conditions of competition are distorted by the combined effect of a concerted practice (in this case with RT) and a dominant position (in this case jointly held with SU). This also applies if, in such circumstances, a tendency to adopt an aggressive commercial course of conduct on competitors' 'traditional' territory is apparent.

So far as the market which has to be taken into consideration is concerned sugar substitutes may be ignored so long as these products do not enable Netherlands sugar importers to offset the restriction of their field of activity effected by CSM. Neither must the market in question be subdivided according to the various qualities of sugar, as the dealers are able to offer comparable qualities to those of the producers.

7. Complaint that SZV prevented its agents from reselling sugar from other sources and tied its customers by the grant of loyalty rebates

A — Formal and procedural submissions

(a) SZV: Illegality of the policy adopted by the Commission for informing the

public; illegality of the communication; unduly short time limits for submission of observations

These submissions in *SZV's* application are supported by arguments, the substance and wording of which are broadly similar to the arguments relied on by SZAG in support of its corresponding submissions; reference must therefore be made to Chapter 1.A.a., b. and e. above.

So far as the submission based on the illegality of the communication is concerned, SZV relies on a memorandum of 9 October 1972 which is substantially similar, although some of the wording is different, to SZAG's memorandum of 28 September 1972 (cf. 1.A.b.(1) (bb) above).

So far as the shortness of the time-limit fixed by the Commission for the submission by the parties of their observations is concerned, SZV states that it decided not to make use of the right, confirmed by the case-law of the Court, to develop its point of view in writing even after the expiration of the said time-limit, since it took the view that the Commission no longer took account of further observations. In fact, in its notice of the hearing of 17 October 1972 the Commission stated that 'the written phase of the hearing' was closed and Mr Jaume, who presided over the oral hearing, remarked that undertakings 'have a period of two weeks from the date of the hearing within which to deliver to the Commission written documents completing their statements (there is no question of an extension of the time for delivering a reply)'.

The Commission replies by developing arguments similar in almost all respects to those which it uses in connexion with the similar submissions raised by other undertakings relating to the complaints concerning the Italian market (cf. 1.A.a., b. and e.(2) above).

(b) SZV: Infringement of Article 4 of Regulation No 99/63

(1) Summary of the application

SZV blames the Commission for having based its decision on facts which were not in the communication and thereby to have infringed Article 4 of Regulation No 99/63.

(aa) Thus, on page 122 of the communication the Commission stated that SZAG's share of the entire production of all the members of SZV was 70 %; that SZAG had a direct influence on 'the second largest sugar producer' that is to say Franken; 'that by means of its majority shareholding in SZV, [SZAG] controls almost all the production of sugar in South Germany'; for these reasons SZAG occupies a dominant position in south Germany. These statements do not include the assertion that SZV also has a dominant position (decision, p. 39, Rt. Col). In fact, on the one hand, the argument based on production does not apply to SZV which is not a producer, and on the other hand, the communication did not state that SZV was directly responsible for supervising the sale of sugar produced in south Germany, but only attributed this supervisory task to SZAG.

(bb) The communication (cf. p. 122 *et seq.)* only blamed SZAG, and not SZV, for having abused a dominant position. Even if this complaint referred to measures taken by SZV, the latter could not conclude that the decision would prefer this complaint *against it* and thus drop the argument that SZV depends upon SZAG because of the latter's controlling interest.

(2) Summary of the statement of defence

While the *Commission,* concedes that the communication blamed SZAG for abusing a dominant position, it submits that it is clear from the context of the communication that SZV was also referred to. Thus the communication (pp.

122 and 123) found that 'the behaviour of the Süddeutsche Zucker AG and its sales organization 'SZV' towards the sugar industry, must also be evaluated on the basis of the provisions of Article 86 of the EEC Treaty'; that, 'by virtue of paragraph 9 of its trade representatives contracts, SZV the sales organization of SZAG, makes its middlemen agree ...'; and that the grant 'by SZV to its customers of a bonus' called a quantity rebate which 'amounts to DM 0·30 per 100 kg' is an abuse. The Commission, in its decision, attributed the dominant position to SZV, because it learnt from the written observations of the parties that SZAG as a shareholder in SZV only has limited voting rights. SZV markets almost all the production of its members and has entered into trade representatives contracts and granted the loyalty bonuses in question, its position and conduct on the market have of necessity to be evaluated under Article 86. As the communication expressly mentioned the operations of SZV, the contents of the decision could not come as a surprise to the latter, which, moreover, defined its position on this point during the administrative procedure.

(c) SZV: Infringement of Article 190 of the Treaty

Under the heading 'Taking of evidence by the Commission', *SZV* makes a submission which may be understood as alleging defects in the statement of the reasons upon which the decision is based. The arguments put forward in support are the same as some of the arguments put forward by SZAG in the context of the similar submission made by this company. Reference must therefore be made to Chapter 1 above and more particularly to Section A.g.

B — Submissions on the substance of the case

SZV, Single submission: Infringement of Article 86 of the Treaty.

(1) Summary of the application

(aa) *SZV* denies that it has a dominant position within the meaning of Article 86 of the EEC Treaty.

It submits that 'the southern part of Germany', is not a 'substantial part of the common market'. The expression 'southern part of Germany' is vague. The area in which SZV operates is limited to seven of the eleven German Länder in only two of which SZV's share of the market corresponds to the figures mentioned by the Commission and in only three of which it exceeds 50 %. This geographical subdivision of a Member State at least deserved an explanation. The production and consumption of sugar in this area increased to about 10 % only of Community production calculated up to the 31 December 1972 which is not a substantial proportion. SZV invokes the communication of 27 May 1970. — Moreover as the decision which was made after 1 January 1973 and also refers to the future, lays down that the parties concerned must bring to an end the infringements found to have existed, the Commission should have taken into consideration the company's share in the enlarged common market, which only amounts to 8 %.

The fact that SZV 'sells almost all the production of its members', that it 'decides the price and sales policy itself' and that, 'when members of SZV sell individually they use the same agents' (decision p. 39 Rt. Col.) has no connexion with the existence of a dominant position. The crux of the argument is, therefore, how the Commission intends to show that SZV is in a position to act without taking any particular account of its competitors. Now the Commission mentions first of all that it is necessary to evaluate SZV's conduct towards its purchasers' (decision, p. 39, Lt. Col.), without, however, giving any particulars at all of this evaluation. The statements relating to the conduct

towards competitors are therefore irrelevant. Moreover, they are not accurate. The applicant's share of the market only reached the proportion of 90 to 95 % mentioned by the Commission in two of the eleven German Länder. Finally 'the continuance of the system of local representatives' and 'the grant of loyalty rebates' cannot be considered at the same time as causes of the domination of the market (decision, p. 36, Rt. Col.) and as an abuse (decision, p. 39, Rt. Col.). In fact SZV is exposed to competitive pressure in particular from French producers, which, as they are compelled to sell their large over production, often make offers to customers in south Germany and compel SZV to ensure that they are not accepted by means of conditions of sales in conformity with the trends of the market. Although SZV may in fact have succeeded, it cannot be inferred that it is 'in a position to act without taking any particular account of its competitors' (decision, p. 39, Rt. Col.). The existence of this competitive pressure is moreover proved by the information which the Commission obtained from Mr Fleischberger (cf, 4. B (b) above); further, it is the consequence of the doubling of German imports of white sugar during the period from 1969/70 to 1971/72.

The decision is inconsistent when it states that SZV is not subject to any competitive pressure because of the small volume of imports (decision, p. 39, Rt. Col.), and at the same time blames it for granting loyalty rebates to prevent imports (decision, p. 40, Lt. Col.). If the first statement was correct, these rebates cannot play the part attributed to them by the Commission and cannot amount to an abuse; the second statement, if it is correct, confirms the existence of competitive pressure forcing SZV to react.

(bb) The reasons given by the Commission that 'The obligation imposed on middlemen not to sell foreign sugar without consent constitutes, if it is imposed by an undertaking having a dominant position, an abuse and an infringement of Article 86' (decision, p. 39, Rt. Col.) is not supported by any facts and is legally untenable. First of all they are not 'middlemen', ('Zwischenhändler'), but trade representatives (Handelsvertreter); the Commission uses inappropriate terminology to justify the argument that the trade representatives agreements in question do not fulfil the conditions specified in the notification of 24 December 1962.

For several decades the sugar industry of the southern part of Germany used trade representatives to sell its products. This is due to the fact that SZV and its members intended to be responsible themselves for the functions which, in other economic sectors, are the typical hallmark of an independent dealer, namely the maintenance of stocks and taking financial risks linked to supplying wholesalers and large processing factories direct.

The statement that the applicant's trade representatives sell 'products other than sugar ... on their own account' (decision, p. 29, Lt. Col.) is also incorrect; in fact these representatives only act for other producers as well in their capacity as trade representatives.

The finding that SZV 'in practice made it impossible for foreign suppliers to sell sugar through dealers who obtain their supplies from SZV' (decision, p. 39, Rt. Col.) only sets out the necessary consequence of the system of contracts entered into by the applicant and its representatives. According to the context the Commission seems to consider nevertheless that foreign suppliers can only sell sugar in the Southern part of Germany if they are also able to use the applicant's distributive network. It emerges from a letter, which has already been quoted, from Mr Fleischberger and which mentions eighteen undertakings which are not tied to SZV, thirteen of which continually distribute sugar

imported into southern Germany, that this assumption is incorrect. Further, there are dozens of potential importers in this area. Therefore the contracts at issue are not likely to, and never in fact did, protect the market of the southern part of Germany.

The argument that there has been an abuse is also untenable in law, because the system adopted by SZV is not substantially different from a marketing organization including commercial travellers having the status of employees. The Commission's reasoning leads therefore logically to the admission that such an organization is also an abuse. In the final analysis the Commission adopts the mistaken argument that any undertaking, if it wants to avoid infringing Article 86, should place its distributive network at the disposal of its competitors.

The Commission's argument is also wrong, because the disputed clause, far from disclosing the exploitation of a position of power, only gives expression to a situation which has, in any event, been brought about by German legislation and case-law. As the prohibition of competition is taken for granted by German representatives, SZV never received a request to delete this clause; on the other hand, it never rejected applications by representatives to market special kinds of sugar from other producers, as these marketing operations did not affect its interests.

(cc) With regard to the system of quantity rebates — which the Commission wrongly describes as 'loyalty rebates' — SZV first of all states that it has definitely given up this practice. It then submits that the Commission has wrongly evaluated the scope and effects of this rebate.

The statement that 'the facts brought to the notice of the Commission show that, in at least certain cases, the rebate has been abolished or its continuation made dependent upon the cessation of imports and that in these cases it has put an end to importing' (decision, p. 40, Lt. Col.) cannot be upheld as it is not supported by any evidence in the decision. If this statement was based on the letters quoted on pages 92 and 93 of the communication. SZV and the Court could not evaluate its scope, as they have been made anonymous. These letters moreover do not in any way corroborate the general conclusions which the Commission drew from them, as is shown for example by the two letters, the senders of which could have been identified. One of them is an undertaking completely unknown to the applicant; the other case proves that the non-payment of the rebate did not prevent undertakings from getting their sugar from other suppliers.

The refund was neither capable of producing the effects attributed to it by the Commission nor intended to do so.

Its level (DM 0·30 for 100 kg, is about 0·3 % of the value of the goods) corresponded to the advantage which SZV and its associate undertakings obtained from supplying a customer regularly. The rebate did not have any appreciable effect either on customers or competitors, as SZV endeavours to illustrate with some calculations. These examples make it clear that the larger the customer's purchases from the third party the smaller the price advantage resulting from the rebate; the rebate is therefore not an appropriate instrument for import protection in the case of precisely those big customers in whom the applicant and the suppliers of foreign sugar are particularly interested.

Moreover the statements of the Commission are contradictory. On the one hand it considers that the disputed practice is likely to prevent imports because foreign producers have to offer prices lower by at least DM 30 per tonne than SZV's prices in order to offset the loss of the refund. But, on the other

hand, it takes the view (decision, p. 37, Lt. Col.) that the unfavourable transport costs which foreign producers supplying Germany have to incur, are not an insuperable obstacle; moreover, these disadvantages are represented by figures which can amount to as much as DM 55·90 per metric ton.

The rebate was never directed selectively against imports. At the request of its customers in particular of those in the West of its sales area, SZV was always ready to deduct the rebate immediately from the invoices relating to the specific deliveries, which permitted a large number of these customers to buy at about the same time sugar from other suppliers without losing, nevertheless, their advantages.

It is absurd to state 'that the most important aspect of the system of loyalty rebates lies particularly in the possibility of controlling purchases by customers from foreign producers, which can easily be done by the undertaking granting the rebate using its knowledge of the average quantities purchased annually, which do not vary much' (decision, p. 40, Lt. Col.). If control can be exercised 'by reason of' this knowledge it is not the loyalty rebate which allows the control to be effected. It is to be expected that SZV and its representatives have information relating to purchases made from suppliers in third countries and that this is due to their knowledge of the undertakings which are their customers. This information enables it to state that large quantities were imported into south Germany; as evidence SZV refers to the information supplied to the Commission by Mr Fleischberger in his letter of 4 November 1972 which has already been quoted.

The system of loyalty rebates had already been adopted by Franken, a member of SZV, when the German organization of the market in sugar was in force, and under this system sugar could not be imported.

SZV adopted this system whereas Franken abandoned it as from 1 July 1968; contrary to the statement in the decision (p. 29, Lt. and Rt. Cols.), SZV's other members never adopted it.

The fact that the rebate system turns out to be an attempt to induce customers, through attractive prices, to buy their supplies of sugar regularly from the applicant without, however, compelling them legally to purchase such supplies exclusively from it means that there can be no question of an abuse.

Finally, the rebate was not either likely to affect to an appreciable extent trade between Member States. Such a tendency cannot be inferred from the subjective aim which the Commission attributes to the originators of the rebate; the conclusion on p. 40 (Rt. Col.) of the decision is therefore illogical.

(2) Summary of statement of defence

The *Commission* begins its reply with certain general observations, dealing in particular with the link which in its opinion exists between the complaints made against SZAG (cf. 4. above) and SZV with regard to the market of the southern part of Germany. It submits in particular the following observations:

The decision (page 36 to 37 under D) found that SZV has engaged in concerted practices relating to the beforementioned market. The Commission refers to certain facts which have led it to the conclusion that such practices exist, and are also mentioned in the statement of defence in Case 54/73 (SZAG) to which it refers for further details; cf. 4. B (b) (2) above. Thus it emerges from the introductory wording of paragraph 2 of the first article of the decision that the abuse of a dominant position for which SZV is blamed was found to have existed in the context of the beforementioned concerted practices and constitutes in itself an infringement, which is tantamount to saying that SZV has

infringed Article 86 of the Treaty by adopting the measures referred to in subparagraph 3 of the said paragraph independently of the fact that these measures were intended to permit the implementation of the concerted action between French and German undertakings.

The Commission recalls that within the meaning of the statement of the grounds upon which the decision was based (p. 43, Rt. Col.), 'the measures which the various interested parties with regard to their middlemen, certain purchasers or ... must be considered in order to determine the amount of the fines, in conjunction with the concerted practices in which they engaged'. Subparagraph 4 of Article I (1) of the decision does not mention SZV among the undertakings which engaged in the concerted practice relating to the market in south Germany, as the Commission considered that it was perfectly proper to regard SZAG and Franken, members of SZV as the responsible undertakings. The Commission nevertheless had to take into consideration that SZV handled the marketing, in south Germany, of its members' products and that the measures which it adopted contributed to the partitioning of the market (cf decision, p. 45, Rt. Col.). This is the reason why it also imposed on SZV a fine for the infringement found to have existed in subparagraph 3 of Article I (2) of the decision. This fine was relatively small, as SZV was merely the organ of the producers' cartel in south Germany.

Replying more specifically to SZV's arguments the Commission makes the following observations:

to (aa) The area where the applicant has a dominant position is its sales area which, on its own admission, includes more than one third of the territory of the Federal Republic, namely Bavaria, Baden-Württemberg and parts of Hesse, Lower Saxony and North Rhine-Westphalia and the Palatinate. This area extends therefore beyond the area traditionally called 'south Germany', an expression which the Commission agrees is vague, and represents 'a substantial part' of the common market even if account is taken of the enlargement of the Community on 1 January 1973.

SZV cannot usefully rely on the communication of 27 May 1970, as the latter only deals with agreements between undertakings and states that the 5 % share which it refers to must be understood in relation, not to the whole of the common market, but to the part of the market 'where the agreement takes effect'.

SZV's share of the market is hardly less than 90 to 95 %, as the applicant itself admits, in Bavaria and Baden-Württemberg if account is taken of the only parts of the other Länder included in the applicant's sales area.

The alleged competitive pressure from French producers only led to deliveries amounting to 1·5 % of the requirements of south Germany (without taking into account deliveries to SZAG and to Franken), and in no way jeopardized the applicant's dominant position. Although SZV states that it had to react to the many offers by French producers to customers established in south Germany, it admits at the same time that the result of its reaction could have been that deliveries from France were relatively small. Moreover that is tantamount to saying that in its sales area SZV is in a position to act without taking any particular account of its competitors. The information supplied by Mr Fleischberger, including the list of the offers from French producers which neither mentions prices nor quantities, falls far short of proof to the contrary. SZV's claim that there was competitive pressure from French producers, is inconsistent moreover with SZAG's statement in which it endeavours to attribute the modest amount of deliveries of French sugar into south Germany to

the unfavourable transport costs payable by French producers and to price conditions.

With regard to the statement that imports from France tended and still tend to increase, the data on which SZV relies include deliveries to the Saar and to German producers, which never applied any competitive pressure.

There is no contradiction between the statements in the decision that SZV, on the one hand, is not subject to any competitive pressure and, on the other hand, applies loyalty rebates to prevent imports. Within the meaning of the statement of the reasons upon which the decision is based (p. 40, Rt. Col.), this rebate was 'granted by an undertaking having a dominant position with a view to limiting the opportunities for imports still further and to strengthening and extending this dominant position'. Even if imports are small, the grant of the rebate can appear useful for SZV, namely in maintaining imports at a reduced level.

to (bb) The system, adopted by SZV, of selling its production through representatives who had to accept a clause in their agreements with SZV prohibiting competition is an abuse of a dominant position, because its aim is to eliminate all commercial competition. If, in principle, each undertaking has the right to choose its own marketing system, a different situation applies to an undertaking having a dominant position, because in such a case the choice of a marketing system, which limits or destroys opportunities for selecting dealers and consumers, is an abuse of the paid position.

By using the expression 'middleman' ('intermédiaire') ('Zwischenhändler'), the Commission meant to suggest that the persons concerned are not commercial representatives of the conventional type. On the other hand, in German the concept of 'intermédiaires' ('middlemen') does not exclude commercial representatives. The general terminology does not distinguish between Vermittler ('intermédiaire' 'middleman') and Händler ('négociant' 'dealer').

If the sugar industry of south Germany used trade representatives for historical reasons, the contracts to which exception is taken date, however, from the period after the establishment of the common organization of the market in sugar. When SZV says that it prefers to assume itself the functions which are the hallmark in other economic sectors of the independent dealer, it recognizes that it intended to eliminate from the marketing of its own production a whole stage of the economic cycle. By doing so it made it impossible for foreign producers to sell their sugar either through its 'trade representatives' or dealers who could obtain their supplies from it.

The list of SZV's independent dealers produced by Mr Fleischberger gives a false idea of the position, as some of these dealers are linked to NZV or to WZV and others can only sell in SZV's sales area special kinds of sugar from other German producers.

If there had to be dozens of undertakings in south Germany having the necessary means to negotiate the import of sugar, this shows to what extent SZV has eliminated free trade from the distributive network for its production.

SZV does not correctly interpret the decision when it takes the view that, in the opinion of the Commission, the abuse consists of SZV not making its distributive network freely available for its competitors, and submits that there is no obligation to promote foreign competition vigorously. The Commission is simply of the opinion that undertakings having a dominant position on the market are under a duty not to eliminate competition at the distribution level.

In all these circumstances the observations relating to German legislation are irrelevant.

to (cc) The Commission submits that what the applicant calls an annual quantity rebate is in fact a loyalty rebate granted independently of the amount purchased. Therefore there can be no question of the rebate being regarded as a way of producing advantages by rationalization. In order to realize the importance of this rebate it is only necessary to compare its rate (0·3 %) with the commission which trade representatives are paid by the applicant (0·27 %) and to take account of the fact that sugar is sold in large quantities. The larger the proportion of a particular customer's specific requirements which he obtains from the applicant, the greater importance the rebate assumes. Purchasers in south Germany were practically forced to apply to the applicant to obtain most of their requirements.

When SZV compares the effect of the loyalty rebate with the unsatisfactory transport costs, it misunderstands the way the Commission looks at the problem. Although in the opinion of the Commission, French producers can overcome the natural disadvantage of heavy transport costs, they cannot however at the same time allow German purchasers considerable price reductions as compensation for the loss of the loyalty rebate.

The rebate undoubtedly enabled SZV to supervise its customers' purchases from foreign producers. In fact SZV could count on the fact that the majority of its customers obtained their supplies exclusively from it lest they should lose the loyalty rebate; therefore it could exactly gauge the actual requirements of this majority.

It is of no importance to know whether SZV pursued the aim of preventing imports, as soon as it was evident that this was the likely effect of the rebate. In view of this effect and having regard to its dominant position SZV can only argue that applying a more favourable price is not an abuse of this position.

Under paragraph (c) of the second paragraph of Article 86 (2), such an abuse consists in 'applying dissimilar conditions to equivalent transactions with other trading parties, placing them at a competitive disadvantage'. The rebate in this case is an example of such dissimilar conditions, because it means that if two customers purchase the same amount of sugar the price paid by the customer, who obtains all his supplies from the applicant, is different from the price paid by the purchaser who does not.

As SZV almost has a monopoly in its area and the effect of the rebate is to make imports from other Member States more difficult, indeed impossible, trade between Member States may be affected.

(3) Summary of the reply

SZV takes the view that it need not go into the merits of the complaint set out in the statement of defence that it has engaged in concerted practices for the protection of the market in the southern part of Germany. In fact such a complaint is not found in the decision which only assesses SZV's conduct under Article 86. The Commission cannot rely on the introductory wording of Article 1 (2) of the decision, according to which the measures adopted by SZV 'have been found to exist within the context of the beforementioned concerted practices and constitute in themselves infringements' (German version *'auch* für sich betrachtet Zuwiderhandlungen ... darstellen'); for the applicant's conduct was not 'also' ('également' 'auch') considered but was considered on its own.

to (aa) The Commission cannot claim that there is a dominant position on a market the territorial boundaries of which it cannot demarcate with any accuracy. The map lodged as an annex to

the statement of defence gives the false impression of the area in which SZV trades, because boundary lines are drawn on it which refer to the trading areas of WZV and NZV, although the latter sell sugar throughout the whole of the southern part of Germany and SZV has commercial representatives in Koblenz, Trier and the Saar, areas which the Commission wrongly describes as areas reserved to WZV.

When the Commission takes the view that SZV's trading area constitutes a substantial part of the common market, it departs from its proposal for a Council regulation modifying Regulation No 17 (OJ C 92, 1970, p. 17) which originated in the idea that, in the normal course of events, the entire territory of Benelux or of each of the Member States constitutes such a substantial part; however, SZV's trading area is only about one-third of the territory of the Federal Republic. The Commission also contradicts its communication of 27 May 1970 in which it expressed the opinion that an area with a market capacity representing about 5 % of the whole of the common market — which is the size of SZV's trading area — cannot constitute a substantial part of the latter.

When the Commission holds that SZV has a dominant position, it is in breach of its own principles that 'the domination of the market cannot be defined solely on the basis of the share of the market which an undertaking has or on the basis of other quantitive factors of a particular market pattern' ('The problem of concentration in the common market', ('Le problème de la concentration dans le Marché commun', Série concurrence III, Brussels 1966, p. 25, No 22), which it applied in the decision it adopted in the Continental Can Case (OJ L 7, 1972, pp. 25 and 35).

The Commission's denial that considerable competitive pressure was brought to bear by French producers is incompatible with its own finding that deliveries to other Member States, even if their volume is small, might interfere with the producers' market policy. However the amount of sugar supplied by French producers to the southern part of Germany increased according to the Commission's figures to more than 10 000 metric tons during the 1970/71 and 1971/72 marketing years, disregarding deliveries to the Saar and between producers. Even though competitive pressure is not completely revealed by competitors' shares of the market, it was nevertheless in their case apparent in the more attractive offers made by SZV's competitors, upon which it attempted, sometimes with and sometimes without success, to improve.

With regard to the alleged contradiction between SZAG's and SZV's respective arguments relating to the effect of transport costs, the Commission cannot minimize the competitive pressure from French producers, as soon as it finds that transport costs do not prevent French producers from making offers in SZV's trading area. (cf. decision, p. 37, Lt. Col.). The functioning of the normal mechanisms of the market arises out of the fact that in 1970/71, by virtue of the revaluation of the Deutsche Mark, the import of white sugar into Germany more than doubled.

to (bb) When the Commission blames SZV 'for eliminating from the marketing of its production one entire stage in the economic circuit', namely 'free trade', it fails to understand the applicant's system of selling sugar. The latter sells exclusively to wholesalers (about 1 270) and to large industrial processing factories (about 730). For this relatively modest number of purchasers a sales service which is not too elaborate is sufficient, consisting partly of salaried staff and partly of trade representatives. It appears that the Commission denies that SZV has the right to include trade representatives in its sales system and that it would like to see them replaced by 'free' dealers who would form an

additional commercial grade between SZV and the wholesalers. However, such an additional commercial échelon would be bound to increase the selling costs beyond the 0·27 % paid to the applicant's trade representatives. The latter must moreover always have its own sales service. The decision to hand over the responsibility for sales to members of its own staff or to trade representatives depends on the amount of costs which will be incurred in either case.

The assertion that SZV denied free trade access to its production, apart from being inaccurate, has no connexion with the earlier complaint set out in the decision, namely that SZV prohibited the sale of sugar by its representatives from other sources without its consent. However the rectification of the first assertion also shows that the prohibition on competition imposed on the trade representatives in no way 'led to foreign suppliers not having the opportunity of selling sugar through dealers supplied by SZV' (decision, p. 39, Rt. Col.). In fact the dealers, that is to say the wholesalers, are free to choose both their suppliers and their buyers. French producers do not depend therefore on the seventeen representatives of SZV for the sale of sugar in the southern part of Germany. Even if they wish to operate through a commercial échelon which in the sugar cycle comes before that of wholesalers supplied by SZV, they can find dozens of undertakings capable of engaging in the sugar trade at this level. The majority of firms set out in Mr Fleischberger's list are neither tied to NZV or to WZV, nor limited to selling special kinds of sugar from other German producers.

to (cc) In leaving open the question whether the applicant in specific cases abolished the rebate or granted it either at once, or only at the end of the year, the Commission removes the whole basis of its decision in which it said without any qualification that the applicant tied its purchasers by means of 'loyalty rebates'.

SZV did not regularly insert in its contracts a clause making the grant of a loyalty rebate dependent upon the grantee obtaining its supplies exclusively from its member companies. Only four of the contracts produced for the Court's file by the Commission have such a clause. In another of these contracts the rebate was conditional on the volume of purchases being approximately the same as in the preceding year. Three of these contracts do not contain a clause of this type. If in its communication the Commission found that the confirmations of purchases include an item 'JmR' (Jahresmengenrabatt = rabais annuel de quantité) ('annual quantity rebate') of DM 0·30, it is clear from these confirmations that the grant of this rebate was not in fact conditional on the grantee obtaining all its supplies from SZV. Even in those cases where these contracts included a clause relating to the grant of an annual quantity rebate SZV proceeded to make an immediate deduction every time a customer asked that this should be done.

According to the Commission the applicant only availed itself of the disputed clause 'in certain cases' (decision, p. 29, Rt. Col.). The four documents cited in pages 92 to 93 of the communication and produced for the Court's file by the Commission do not enable any general opposite conclusions to be drawn. One of these documents even shows that an employes of one of the trade representatives of SZV spoke of the imminent abolition of this rebate to a customer in the Spring of 1972, when the applicant in fact intended to do so. SZV however took no such action until it was notified of the communication because a conversation with the Commission left it with the impression that the latter did not regard the rebates as a fundamental issue.

The rebate has nothing to do with the control of customers' purchases. SZV like any other supplier has a more or less accurate knowledge, as the case may be,

of its customers' purchases but does not have the opportunity of checking their requirements. The arguments developed by the Commission to prove that it was possible to control customers' purchases from foreign producers cannot establish a causal connexion between the rebate and the exercise of any such control. In fact the purpose of the control should be to confirm that the purchasers have met all their requirements from the applicant. However the Commission takes this finding as the starting point of its argument.

The Commission cannot claim that the rebate is illegal under Article 86 (c). The fact that two customers are dealt with in a different way does not automatically mean that one of them, by comparison to the other and on the level of the commercial échelon to which the two customers belong, is placed at a competitive disadvantage. For Article 86 to apply it is necessary that a disadvantage has actually occurred, which the Commission has not even tried to prove. The Commission cannot avoid the fact that the burden of proof lies upon it by calling in evidence the conditions of general application set out in the first paragraph of Article 86. In fact the only objections to the disputed rebate are based on discrimination; however, according to Article 86 (c) discrimination is only an abuse if customers are placed at a competitive disadvantage.

(4) Summary of the rejoinder

The *Commission* maintains that the decision in fact evaluated SZV's behaviour in connexion with the concerted practices. It states that 'this concerted practice is evident ... from the adoption by SZV of a system of loyalty rebates' (p. 36, Rt. Col.) and that 'SZV's operations must also be evaluated in the aforesaid context' (that is to say in the context of SZAG's behaviour; p. 45, Rt. Col.).

to (aa) So far as the de-limitation of SZV's sales territory is concerned, the Commission submits that the map which it produced was made from the maps annexed to the contracts entered into between WZV and its commission agents and that the fact that WZV and SZV assigned specific territories to their regional middlemen leads to the conclusion that there was a partitioning of the two respective sales territories. If SZV has trade representatives at Koblenz, Trier or in the Saar they are to be treated as exceptions.

The proposal — which was not adopted — for a Council regulation amending Regulation No 17 cannot be interpreted as meaning that the Commission only intended to regard the territories which it mentions as a substantial part of the common market. SZV's sales area, moreover, is the equivalent to the whole of Benelux, as consumption in these two regions is 900 000 metric tons and 950 000 metric tons respectively per annum. Further, the fact must be borne in mind that sugar is a transport costs intensive product.

The Commission's communication relating to small cartel agreements cannot be used as an argument by the applicant since the essential criteria which it lays down are, in addition to a share of the market not exceeding 5 % of the market in question, a maximum turnover fixed at a low level. Further the arguments based on this figure of 5 % cannot be applied to the examination which must be carried out under Article 86 to ascertain whether a specific area constitutes a substantial part of the common market. Furthermore the capacity of the market of the southern part of Germany exceeds by a considerable extent 5 % of that of the common market.

If a share of between 30 and 50 % of the market does not allow the conclusion to be drawn that there is *ipso facto* a dominant position, the situation is quite different in the case of a share of the market of between 90 and 95 % which

unquestionably enables the holder 'to act without taking any particular account of its competitors'.

Even a considerable increase in French imports does not threaten the applicant's dominant position. If French producers are able to make good any shortfall in the production of manufacturers in south Germany, which is what happened in 1970/1 and in 1971/72, when the price level in south Germany was higher than the price level in France, it is, however, difficult for them to achieve a long-term increase of their share of the market in south Germany if these two price levels are approximately the same.

to (bb) So far as the applicant's marketing organization is concerned, the Commission considers that the explanations given in the reply confirm its view. In fact out of the 1 270 wholesalers mentioned by the applicant approximately 1 200 are regional wholesale provision merchants who sell sugar to shops and wholesale trade branches and who do not import sugar. Since, according to SZAG, 'about 55 % of sugar sales are intended for the processing industry' and 'French supplies ... are concentrated ... in the processing sector', the applicant excluded the wholesale trade from a particularly important sector. The applicant can only put an end to the abuse of its dominant position by granting independent wholesalers direct access to its production. There is no evidence that such a modification of the sales organization would necessarily entail an increase in marketing costs.

The Commission adds that the many other dealers mentioned in Mr Fleischberger's list are dealers to whom the applicant does not sell sugar direct and whose commercial operations are limited to dealing with small processing businesses and the retail trade.

to (cc) The Commission does not consider the argument that the deduction of the disputed rebate immediately from the contract price was not conditional upon the annual requirements being met solely from SZV, as convincing. It is very unlikely that the applicant granted a rebate which had not been agreed. It appears likely to be another way of settling loyalty rebates.

The applicant's assessment of the effect of the rebate is not in accordance with the facts. The rebate did not lead to a lower price; on the contrary, the applicant's prices were approximately 5 % higher than those of French producers. In these circumstances the latter did not have to compete with a relatively low price but they had to compensate the purchasers, who wished to be supplied by them, for the loss of the rebate.

With regard to the argument based on Article 86 (c) the Commission takes the view that there can be no doubt that a purchaser is placed at a disadvantage in the field of competition, if he finds that a loyalty rebate is abolished because he obtained part of his requirements from another producer.

8. Complaint that Pfeifer & Langen entered into agreements with its agents restricting their opportunities for importing and exporting within the Community

A — Formal and procedural submissions

(a) Pfeifer & Langen: Premature publication a breach of the principle that everyone has the right to a 'fair trial'; Unduly short time-limits for the submission of observations

These submissions raised by *Pfeifer & Langen* refer, in essence, also to the other complaints made against this company. Reference must, therefore, be made to Chapter 2.B (a) and (b), above.

(b) Pfeifer & Langen:
No opportunity given to the applicant to present its case on the facts which the Commission considered before taking any action

(1) Summary of the application

Pfeifer & Langen submits that, since the Commission did not give it the opportunity to comment on some of the facts which the Commission considered before taking any action, it is in breach of the principle that everyone has the right to defend himself; in the communication the Commission did not draw an exact distinction between the statement of the facts and its own considerations:

— The claim that Pfeifer & Langen put into effect with other undertakings which were members of WZV a common sales policy (Communication, p. 106: cf. also decision, p. 34, Lt. Col.) is not supported by the necessary evidence. This is how the Commission identifies the typical course of conduct adopted by producers of homogeneous goods on oligopolistic markets. It is clear that the prices of a product such as sugar always tend to settle at the same level.

— The same page of the communication (cf. also decision, p. 27, Rt. Col.) states that Pfeifer & communication 'made' its middlemen agree not to sell without its consent imported goods which if sold on the free market might affect competition. The Commission seems to proceed on the basis that Pfeifer & Langen provided for this clause with a view to preventing international trade. However, the Commission itself quotes (Communication, p. 89), as an example of a trade representatives contract, an agreement entered into in 1948 when, even if there had been no such clause, inter-Community trade was impossible.

(2) Summary of the Statement of Defence

The Commission replies that this submission concerning the evaluation of the findings relates to the substance of the case.

B — Submissions on the substance of the case

Pfeifer & Langen, a single submission: Infringement of Article 85 of the Treaty

(1) Summary of the application

Pfeifer & Langen takes the view that the 'trade representatives contracts' referred to on page 40 *et seq.* of the decision in the part numbered 4, do not have as their object or effect the restriction of competition: the Commission proceeds on the basis that Pfeifer & Langen's agents are not completely integrated in this company's distributive network; they should be regarded not as trade representatives *stricto sensu* but as independent dealers. It finds in this connexion that the said agents with the consent of Pfeifer & Langen may act and in fact also act for the benefit of WZV and NWZV; they sell as independent dealers sugar for denaturing or for export to third countries.

However, the classification of an agent in one or the other category must be done in accordance with legal criteria which, in the absence of any Community provisions dealing with the matter, can only be found in national law. This was also the point of view adopted by the Commission in its Communication of 24 December 1962. In this case the Commission however disregarded German Law, when it proceeded on the false premise that the middleman is an independent dealer from the moment he ceases to work exclusively for his principal, whether or not the latter has given his consent.

The Commission seems to rely on German case-law under which the obligation placed upon the trade representative to show good faith in his dealings with his principal, includes,

even in the absence of any express stipulation to this effect, a prohibition on competition. But the Commission forgets that the representative does not lose this capacity merely because the principal has released him from the said prohibition in the case of isolated transactions or certain categories of operations.

The very fact that the representative must ask the principal for his consent if he intends to act also for a third party shows that the representative is not independent. The Bundesgerichtshof conceded that an operator may at the same time act as a representative and as an independent agent.

Pfeifer & Langen gives in detail the reasons why the economic position of this company's agents is markedly different from that of independent German dealers. It draws the conclusion from this that the principles laid down in the beforementioned Communication of 24 December 1962 relating to exclusive dealing contracts entered into with trade representatives apply in their entirety to the relations between Pfeifer & Langen and its agents. As the contracting parties form a single economic unity competition between them is by definition eliminated and cannot therefore be 'restricted'.

Even if this was not the case, Article 85 does not apply as the restriction of competition stemming from the disputed clauses is not 'appreciable'. In fact the large number of independent sugar dealers in Germany makes it quite impossible for Pfeifer & Langen, which only has a small number of agents, to keep imports out of the German market.

(2) Summary of the statement of defence

The *Commission* begins with its findings relating to the organization of sugar distribution in Germany. In this connexion it makes the following observations:

— German sugar manufacturers grouped themselves into four (later three) marketing organizations. These organizations and their members reserve the sale of their output for a limited number of dealers, who have to comply with the manufacturers' instructions, as they cannot, without consent, act for other manufacturers, and they operate inside sales territories the boundaries of which have been very accurately demarcated.

— More particularly, WZV, of which Pfeifer & Langen was the most important member, covers four sales sectors in each of which a dealer operates having, in relation to WZV, the position of a regional commission agent acting on behalf of WZV. These dealers are large undertakings in the food trade who also trade for their own account. They also work for Pfeifer & Langen and are, in relation to this company, trade representatives, in so far as they transact business in the name and on behalf of Pfeifer & Langen. In Pfeifer & Langen's sales territory sugar is sold by this company, by other members of WZV and by the latter itself in its capacity as an organ of the cartel.

— The other dealers could not in practice obtain their supplies from members of WZV. This prevented effective competition at the sales level for sugar in the territory assigned to Pfeifer & Langen. Further, German sugar manufacturers control sales of sugar from other Member States.

In direct reply to Pfeifer & Langen's arguments, the Commission makes the following submission:

The fact that undertakings act as trade representatives for Pfeifer & Langen and as regional agents for WZV is only explained by a cartel to which members of WZV belong, pursuant to which the distribution of all the sugar produced in the western part of the Federal Republic has been entrusted by all the members exclusively to the said undertakings. This cartel fulfills the conditions of Article 85 of the Treaty.

This is also the position with regard to the contracts in this case. The before mentioned undertakings are not agents integrated in Pfeifer & Langen's sales organization but are large firms which, in addition to the transactions carried out for Pfeifer & Langen and WZV, do a large amount of business on their own account. Therefore they can be clearly distinguished from the normal trade representative, who has to comply with instructions covering the whole extent of his operations and acts exclusively in the name and for the account of his employer. Pfeifer & Langen took account of this situation, by giving its agents authority to act as commission agents for other sugar manufacturers as well as WZV.

The four dealers in question are the concentration point for all the offers for the sugar sold by WZV and its members. In their capacity as trade representatives or commission agents they are bound by the instructions which they receive; further, pursuant to a clause prohibiting competition, they cannot sell sugar produced by other manufacturers and are only authorized to sell Pfeifer & Langen's and WZV's sugar in a specific territory. The legal form of the trade representatives contract and of the agency agreement for commission appears to be a suitable method of eliminating all forms of competition at the trading level in Pfeifer & Langen's field of operation, so far as the sale of sugar produced by manufacturers of the western part of the Federal Republic is concerned. Restriction of competition between manufacturers due to cooperation within WZV is therefore complimented by restriction of competition at the trading level.

Pfeifer & Langen cannot base their arguments on the Communication of 24 December 1962, which regards the trade representative as an auxiliary organ integrated in the principal's undertaking and carrying out, for a specific period, transactions for that principal. It is possible to understand what kind of operator the Commission had in mind if it is remembered that it did not recognize as a trade representative a party to a contract who has undertaken to maintain a warehouse, provide an important service or fix prices applicable in commercial transactions. The dealers in question in this case do not correspond at all to the kind of operators referred to in the said communication; their economic position is similar to that of an independent dealer. Their turnover is very large; they carry out a large number of important transactions on their own account, including the supply of sugar for denaturing or for export to third countries and also the sale of other products.

The observations relating to German law are unnecessary, as the function of agents must be evaluated under Article 85 of the Treaty.

The argument based on the large number of independent dealers is only relevant if Pfeifer & Langen allows most of them to distribute their products and if they were all free to obtain their supplies from Pfeifer & Langen or elsewhere. Now out of 86 dealers 82 were unable to purchase direct from Pfeifer & Langen, from the other members of WZV and from WZV. Moreover Netherlands and Belgian competitors of Pfeifer & Langen only supplied small quantities to the latter's field of operation, so that the said dealers only had a few opportunities to import freely.

(3) Summary of the reply

Pfeifer & Langen replies that the Commission still proceeds on the basis of the erroneous view that its agents are, in relation to itself, on a different marketing level and are, for this reason, in competition with independent dealers. In fact the relationship between these agents, who are integrated in Pfeifer & Langen's sales organization, and independent dealers, was that of

suppliers and purchasers. This relationship does not prevent them, to the extent to which they sell on their own account, from being able to compete also with the said dealers; but in these circumstances they acted independently of Pfeifer & Langen's sales organization.

The Commission contradicts itself when it states first that Pfeifer & Langen's sales system must be regarded separately and then that it is evidence of the existence of concerted practices giving rise to other complaints. This latter arguments is in any case untenable, because it is difficult to understand how the trade representatives contracts, dated 1948, could be concluded for the purpose of protecting the German market against Community imports.

Even if these contracts are considered separately, they do not come within Article 85. The classification of the contractual relations between Pfeifer & Langen and its agents is a legal question which must be answered under German law, before it is possible to decide whether Article 85 applies. This decision cannot be determined solely on the facts. A producer can use either independent dealers, commission agents, or trade representatives for the organization of his sales system. Whether Article 85 applies depends on which of them is chosen. — In the Communication of 24 December 1962 the Commission correctly referred to national rules of law in order to distinguish between independent commercial agents in law and in fact, on the one hand, and agents and trade representatives, on the other hand.

In order to show that Pfeifer & Langen's representatives are not integrated in this company's sales organization, the Commission uses vague expressions, when it states that they are 'large firms', which carry out a 'large' number of transactions, for their own account and are different from 'normal' trade representatives. The question arises what is the figure for turnover above which a firm must be regarded as 'large'.

Moreover the legal classification of the operators in question cannot depend upon their size but solely on their function, which is determined by the clauses of the contracts in this case. Now it appears from these that the said operators, entering into contracts in the name and for the account of Pfeifer & Langen carry out the 'function of auxiliary members of its staff who are not independent' ('unselbständige Hilfsfunktion).

The Commission does not even try to prove the statement, which it made for the first time in the statement of defence, that Pfeifer & Langen, WZV and the other members of WZV came to an agreement only to sell their sugar through Pfeifer & Langen's agents. It is incorrect to claim that Pfeifer & Langen and WZV used the same undertakings to sell their products. Pfeifer & Langen gives the names of the various firms with which it entered into representation agreements, of certain undertakings with which it cooperated without entering into any firm agreement, and of WZV's regional commission agents; it emerges that there is overlapping of territories in only three cases. The decision nowhere confirms the existence of an agreement between Pfeifer & Langen and WZV to demarcate by common accord the sales territories of their representatives; they were content to invoke 'the measures which WZV and Pfeifer & Langen have taken in respect of their agents' (p. 40, Rt, Co.), that is to say measures which each of the parties concerned took individually.

Moreover, the subject matter of the present proceedings is not WZV's conduct — Pfeifer & Langen does not know why WZV, and also the third undertakings, entered into contracts with certain of Pfeifer & Langen's agents. It supposes that the parties concerned wanted to benefit from these agent's knowledge of the markets.

In any case there can be no question of an appreciable restriction of competition.

Pfeifer & Langen never witheld its consent to requests by its representatives to act for a third party or to carry out transactions such as exporting, which were extraneous to the relations between itself and its representatives. The same applies to WZV.

(4) Summary of the rejoinder

The *Commission* recalls what the decision says about the connexion between the concerted practice for the protection of the market of West Germany, on the one hand, and the disputed contracts, on the other hand. Experience showed that concerted actions between producers intended to partition the markets are ineffective if steps are not taken to ensure that they are observed by commercial undertakings.

Pfeifer & Langen's agents were authorized to act in their capacity as independent dealers only in those cases where no competition was to be feared, namely in the case of exports to third countries and deliveries for denaturing. They are not true commercial representatives, because they are only in the Pfeifer & Langen undertaking for a half day's work thus leading a 'double life'.

It does not matter whether the applicant entered into the contracts in question in 1948; it is sufficient to bear in mind that the latter contracts were in force during the period from 1968 to 1972.

The fact that a contract has to be regarded, in the light of the national law governing its provisions, as a trade representatives contract does not mean that it *ipso facto* falls outside the field of application of Article 85.

The Communication of 24 December 1962, which makes the function actually carried out by the person concerned the determinative criterion, is also based on this idea. Moreover this Communication did not envisage cases such as the ones which have arisen in these proceedings (large commercial undertakings, which also carry on business, to a great extent as independent dealers and work partly as commission agents or trade representatives for the organ of the cartel of which the principal is a member and also for the other members of this cartel).

In order to ascertain, for the purpose of applying Article 85, whether an undertaking acting as a trade representative for a specific principal, is 'large' and does a 'large amount of business' on its own account, the turnover figure is irrelevant; all that needs to be known is whether the representative is or is not integrated in the principal's firm as an auxiliary organ.

The applicant omitted to say whether the three firms, with which it cooperates without a firm contract, act for it in their capacity as independent dealers or as trade representatives.

It would be advisable for the applicant to produce the trade representatives' contracts into which it entered.

The decision (p. 41, Rt. Col.) made it clear that the Commission presumed there was an agreement between WZV and its members. Pfeifer & Langen cannot claim that they did not know why WZV and 'third undertakings' — in fact the other members of WZV — entered into contracts with the applicant's agents, as the latter is the largest member of WZV and as its agents must obtain its consent before they can act for other producers.

The statement that, if there was any restriction of competition it had no appreciable effects, is vague, as Pfeifer & Langen never refused to give its consent to transactions being effected by its agents with third parties. If the company means that the requirement of prior consent dit not have practical consequences, this indicates that the agents never asked for such consent and

therefore did not conclude any transactions with third parties. If, on the other hand, Pfeifer & Langen means to say that it never refused any requests for its consent, it would be advisable for it to indicate how many requests of this type were made and which foreign producers they concerned.

9. The complaint that RT, Say, Béghin, Générale sucrière et Sucres et Denrées engaged in a concerted practice in connexion with the invitations to tender for export refunds

A — A single formal and procedural submission

Générale sucrière et Sucres et Denrées, one submission:
Infringement of Article 190 of the Treaty

(a) Summary of the applications

(aa) *Sucres et Denrées* submits that the application of Article 85 (1) cannot be justified merely by the finding that the invitations to tender for export refunds to third countries 'allow the export of sugar produced inside the Community' (decision, p. 42, Lt. Col.). The Commission failed to explain the reasons why it concludes that competition is restricted within the Community, even though the context of the alleged concerted action prevented any appreciable modification of the conditions of the European sugar market.

(bb) *Générale sucrière* and *Sucres et Denrées* consider that the statement that 'this concerted action has also complemented the other measures taken by the persons concerned to protect certain national markets' (decision, p. 42, Rt. Col.) is not clear.

(b) Summary of the statements of defence

to (aa) The *Commission* replies by arguments showing that the substance of its arguments is justified (cf. B (a) 2. below).

to (bb) The Commission refers to its submissions on the substance of the case (B (a) 2. below).

(c) Summary of the replies

Générale sucrière states that even if the explanations supplied in the statement of defence are in fact true they have been delivered too late and cannot therefore cure the defect in the statement of the grounds upon which the decision is based which makes the decision unlawful. For the remaining observations of Générale sucrière and Sucres et Denrées, cf. B (a) 3. below.

B — Submissions on the substance of the case

(a) RT, Say, Béghin, Générale sucrière et Sucres et Denrées:
Infringement of Article 85 of the Treaty

(1) Summary of the application

(aa) So far as the measures which were in fact carried out, the reasons for them and the institutional framework in which they were adopted are concerned, the *applicants* make the following observations:

RT states that certain undertakings, including itself, sent each other information on a reciprocal basis before taking part in the invitations to tender, in order to secure a return corresponding to the intervention price. This attempt however was not successful (cf. (bb) below).

Say and Béghin submit that the main object of the said exchange of information was to ascertain the capacity of and prices on the world market. Exporters were forced to enter first of all into contracts at world prices and later to obtain an export licence and the

corresponding refund. This situation guarantees keen competition at the invitations to tender, which moreover is proved by the fact that Say and Béghin always exported at an inclusive price (world price + refund) below the intervention price, whereas, if there had in fact been a concerted action, the rate of the refunds could probably have been maintained at a level enabling this price to be obtained, which moreover is the objective of Community regulations.

Générale sucrière and Sucres et Denrées deduce from a detailed analysis of Community regulations:

— that the system of levies and refunds eliminates the operation of the law of supply and demand and brings about a sharply defined separation of the world and the Community markets;
— that the purpose of the refunds is to promote exports and that the aim of the measures adopted by the Council is to guarantee their effective implementation in each case and their continuity; that these objectives can also be explained by the fact that there is a surplus of sugar produced in the Community;
— that under the Treaty efforts be made to find a proper balance between the protection of the common market and the development of trade with third countries;
— that Article 5 (1) of Regulation No 839/68 limits the scope of competition between the bidders by providing that 'the award shall be made to any bidder whose tender does not exceed the maximum amount of the refund'.

However the Commission rendered the export mechanism ineffective by fixing the refunds — under the system of periodic fixing provided for by Community regulations side by side with the tendering system — at too low a level to enable the difference between the world price and Community prices to be offset. On several occasions it even refused to make an award on the ground that the tenders submitted by undertakings were too high. Such refusals and the fact that export licences were not at that time transferable meant that the export market had no flexibility at all.

Générale sucrière admits that producers conferred together but only 'at each invitation to tender'. *Sucres et Denrées* admits 'that at certain invitations to tender it could be foreseen that a particular undertaking would tender for a particular quantity'.

(bb) *All the applicants* submit that the practices to which exception is taken did not have the effect inside the Community specified in Article 85 of the Treaty.

All the applicants object to the importance attached by the Commission to the fact that the invitations to tender 'allow the export of sugar produced inside the Community' (decision, p. 42, Lt. Col.). According to this view, all cartels relating to export come within Article 85, which is inconsistent with the opinion upheld by the Court and by the Commission itself in previous decisions. The place where the sugar is produced is not a determining factor when deciding whether Article 85 applies or not; it is only necessary to know whether the agreement or the concerted action in question affects the functioning of the intra-Community market.

All the applicants criticize the Commission's statements (loc. cit.) relating to the effect of the alleged concerted action on the amounts of sugar sold by each of the parties concerned on the domestic market:

— *RT* states that all the export cartels have an effect on the total amount of the products offered for sale on the internal market, but that this amount depends in particular on consumer demand; in addition, the decision (loc. cit.) itself admits that Community regulations 'aim at selling a specific quantity of sugar on the world market'.

— According to *Say and Béghin* the exports in these proceedings had no influence on the amounts sold on the home market as it had a sugar surplus. The effect of any restriction of exports was the disposal of more sugar to the intervention agencies which, because the domestic market had reached saturation point, had to export the amounts which they purchased. If one of the applicants had not exported a specific quantity, it would have been exported by another undertaking. The change in allocation of the source of the exports does not affect trade between Member States, so long as the total amount sold within the Community remains the same; this conclusion follows from the fact that intra-Community trade barriers have been removed for the benefit of the establishment of a single market. The Commission itself proceeded on the basis of this idea, since it decided that from 1 January 1971 export licences may be used from any part of Community territory. The alleged concerted action could not change the total amount referred to above, as the amounts to be exported were fixed by the Commission.

— According to *Générale sucrière* the Commission proceeded on the basis of the view that the conduct to which exception is taken allowed an artificial export price to be maintained, which made such exporting easy and sugar scarce within the Community, and that this was also due to the concerted action concerning the amounts to be exported (cf. Communication, p. 116). Such considerations however are not borne out by the facts and do not take account of the common organization of the market in sugar.
The export price obtained thanks to the export fund in question was not abnormal, either in relation to the world market — where the sugar which was exported was of necessity sold at the price prevailing on this market or on the basis of this price — or in relation to the prices applied on the common market. It emerges from Article 17 of Regulation No 1009/67 that the export fund could at most have brought about an alignment of the export price on the Community price.

Moreover the fund granted to Générale sucrière in 1970 (the year taken by the decision) added to the prices applied on the world market, never even allowed the French intervention price to be reached (a similar argument is put forward by *RT);* this situation, which applies equally to other exporters, is said to have slowed down exports.

The effect of every export is to make the supply of the goods in question scarcer on the market of the exporting country. But such scarcity only falls within Article 85 if it is caused by agreements or concerted actions whereby the participating undertakings undertake to export specific quantities for a definite period of time. However in this case there was no such agreement or concerted action. If, when there was an invitation to tender, it was decided in advance that a certain undertaking would tender for a specific amount, that amount was freely determined by the undertaking, according to the contracts for sale into which it had entered previously.

The concerted action did not partition the common market into national markets. To the extent to which the Commission intends to argue that this concerted action so reduced the total supply of sugar on the internal market, that it could change the conditions of competition on this market, its evaluation is wrong. To the extent to which the Commission wishes to say that there was a change in the patterns of trade between Member States by reason of a kind of agreement to substitute tenderers, it disregards, on the one hand, the fact that although producers conferred together at each adjudication to

tender, they were not bound by any prior undertaking to submit tenders for the export of specific quantities and, on the other hand, that whether they engaged in a concerted action or not, they had to export in order to maintain their commercial positions in third countries. The sole purpose of the concerted action was simply to prevent too large a loss being made (because the export fund was insufficient). Therefore it could not change the pattern of trade between each producer and the Member States to which it was most appropriate that it should export having regard to the location of its plant and its commercial links; in any event such a modification could not have been 'appreciable'.

— *Sucres et Denrées* argues on partly similar lines. Apart from the fact that fixing an abnormally high export price did not entail any restriction of competition within the Community the export prices obtained were not abnormal. These prices tend inevitably to align themselves on the prices applied on the world market. As the Commission has the right to fix the maximum amount of the refund, any concerted action relating to the fund could not produce unduly high prices.

No reduction of supply within the common market capable of restricting competition has been found to exist.

The concerted action did not have as its object or effect an appreciable modification of the patterns of supply of the producers concerned. The Commission has not showed that the amounts exported to third countries could be marketed on the territory of the common market.

When the Commission states that 'according to the results of the invitations to tender, certain producers rather than others have to sell surplus amounts in the other Member States of the Community', it is not referring to a scarcity of supplies on the common market but to tenderers taking the place of each other. However a large interchange of tenderers was impossible in 1970. In fact only producers trading regularly with third countries were in a position to export. Furthermore, exchanges of views between the undertakings which are blamed only took place at each invitation to tender. Moreover it is paradoxical to blame sugar exporters for having replaced each other, whereas, after the period considered by the decision, the Community authorities, being aware that the previous system was too rigid, provided that export licences could be assigned and, thereby encouraged exporters to replace each other.

Say and Béghin emphasize that their conduct could have no effect on prices within the Community. In fact, these prices were always below the target price, and the prices obtained on the world market were below the intervention price, and, therefore, the prices applied in the Community.

All the applicants dispute the finding that the powers conferred on the Commission by Community regulations are not sufficiently wide to 'alter the conclusion that the concerted action described above may affect trade between Member States' (decision, p. 42, Rt. Col.). In fact these powers, of which it made considerable use, give it complete control of exports. They allow it in particular to determine the frequency of the invitations to tender, fix the maximum amount subject to the tendering procedures as well as the maximum amount of the export fund and discontinue an invitation to tender. It was thereby able to prevent the volume of exports from disturbing competition on the common market and affecting inter-Community trade.

Sucres et Denrées adds that, although it is true that the Commission has to exercise its powers on the basis of the tenders which it has received, it should also take

account 'of the supply situation and prices within the Community, prices and potential outlets on the world market and costs incurred in exporting sugar' (Article 4 (3) of Regulation No 766/68), that is to say of objective factors which do not come under the influence of undertakings willing to export. According to this applicant it is wrong to state that the Commission only has certain 'overall' supervisory powers over exports, when in fact it supervises each invitation to tender.

(cc) RT states that Article 85 is also inapplicable because it only refers to the market for the product and not to the 'market' for export licences.

(dd) *Say, Générale sucrière and Sucres et Denrées* submit that, in contrast to what is stated in the decision (p. 42, Rt. Col.), without, it must be added, any justification, there is no connexion between the practices which are the subject-matter of this complaint and the complaints relating to the protection of certain national markets. *Sucres et Denrées* also emphasizes that, since it is an independent dealer, it does not carry on any domestic business, so that it cannot be said to have endeavoured to protect national markets.

(2) Summary of the statements of defence

The *Commission* after summarizing Community regulations relating to export refunds to third countries (cf. above I 1, B and C) explains that side by side with the system of periodic fixing which continued to function, although relatively low refunds were awarded, the system of fixing prices by means of invitations to tender, which was adopted for the first time in September 1969, was in fact used regularly afterwards for the grant of refunds. Export licences were generally valid for six months in the case of an award and for four months (14 days from 1972) under the system of periodic fixing. Under the rules for the standing invitations to tender opened from the beginning of the 1969/70 marketing year undertakings could submit their tenders weekly, a partial award being made each Wednesday. Although the Commission could decide not to give effect to an award, it never used this power throughout the period when the infringement in question occurred. The growth of exports to third countries, which reached 1 025 000 metric tons in 1971/72, confirms that the system of invitations to tender was effective.

The Commission produces a series of documents which show that the applicants conferred together in 1970 at the time of the invitations to tender concerning the amount of the export refunds for which application had been made and also the amounts tendered, within the framework of what Export's internal memoranda calls 'the Paris consortium' or again 'the Paris concerted action':

— In a telex message to Export of 23 July 1970, RT refers to 'our efforts', the main object of which is the 'abolition of competition for refunds so that each producer will be guaranteed at least the intervention price' and, 'consequently abolition of the struggle to sell amounts on the domestic market were the price is more certain rather than having to export (this applies particularly to France)'.

— A note of Export of 17 February 1970 recalls 'a meeting between refiners', which took place the night before in Paris and during which 'the amount of the refunds for which tenders shall be submitted was the subject of an agreement'. This note states that the 'participants' in this 'concerted action' are, *inter alia*, 'Say, Béghin, Lebaudy, Commerciale sucrière (Bouchon-St.-Louis)' — a business name referring to Générale sucrière — 'Sucre-Union, RT and Sucres et Denrées,' and that during regular meetings, the persons concerned discussed the 'general level of refunds' and 'the amount for which each of the

members shall tender, any necessary reconciliation of the tenders submitted taking place during multilateral discussions'. This 'concerted action' is invoked and explained also in Export's note of 26 March and 21 May 1970 and in the minutes of the decisions taken by Export's Managing Board on 17 February 1970.

The minutes of the meeting of RT's Board of Directors of 17 July explains the reason for the concerted action in these words: 'For next year, we would like to try to avoid cut-price (sic) refunds. For this purpose the managing director has submitted a preliminary draft of a plan for pooling exports. Moreover, one advantage of this plan is that it will also reduce the tendency in France to apply cut-price internal prices . . .'.

— A telex message from Export to RT of 19 August 1970 speaks of the policy to be adopted for exports to the Netherlands and Italy before continuing as follows: 'Refund: taking into account our participation in the points above, and in principle, whatever may be the formula drawn up in Paris, we advocate that Export and RT actually work together in connexion with third countries and this cooperation must normally result in a concerted action on the level of refunds, account being taken of the manufacturers' policy'.

These documents show the link between, on the one part, the concerted action relating to the amount of the refunds and also to the amounts tendered at the invitations to tender and, on the other hand, the concerted actions to which the participating undertakings engaged with the object of partitioning national markets. A comparable link had moreover been established in 1968, under the terms of an agreement entered into between French producers, which was performed for one year and provided for a system of equalization between the profits made on export and those made on the domestic market in the case of sales for human consumption.

The parties concerned therefore substituted conscious cooperation for the risks of competition, whereas a system of invitations to tender is pre-eminently the place where it must be possible to generate competition.

This concerted action restricted competition within the common market. In fact the result of the concerted action was to abolish competition in the export of amounts produced within the common market, thus restricting the opportunity participating undertakings had of disposing freely of the amounts to be sold within the common market. By arranging to divide the amounts of sugar between intra-Community exports and other destinations these undertakings therefore determined the amounts which were to be exported to third countries in order to avoid depressing the level of domestic prices. The Commission therefore has not traced the restrictive effect solely to the fact that the sugar in question was produced inside the common market, but in particular to the fact that the concerted action withdrew quantities of sugar from free competition within this market.

Even if, contrary to what the Commission thinks, the effects of the concerted practice were not immediately unfavourable, it could call in question the normal trend of trade between Members States.

The Commission then makes replies individually to the applicants' arguments.

to (aa) By submitting that the aim of the concerted action was to ensure that undertakings would at least obtain the intervention price (RT), that the Commission destroyed the efficacy of the refunds by fixing them at too low a level (Sucres et Denrées), and that the applicants could not even obtain the intervention price for their exports (all the applicants), the latter fail to understand the nature of the infringement which has been found to exist. The Commission has not relied on

the effect which the concerted action might have on the export price level.

Reply to Sucres et Denrées

During the period taken for the finding of the infringement, the Commission never used its power not to discontinue an invitation to tender; in certain cases it however had to record that the tenders made were higher than the maximum amount of the refunds which it had fixed and that these tenders could not therefore be accepted.

Reply to Say, Béghin and Sucres et Denreés

The participation of Say, Béghin and Sucres et Denrées in the concerted practice is established by the beforementioned documents and, in particular, by Export's note of 17 February and 21 May 1970, where these undertakings are expressly mentioned, Sucres et Denrées sometimes in the person of Mr Varsano.

to (bb) Replying to all the applicants the commission states that if, in earlier decisions relating to restrictions on competitions relating to exports, it found that these restrictions were not likely to affect trade between Member States, this finding was always based on the facts in the particular case of which it had knowledge. On the other hand it never excluded the possibility that in other cases cartels relating to exports to third countries may effect trade between Member States.

It is not correct to say that the Commission has absolute control of exports to third countries. It cannot fix as it likes the conditions applicable to these exports, so far as both refunds and the amounts are concerned, since it can only act within the framework of tenders made by producers over which it has no influence.

Reply to Say and Béghin

Instead of offering certain quantities to the intervention agencies undertakings were also able to sell them on the intra-Community market. They cannot therefore state that the offers to the intervention agencies were the unavoidable result of their inability to export to third countries.

With regard to the reasons why the concerted practice in question might affect trade between Member States, cf. reply to Générale sucrière below.

The fact that from 1 January 1971 export licences may be used from any part of Community territory has no connexion with the complaint which has been made, as it only relates to the year 1970.

Reply to Générale sucrière, RT and Sucres et Denrées

The decision did not blame the applicants for applying abnormal export prices but for having prevented pricing from being established freely. With regard to the statement that the course of conduct to which exception is taken did not make sugar scarce within the Community it must be pointed out that there was a large demand in other countries of the common market.

With figures in support the Commission argues that the sum of the maximum amount of the refunds and the sugar prices (taking either the Paris 'spot price' or the futures price) was always above the intervention price. As the undertakings had several months in which to export the sugar, they could also wait until the world price was most favourable. The fact that exports to third countries comprise 10 % of Sucres et Denrées' turnover shows its interest in such operations.

Producers engaged in a general concerted action in connexion with the amounts to be tendered at the invitations to tender and not just in relation to each tender.

In reply to the statement that the producers were nevertheless forced to export to third countries in order to

maintain their commercial position in those countries, the Commission reminds these applicants that in its opinion the concerted action relating to the invitations to tender is one of the total number of concerted actions in which the participating undertakings engaged in order to partition national markets. Within the framework of this general cartel provision was made for specific quantities to be exported to third countries in order to prevent excess supply causing prices to drop within the Community. Moreover the total volume of exports to third countries and the amount of the surpluses followed a parallel course. The trend of exports justifies the finding that they were not held back by the system of invitations to tender.

Sucres et Denrées is wrong to think that the Commission has blamed the tenderers for taking each others place because export licences were transferable. In fact it found that an infringement had been committed at a time when licences could not be transferred.

to (cc) RT disregards the fact that, within the spirit of the decision, the fact to which exception is taken is that the parties concerned agreed the amounts for export and the amounts of the refunds and not that the mechanisms of the invitations to tender may have been used improperly.

(3) Summary of the replies

The applicants submit that the Commission's powers under Community regulations relating to exports are sufficient to prevent interference with competition by means of concerted actions between exporters.

Générale sucrière (and — using identical language — *Say* and *Béghin)* as well as *Sucres et Denrées* submit that it emerges from Article 4 of Regulation No 766/68 that although the tenders received serve as a 'basis' for determining the maximum amount of the refund, they are not the decisive factor in fixing the amount. The Commission does not have to fix the amount at the level of the most satisfactory tender. The amount fixed should be based upon a comparison between the situation on the common market and the world market.

Générale sucrière, Say and Béghin add that the Commission has the power:

— to refuse to accept all tenders if it is of the opinion that even the lowest tender is not satisfactory;
— to limit exports, by fixing a maximum figure, to an amount which appears to it to be compatible with maintaining an adequate total supply and, therefore, effective competition on the intra-Community market;
— to discontinue the periodic fixing of refunds, in which event no refund shall be granted; since the world price was always below the common market price during the period under consideration, the absence of any refund sufficed to prevent exports and, therefore, the possibility of the supply of sugar in the Community becoming scarce.

Sucres et Denrées also agree that the Commission had the opportunity of resorting to the system of periodic fixing of refunds which, because it is automatic, allows more scope for free competition. It can influence the amount of sugar exported by fixing the periodic refunds, sometimes at a low level, sometimes at a high level.

In the document headed 'The files of the common agricultural policy' 'les dossiers de la politique agricole commune') of 15 April 1973, the Commission states that 'in practice the refunds determined by periodic fixing are fixed systematically at a level which is clearly lower than the refunds resulting from invitations to tender in order to allow the Community authorities to excercise continuous supervision over sugar exports'. The

Commission's argument is contradictory because, if the concerted action to which exception is taken impeded the maintenance of effective competition within the common market, the Commission did not fail to exercise its regulatory and supervisory powers.

The Commission publishes each year estimates of the amount of sugar supplied for different purposes; if the figures produced do not have legislative value, they are however 'an indication' of the Commission's policy-making and supervisory powers. Similarly the Commission fixes at the beginning of each marketing year the amount of the stocks which shall be available on the common market at the end of the marketing year, thereby determining in great measure the total volume of the surpluses intended in particular for export.

Générale sucrière, Say and Béghin are of the opinion that the reason why the Commission did not use its powers in 1970, is that it thought that neither the quantities offered for export, nor the prices obtained by producers, were likely to endanger effective competition within the common market. Moreover if the powers conferred on an authority are sufficient to prevent any effective concerted action, there cannot in law be a concerted action deserving censure.

RT calls attention to the fact that it is of little moment to know whether the Commission did or did not use its powers frequently. The mere existence of these powers breaks the causal connexion between the practices to which exception is taken and the effects referred to in Article 85.

With regard to the arguments invoked by the Commission to show that the practices in question had the effect referred to in Article 85, the applicants make the following submission:

Générale sucrière, Say and Béghin reply to the statement, that the parties apportioned the amounts produced among intra-Community exports and other destinations with the object of relieving the intra-Community market of this task, by arguing that surpluses were exported and that this was encouraged by the Commission through export refunds. Moreover, if the producers could neither export nor sell their surpluses on the domestic market at a price at least equal to the intervention price, they offered them to intervention agencies which, for their part, could only sell them in the Community at a price higher than or at least equal to the intervention price (Regulation No 1009/67, Article 10). As the export prices obtained by the applicants never exceeded the intervention prices, there was under Community regulations no advantage at all to be derived from a general concerted action for the purpose of fixing the amounts to be exported. On the other hand producers were forced to engage in a concerted action in order to meet the requirements of their foreign markets at each invitation to tender, without the applicants' freedom of action being restricted either in the common market or on the world market.

Sucres et Denrées takes the view that the Commission has neither shown that the amount alleged to have been withdrawn from the intra-Community market could have been sold there, nor that, even on this purely theoretical assumption, the intra-Community market would have operated in a different way. In fact, if Sucre et Denrées had not exported the amounts in question, it could have offered them to the intervention agencies. However, during the marketing year under consideration, the French intervention agency itself exported 120 000 metric tons, that is to say one quarter of Community exports. This fact, particularly if it considered in the light of the fact that during the marketing year covered by the proceedings, a certain amount of sugar could be denatured on the initiative of the Community authorities, removes all foundation from

the Commission's argument. In addition the Commission has admitted that, during the marketing year under consideration, the Italian market was supplied in a perfectly satisfactory way.

RT submits that the argument, that the concerted action in question had an effect on the amounts to be sold within the Community, comes up against the fact that the objective of the parties concerned was, not to increase the volume of exports but to obtain the intervention price. Further, the said agreement is tantamount to saying that any cartel for exports is prohibited and is therefore inconsistent with the normal practice of the Community.

So far as the Commission's statement that the export price level was always above the intervention price is concerned, *Sucre et Denrées* states that it is irrelevant, as the Commission stated that it has not treated any effect which the concerted action might have on the level of these prices as being an element or evidence of the infringement. Moreover, this statement is wrong. The table produced by the Commission in support of its statement sometimes takes the 'Paris price' and sometimes the futures price as the intra-Community reference price according to the requirements of the case. Further it gives a false idea of export costs; they amount to 7 % whereas, according to the figures produced by the Commission, the exporter is left on average with 2·38 % to cover export costs if he wishes to obtain the intervention price.

RT also disputes the evidential value of the table produced by the Commission by arguing that 'the Paris price' is a price fob port of shipment, whereas the intervention price is an ex works price. The Commission's figures are therefore wrong, since they take no account of the cost of packing, transport and shipment. RT produces a note from Export which in its opinion makes good these omissions.

Générale sucrière, Say and Béghin criticize the Commission's figures on the ground that they do not take certain costs into account. Further they call attention to the fact that the complaint that they obtained a price which was not arrived at by free market forces cannot be made against either the world market price — and it has never been suggested that this price is arrived at otherwise than by competition — or the amount of the refund which cannot from the nature of things be arrived at 'freely'. In fact, according to the fifth recital and Article 3 of Regulation No 766/68, this amount must be equal to the difference between the world market price and the intervention price. If on some occasions at the invitations to tender, several producers were able to tender amounts of the refund which were not the same, the reason was that the price which the exporter obtains from his foreign customer may vary to some extent from the average price on the world market, and — *Générale sucrière adds* — the formation of this price is moreover not influenced by any concerted action or Community law.

Sucres et Denrées submits that the complaint that it applied an export price which was not fixed by free market forces is neither relevant nor well-founded. On the one hand the Commission has not shown that any obstacle to the free determination of this price could have any effect on the intra-Community trade. On the other hand export refunds are the only item in the said price which is not fixed before obtaining export licences. The regulations governing the sugar market show that the refund must make good the difference between the world price and the intervention price, and it must be fixed after taking into account those exports costs which cannot be dispensed with. In these circumstances no complaint can be made against Sucres et Denrées, for the very good reason that it could not obtain a price above the intervention price. It is no good

objecting that the machinery of the invitations to tender was designed for the case where it is possible to export with a refund lower than that which results from the preceding considerations. This argument only applies to those invitations to tender which are described as special and which in fact have never taken place; further the Commission has not shown that Sucres et Denrées was in a position to export with a refund lower than that which was awarded.

With regard to the alleged opportunities for exporters to 'speculate' on prices it must be borne in mind that in international trade obligations have to be performed within the time periods laid down.

RT asks the Court, on the basis of Article 184 of the Treaty, to find that the regulations instituting the system of invitations to tender for export refunds are null and void. In fact, as this system speculates on storage or cash difficulties, its effect was to force producers to accept a lower return than the intervention price; it is therefore incompatible with the fundamental objective of the common organization of the market, which is to guarantee producers the intervention price so as to enable them to pay the growers the minimum price for sugar beet.

Sucres et Denrées makes the further submission that in its capacity as a dealer, it only holds that amount of sugar which corresponds to the available opportunities for selling it on the markets of third countries and does not therefore fix the amounts to be exported.

With regard to the question whether the concerted actions to which exception is taken might affect trade between Member States and also the question of their connexion with the concerted actions found to exist on the intra-Community market, the *applicants* make the following observations.

Sucres et Denrées state that even if in fact tenderers took each other's places, that did not produce the effects referred to in Article 85; at least, the effects on the intra-Community market were neither appreciable nor prejudicial. Tenderers can only interchange to a limited extent, since sugars exported to third countries, because they are geographically located near to ports, cannot be replaced by others.

Générale sucrière, Say and Béghin do not deny that the effect of each invitation to tender, treated separately, could be the replacement of tenderers. But this effect could not be found to exist throughout the whole of the marketing year. The Commission has not established the existence of a comprehensive concerted action. The concerted actions actually implemented, which were simply carried out from time to time according to *Générale sucrière,* did not limit the freedom of undertakings to decide themselves whether they intended to take part in an invitation to tender, their decision being dependent upon the commitments and commercial requirements of companies on foreign markets. The only effect of concerted actions could have been that meeting these requirements was spread over a certain number of invitations to tender, (in such a way as to allow the meeting of other producers' requirements to be spread over in the same way, as *Générale sucrière* adds).

With regard to the documents which, according to the Commission, prove the link between the concerted action in question and that found to exist on the intra-Community market, *Générale sucrière, Say et Béghin* are of the opinion that the telex message of RT to Export of 23 July 1970, only expresses the opinion of its author and cannot therefore be admitted as evidence against the other applicants.

Sucres et Denrées state that contacts between undertakings, such as those revealed by the documents produced for the Court file by the Commission, are

customary on the sugar market 'where business has always been transacted in public and gives rise to publicity through circulars from the exporting companies and above all through telegrams from specialist agencies'. Such an exchange of information does not adversely affect undertakings' freedom of action; it does not in itself deserve censure. On the other hand, the fact that Sucres et Denrées is an international dealer and knows the markets of third countries explains why it was consulted.

RT points out that according to the Commission's statement, the concerted action relating to exports to third countries was restricted to the year 1970, whereas the concerted action relating to the internal markets continued beyond this year; for this reason the alleged link does not exist.

(4) Summary of the rejoinders

The *Commission* replies that the system of invitations to tender allows for the existence of, indeed postulates, that there should be 'competition'. In fact although it is true that this system enables the Commission to direct exports to some extent, it does not however fix the amounts to be exported. It opens a standing invitation to tender to which undertakings can resort once a week. It must accept tenders submitted by undertakings for an amount not exceeding the maximum amount fixed by the Commission. The concerted action between the applicants before the submission of tenders concerning the amounts and the amount of the refunds restricted competition precisely at the point where there should be competition between producers, so that the Commission could no longer come to a decision with full knowledge of all the circumstances on the basis of objective facts. Thanks to this concerted action each undertaking avoided upsetting the others by submitting tenders in respect of which they had not come to an agreement. Générale sucrière moreover acknowledged that apart from these concerted actions, there was 'lively competition to obtain refunds', between undertakings. The Commission quotes the example of a decision taken by a French authority according to which a concerted action relating to the tenders at an invitation to tender was considered as a restriction on competition.

The argument that if the amounts of sugar in question were not exported to third countries they could be offered to intervention agencies which could only sell them inside the common market at a price at least equal to intervention price, is no answer to the Commission's finding that the concerted action served to relieve the intra-Community market and prevent any pressure on the domestic price level. In fact the undertakings were as interested in removing the sugar from the intra-Community market as in obtaining the intervention price: if they had offered the amounts in question to the intervention agencies, they could not be certain that they would be returned to the intra-Community market and depress prices.

In previous decisions quoted by the applicants the Commission did not intend to rule out this possibility that a restriction on competition at the level of exports to third countries might affect trade between Member States. The German and American legislative systems, in particular, apply the rules on competition to export cartels, taking into account their effect on the domestic market. Sucres et Denrées' reply misses the point of the Commission's argument when it states that 'exports cannot have as their effect the alteration of intra-Community market conditions'.

The argument based on meeting the requirements of foreign markets is not convincing. The applicant do not produce any evidence likely to confirm the continuity and regularity of supplies delivered to specific customers over a

definite period. In this connexion the Commission calles attention to a double contradiction which the applicant's arguments bring to light: first the claim that they had commitments outside the Community is inconsistent with the argument that it was in the interests of producers to sell their surpluses to the intervention agency rather than to export them to third countries in consideration of a return which never reached the intervention price level. Finally the latter argument is inconsistent with the economic interests of producers to export, which is shown by the large amount of sugar exported.

So far as the export price level is concerned the Commission's reply to Sucres et Denrées is that there can be no question of 'new positions' taken up by the Commission, simply because some only of the facts mentioned in the notification of objections were used in connexion with this point in the decision.

So far as the argument based on the export price level is concerned, the Commission submits that, even if the applicants did not obtain the intervention price, this fact has no relevance in proving the existence of the concerted action. It is however quite wrong to state that the attempt to obtain the intervention price failed. The Commission refers again to the 'table showing the maximum amounts of the refunds' which it produced with its statement of defence and adds that it never denied that it did not include in its calculations the costs of packing and transport. But, when a producer makes a comparative economic calculation for the sale of specific quantities to different destinations, he computes his sale price ex works as is shown by certain documents annexed to the statements of defence. Further there are no packing costs for sugar in bulk and transport costs depend upon the geographical situation of the refinery. In its reply to RT the Commission argues that the costs of shipment are only incurred in the case of transport by boat and these costs are not incurred in the case of sales to Switzerland. By way of example the Commission produces a contract entered into by Export on 8 April 1970. In its reply to all the applicants the Commission adds that the undertakings have a period of several months during which they can export sugar so that they could therefore speculate by waiting for the moment when the world price was most favourable. In its reply to RT the Commission refers by way of example to the beforementioned contract in which the time for delivery was fixed at 'April/August 1970, at the option of the purchaser'.

Finally, the applicants fail to understand the function of the intervention price which is only 'guaranteed' to the extent to which the goods are offered to the intervention organs. A wider 'guarantee' cannot be inferred from the fifth recital and Article 3 of Regulation No 766/68.

The Commission's answer to Sucres et Denrées argument that, as a middleman, it could not alter the amounts offered in the common market, is that Sucres et Denrées holds itself out on the market as a producer having very large quantities and that it participated in the concerted actions to which exception is taken on the same footing as the producers concerned. Moreover it engaged in the concerted actions relating to deliveries on the Italian market. The documents produced by the Commission prove that the undertakings concerned, including Sucres et Denrées, established a link between the concerted actions aimed at the protection of different markets within the Community and the concerted action which is now being considered.

With regard to the question whether trade between Member States was affected the concerted action might bring about an alteration in the exports by certain French and Belgian producers to

other countries of the Community. It is useless to object that this trade was not substantially affected, because the Commission does not have to prove that the concerted action actually partitioned the market; it is sufficient that it may affect trade between Member States. This is the position in this case, since one or other of the applicants may have found that it was unable to deal with a request coming from within the common market owing to the concerted action to which exception is taken. Similarly whether tenderers in fact change places with each other — a criterion which the Commission has not followed — is of no importance because it is sufficient that such an interchange may arise. Finally Sucres et Denrées cannot rely on the allegedly very small volume of the amounts of sugar concerned, because the invitations to tender for exports covered, in 1970, 133 000 metric tons of white sugar and 60 000 metric tons of raw sugar, almost all of which came from France or Belgium.

(b) RT, Say and Générale sucrière: Infringement of Regulation No 26

RT, Say and Générale sucrière submit that even if, contrary to the arguments put forward by these companies, the practices to which exception is taken fall within Article 85, they are covered by exceptions to the said Article provided by Regulation No 26. As the arguments put forward on this point deal also with the other complaints made by the Commission against the said companies, reference must be made to Chapter 1, B b above.

10. The fines

The aim of these submissions is to show, either that Article 3 of the Decision should be annulled even if the Court finds that the alleged infringements have been committed or that the amounts of the fines should be reduced. In addition to the submissions summarized below, each of the applicants repeat, so far as it is concerned, certain arguments mentioned above (1 to 9); the Commission has adopted the same method.

A — Formal and procedural submissions

(a) Industria degli zuccheri, Sucres et Denrées, Béghin, Say, Générale sucrière, SU and Pfeifer & Langen:

Infringement of Article 190 of the Treaty

(1) Summary of the applications

The *beforementioned applicants* submit that the decision, in so far as its considerations justifying the principles upon which fines are based and their amount (page 43 *et seq.)* are concerned, is defective because of the inadequacy or contradictory nature of the grounds upon which it is based. Some applicants claim in a general way that the imposition of such big fines should be accompanied by a very carefully prepared statement of the reasons upon which they are based.

(aa) *Générale sucrière, Say, SU* and *Pfeifer & Langen* criticize the Commission for not having stated the reasons upon which its statement that the infringements were committed 'intentionally or, at least, negligently', are based, because the parties concerned, 'knew, or in any case could have known the restrictive effects of these practices on competition' (decision, p. 43, Rt. Col.).

Générale sucrière, Say and *Pfeifer & Langen* take the particular view that the Commission should have stated the exact degree of blame which it found to exist.

SU also states that the Commission failed to show whether the disputed contracts had as their 'object' or only as their 'effect' the restriction of competition, which is an important matter since in the latter case negligence is the exception. The Commission should have

stated why SU, when it bought sugar to cover its deficit, knew or should have known that it was participating in a restrictive policy adopted by sellers. The finding that an undertaking 'could have been aware' of the effects of its practises does not in itself justify any mention of 'negligence'.

(bb) *Générale sucrière, Say, Béghin* and *Sucres et Denrées* regard the fact that the Commission did not break down the fine in relation to the various infringements which were found to exist as a defect in the statement of the reasons upon which the fine was based. The Commission should either have imposed the fines separately in respect of each infringement or at least indicated the factors relating to each infringement which led to the fixing of the whole amount of the fine.

(cc) *Générale sucrière, Say, Béghin* and *Pfeifer & Langen* blame the Commission for having failed, when it fixed the amounts of the fines, to state in detail and evaluate how seriously each of the undertakings concerned participated in the concerted actions compared with their co-participators.

(dd) *Pfeifer & Langen* states that by basing the seriousness of the infringements solely upon the fact that they 'were drastic and are clearly contrary to the objective of integrating the markets envisaged in the Treaty' (decision, p. 44, Lt. Col.) the Commission made a finding and not a statement of the reasons upon which the fines were based.

(ee) According to *Sucres et Denrées* the Commission should have accounted for the fact that this undertaking does not control any part of the European markets.

(ff) *Sucres et Denrées* criticizes the Commission's failure to explain the effect of the situation on the Italian market on the conduct to which exception is taken.

(gg) *Générale sucrière, Say, Béghin* and *Scures et Denrées* state that the claim that the seriousness of the infringements is due to the fact that 'the effect of every such practice is to reduce to a minimum the opportunities of importing sugar freely without the control of the national producers' (decision, p. 44, Lt. Col.) can have no connexion with the complaint concerning exports to third countries; on this point the decision therefore contains no statement at all of the reasons upon which it is based.

(hh) *Générale sucrière, Say, Béghin* and *Sucres et Denrées* submit that the sentence 'With regard to the duration of the infringements, it must be stated that in general they cover serveral years' (loc. cit.), is inconsistent with Article 1 (3) of the decision which states that the practices relating to the invitations to tender for export refunds only took place in 1970.

(ii) *Industria degli zuccheri* calls attention to the fact that the decision itself states (loc. cit.), that 'it must be borne in mind that the production of and trade in sugar were regulated up to 30 June 1968 by national market organizations, which even provided for sales territories for marketing of sugar, this explains 'a tendency to stick to old practices and a slowness to adapt to and take advantage of the opportunities that the Community organization of the sugar market has openend up for free intra-Community trade'. This finding — which is correct — is inconsistent with the large amount of the fine. Further it is difficult to reconcile it with the fact that the duration of the infringements is treated in the decision (loc. cit.) as an aggravating circumstance; in fact a three year period for adapting to the Community organization cannot be regarded as a long period.

(2) Summary of the statements of defence

The Commission makes the following observations:

to (1) (aa)

In reply to *Générale sucrière* and to *Say* the Commission states that, in the decision it gave a detailed statement of the considerations upon which it relied in order to justify the imposition of the finces.

In reply to *SU* the Commission points out that it is clear from the evidence which it has produced and from the circumstances surrounding the company's conduct that it intended to act as it did. Moreover the nature of the practices for which SU is blamed is such that they had both as their object and effect the restriction of competition, a distinction moreover which is not of crucial importance in determining the amount of the fine.

In reply to *Pfeifer & Langen* the Commission states that, if the general finding of the decision is that the undertaking concerned committed the infringements intentionally or, at least, negligently, the eason for this that the undertakings concerned have not all been found guilty of an intentional infringement. Pfeifer & Langen, however, carried out intentionally the practices proved against it; this finding must therefore be applied to the infringement as a whole.

to (1) (bb) to (ff)

The decision sets out exhaustively the factors taken into account to determine exactly how serious was the conduct of each of the respective undertakings concerned. So far as the Italian market in particular is concerned, it showed that there were opportunities for competition there. With special reference to Sucres et Denrées it called attention to the decisive role played by this company in the concerted action concerning this market.

Since each applicant therefore was aware of all the factors taken into consideration for fixing the fine imposed upon it, the Commission did not have to apportion the amount of the fine between the various infringements.

to (1) (gg)

The Commission showed that the concerted action relating to the invitations to tender for export refunds was connected with the concerted actions in which the undertakings concerned engaged in order to partition the domestic markets; moreover it showed that the object and effect of the practices relating to national markets was to prevent independent consumers from obtaining their supplies freely from producers of other countries of the common market.

to (1) (hh)

The infringements in fact covered several years except in the case of the concerted action relating to the invitations to tender for export refunds, which the Commission found to have existed in 1970 only.

to (1) (ii)

The decision expressly indicated that the common organization of the market in sugar promoted competition by opening national frontiers. The practice, to which exception is taken, was likely to prevent the market from adapting itself, even slowly, to the requirements of the said organization.

(3) Summary of replies

to (1) (aa)

Pfeifer & Langen replies that by stating now that this company was one of the companies which intended to act as it did, it is attempting to justify *a posteriori*. The Commission's statement makes clear once more the weakness of the procedure adopted by the Commission of making a collective decision covering a large number of undertakings.

to (1) (bb) to (ff)

Générale sucrière, Say, Béghin and *Sucres et Denrées* reply that owing to the failure to apportion the fine they cannot discuss it infringement by infringement and the Court is unable to review the evaluation by the Commission of the seriousness of each of the infringements. *Générale sucrière, Say* and *Béghin* add that the composite penalties are not part of Community law; in any event they can only run after each infringement has been punished separately.

SU points out that the failure to apportion the fine makes it impossible for the Court to make a decision after ascertaining all the facts, if it were to hold that only one of the two infringements for which the company has been blamed has been proved.

(4) Summary of the rejoinders

The Commission replies as follows:

to (1) (aa)

In reply to Pfeifer & Langen the Commission says that the finding that Pfeifer & Langen intentionally committed the infringements found to exist against it can automatically be inferred from the reasons stated in the decision why the Commission blamed Pfeifer & Langen for having committed these infringements. Moreover Article 15 of Regulation No 17 does not draw any distinction between infringements committed intentionally and negligently.

to (1) (bb) to (ff)

In reply to Générale sucrière, Say, Béghin and Sucres et Denrées, the Commission says that the applicants were aware of all the facts upon which the Commission relied for the purpose of determining the amount of the fines. The Commission had the right to punish by a single fine the participation of the applicants in several concerted actions having substantially the same objective which the applicants themselves had linked together.

In its reply to *SU* the Commission states that, when it fixed the fine, it drew no dinstinction between infringements of Article 85 and of 86, because, although these two infringements are different in law, they had as their aim the attainment of one single objective. If there had been no infringements of Article 85 there could have been no question of an infringement of Article 86; had it not been for the infringement of Article 86, the infringements of Article 85 would not have been so effective. If the Court were to hold that one of the infringements has not been proved, it could, on the basis of its unlimited jurisdiction which it exercises in cases such as this, itself draw the necessary conclusions in so far as the amount of the fine is concerned.

(b) SZAG and SZV:
Infringement of Articles 15 (2) and 18 of Regulation No 17 and of the rules governing the juridisdiction of the Court

(1) Summary of the applications

SZAG and SZV take the view that the fact that the Commission did not apportion the fine between the various infringements which it found to have existed (cf. (a) (1) (bb) above), is an infringement of Article 15 (2), of Regulation No 17, a provision which uses the expression 'infringement' in the singular. Further if the Court, having held that only part of the infringements alleged have been established, were to consider that it must annul part of the fine, it would have to decide the amount which must be retained; however, such a decision would not amount to a reduction of the fine but to its determination, *ab initio,* which is not within its jurisdiction.

Articles 15 (2) and 18 of Regulation No 17 only refer to units of account; the

Commission did not therefore have to convert the amount of the fine into Deutsche Marks. The undertakings may also pay a fine in a currency other than their national currency. Further the operative part of the decision does not allow possible changes in exchange rates to be taken into account; however the conversion has to be carried out by applying the exchange rate in force at the date of payment and not at date when the decision was adopted.

2. Summary of the statements of defence

The *Commission* states that according to the case-law of the Court it has the right to punish with a single fine one undertaking's participation in several infringements having the same objective. So far as SZV in particular is concerned this company's infringements were evaluated in relation to the concerted practice which had as its effect the protection of the market of south Germany (cf. p. 45 of the decision); it is impossible to split up the practices engaged in by this company which deserve censure into separate transactions.

The unit of account is not a currency and the fine must be paid in national currency. The Commission has hitherto always allowed undertakings to pay fines in one of the currencies of the Member States. But it has to ensure that the decisions imposing fines may if necessary be enforced. That is why the fines are also determined in national currency. Moreover the advantage of this solution is that all the undertakings upon which findes have been imposed are treated in the same way, in that they have to pay in national currency the equivalent value of the unit of account at the date when the decision was adopted.

B — Submissions on the substance of the case

(a) Eridania, Industria degli zuccheri, Sucres et Denrées, Béghin, Say, Générale sucrière, SZAG, SU, CSM, Pfeifer & Langen and SZV: Infringement of Article 15 of Regulation No 17

(1) Summary of the applications

(aa) *Générale sucrière, Say, Béghin, Sucres et Denrées, SZAG, Industria degli zuccheri, SU, CSM, Pfeifer & Langen and SZV* submit that, even if the alleged infringements had occurred, they were not committed either 'intentionally' or 'negligently'.

So far as the practices relating to the Italian market (cf. 1 above) are concerned, *Générale sucrière, Say and Béghin* submit that, having regard to the national regulations applicable to this market, it could never have occurred to them that the distribution of the orders, which was suggested to them, might in fact restrict competition. The good faith of the undertakings concerned is also illustrated by the moderate prices obtained from their sales in Italy.

SZAG submits that it had no means of knowing that the Commission would regard deliveries between producers, which had been customary in Germany long before the entry into force of Community agricultural regulations and in other branches of trade for decades, as concerted practices.

Industria degli zuccheri states that the undertakings concerned, which were working towards legitimate aims, did not intend that their transactions should have the effects which the Commission considers were caused by the practices to which exception is taken.

So far as the practices relating to the Netherlands market are concerned (cf. 2 above), *SU* states that it made the disputed purchases in order to make good a deficit in sugar, so that these transactions could not possibly have had as their object but at most as their effect restriction of competition and such an

effect would moreover have been against the wishes of the company. The Netherlands text of the decision (p. 43, Rt. Col.) moroever states that the interested parties acted 'opzettelijk of althans uit grove nalatigheid' ('intentionally or at least with gross negligence'), so that the fine cannot be upheld if the Court has to find that there was no such gross negligence; the Commission has not found that SU acted 'onachtzaamheid' ('negligently').

CSM states that it had reason to believe that its commercial course of conduct is normal and economically justified. The practices to which exception is taken have to be considered in the light of the history, content and scope of Community regulations.

Pfeifer & Langen takes the view that it had no means of knowing that the Commission would regard deliveries from producer to producer as practices designed to partition the markets. In fact neither the Commission nor the national authorities have adopted such a position until now, which was all the more unexpected as sales are due to the conflicting interests of the parties, whereas cartels are based on converging interests.

So far as the practices relating to the markets of the western and southern parts of Germany are concerned and the economic pressure alleged to have been brought to bear upon Netherlands importers is concerned (cf. 3, 4 and 6 above), reference is made to the arguments of *Pfeifer & Langen, SZAG, SU and CSM* repeated above.

So far as the complaint that middlem were prevented from reselling sugar from other sources and that customers were tied by the grant of loyalty rebates (cf. 7 above), *SZA* states that it could not foresee that the Commission would consider the prohibition on competition stipulated in the disputed contracts as an infringement, when such clauses are customary in trade representatives contracts and were acknowledged to be admissible in the communication of 24 December 1962.

With regard to the loyalty rebates, SZV never linked then with intra-Community trade. When the company learnt that they were being investigated by the Commission, it asked for and obtained an interview with the Commission's representatives which took place on 29 May 1972 and during which the latter did not indicate that they had any objections to make against them.

So far as the complaint of having entered into agreements with middlemen which restricted their opportunities for importing and exporting within the Community (cf. 8 above) is concerned, *Pfeifer & Langen* submits that it could expect the Commission to feel it was bound by its beforementioned communication of 24 December 1962, instead of classifying this firm's agent in the category of independent agents.

So far as the invitations to tender for refunds in connexion with exports to third parties (cf. 9 above) are concerned, *Générale sucrière, Say, Béghin and Sucres et Denrées* state that, taking into account the context in which sugar is exported — namely through institutions — and the Commission's supervisory powers in this field, it could never have occurred to them that the concerted action to which exception is taken could have the effect of eliminating competition within the Community. Furthermore it was the intention of the undertakings to attain the objectives fixed by Community regulations.

(bb) *SZV* submits that by virtue of Article 15 (5), subparagraph (a) of Regulation No 17, fines cannot be imposed for acts taking place after notification to the Commission and before its decision granting or refusing the exemption. However the case-law of the Court shows that agreements exempt

from notification must be treated in the same way as agreements which have to be and have in fact been notified. As provided for in Article 4 (2) subparagraph (1) of Regulation No 17 the disputed contracts were exempted from notification, since they 'do not relate either to imports or to exports between Member States'.

(cc) *Certain applicants* state that the findings of facts and statements relating to the principles in accordance with which the fines were imposed and their amount include allegations which are incorrect:

(aaa) *Eridania* disputes the accuracy of the statements (decision, p. 44, Rt. Col.) that:

— it was 'the undertaking around which the group of Italian importers organized itself in order to control sales in Italy of sugar produced in the other Member States of the EEC';
— it took the initiative in 'finding opportunities to negotiate and complete agreements for the supply of sugar with French, Belgian and South German buyers';
— 'by the concerted organization of those supplies, ... it was able to maintain and even strengthen its position on the Italian market'.

With regard to the first point it emerges from the documents quoted on pages 57 and 58 of the Communication that the part played by Eridania was limited to that of a mouthpiece, who in each case had to pass on to the other Italian undertakings — which remained free to react as they thought fit — the offers for sale of foreign operators.

With regard to the second statement it is entirely unfounded and based on very weak evidence.

With regard to the third point it is on the contrary quite true that during the years under consideration Eridania's position became rather weaker, not only in absolute terms but in relation to other Italian sugar undertakings, as the decision itself admits (p. 19, Rt. Col.).

(bbb) *Générale sucrière, Say and Béghin* take the view that the statement that the serious nature of the practices to which exception is taken is due to the fact that 'the effect of every such practice is to reduce to the minimum the opportunities of importing sugar freely without any supervision by national producers' (decision, p. 44, Lt. Col.) is not true so far as the practices relating to the Italian market are concerned. *Béghin* adds that the same applies to the market of south Germany.

(ccc) *Béghin* denies that it is 'the largest producer in the group of French and Belgian producers exporting to Italy' (decision, p. 44, Rt. Col.); in fact the volume of its exports to Italy represents a very small proportion compared with the percentage of exports by all the French and Belgian producers.

(dd) According to *SZV* the grounds of the decision relating to this company (decision, p. 45, Rt. Col.) show that the Commission also imputed to it in part SZAG's course of conduct. This is unacceptable; although SZAG has a majority holding in SZV, it does not have a controlling interest in SZV owing to the way voting rights are allotted under SZV's articles.

(2) Summary of the statements of defence

to (1) (aa)

Some of the *Commission's* replies to the present submission are found in its arguments reproduced above, A (a) (2), to (1) (aa) to (ff). In addition the Commission makes the following submissions:

The Commission's reply to SZAG is that the decision is not based on the view that deliveries between producers amount in

themselves to an infringement, but on the ground that concerted practices having as their object and effect a partitioning of markets are prohibited.

The Commission's reply to *Industria degli zuccheri* is that this company knew, or at least must have known, that the effect of the concerted practice was to restrict competition.

The Commission's reply to *SU* is that the company fails to understand that the fine was not imposed upon it simply because it purchased from other producers. Even if SU did not intend to restrict competition the fact that an undertaking operating on such a large scale was not aware of the restrictive effect of such a course of conduct as the one in question amounts to gross negligence.

The Commission's reply to CSM is that, having regard to the nature of the practices in question, it is reasonable to hold that the company could not be unaware that it countinually endeavoured, with the help of non-competitive means, to restrict the potential competition of imports from other Member States.

The Commission's reply to *SZV* is that, in its view, in order to solve the question whether the company was culpable, the surrounding circumstances must be taken into account. With regard to the statement that SZV never linked loyalty rebates with trade between Meber States the objection must be raised that the company inherited the system of discounts applied by Branken at the same time as the common organization of the market in sugar was set up. SZV's natural competitors on the market of south Germany were French producers. It must therefore be assumed that the company introduced the system of rebates in order to impede the sale of French sugar.

The Commission's reply to Pfeifer & Langen is that in order to fix the fine, it did not take into account the agreements entered into with middlemen (cf. decision, p. 45); it simply recorded that these agreements, considered separately, infringe Article 85.

to (1) (bb)

The Commission states that it did not have to determine whether, considered separately, each of the seventeen trade representatives contracts entered into by SZV fulfilled the conditions of Article 85. The abuse found to exist in this connexion arises out of the system adopted by SZV. There is no implication that the acts amounting to an infringement of Article 86 are acts which are also illegal under another provision, in this case Article 85. It is not important therefore to know whether the said contracts had to be notified or not. Similarly SZV fails to understand that the contracts entered into with the purchasers and containing a clause relating to the loyalty rebate were not evaluated under Article 85 but under 86; measures amounting to an abuse of a dominant position do not have to be and cannot be notified.

to (1) (cc) (aaa)

The Commission's reply to *Eridania* is that:

- the group which this company was the head controls more than one-third of the Italian market;
- Eridania found opportunities to negotiate and complete agreements for the supply of sugar entered into with foreign suppliers;
- it was the company around which the group of Italian producer-importers organized itself in order to control the import and sale in Italy of sugar produced in the other countries of the Community;
- owing to its continual participation in the invitations to tender, Eridania secured 41·2 % of the total imports effected by the group of producers during the marketing years under consideration.

to (1) (cc) (bbb)

Cf. A (a) (2) to (1) (gg) above.

to (1) (cc) (ccc)

The Commission states that *Béghin* controls about 11·5 % of French sugar production; Béghin itself together with Sucre-Union, Say and Générale sucrière control 75 % of this production. It is one of the largest producers of the group of French and Belgian producers. The volume of exports to Italy suggests that these exports would have been even larger if Béghin had not participated in the concerted action.

to (1) (dd)

The Commission states that *SZV* is not an independent undertaking, but is the 'organ of the cartel formed by its associates'. The latter assigned it the task of selling their production to south Germany.

(3) Summary of the replies

to (1) (aa)

Générale sucrière, Say and Béghin state that the Commission passed over in silence the question whether the companies could have known that the practices to which exception is taken restricted competition.

Industria degli zuccheri refers to its statement relating to the submission that the Commission has infringed the rules of procedure of Regulation No 26 and the principle of legal certainty (cf. 1 A (d) (3) above). If the company's argument that the alleged concerted practice must be regarded as provisionally lawful is accepted, no sanction could be imposed, because it would infringe the principle of legal certainty and the principle that punishments cannot have retroactive effect. If, on the other hand, it is necessary to proceed on the basis that this argument is no longer valid because of 'the complete change in the case-law brought about by the Court' in its judgment of 6 February 1973 (Case 48/72, *Brasserie de Haecht* [1973] ECR 77), the Court must take into account its case-law existing at the moment when the facts to which exception is taken occurred and, therefore, annul the fine.

Eridania submits a similar argument.

SU states that the assertion that the fine was not imposed upon it simply because it purchased from another producer is inconsistent with the other passage of the statement of defence from which it must be inferred that the company is blamed solely for having met its requirements form RT.

An undertaking which is fined has the right to a statement of the specific reasons upon which the decision is based stating whether it is alleged that it intended to act as it did or that it acted negligently.

The Commission attempts to regard 'a conscious parallel course of conduct' as an infringement of Article 85. If the Court, contrary to the legal opinion which has been held until now on this point, has to accept this argument and also takes the view that the deliveries between producers are *ipso facto* inconsistent with this provision, the fine must still be annulled, because none of the factors constituting intention or negligence are present.

Pfeifer & Lagen replies that it does not appear on reading either the grounds or the operative part of the decision that the Commission did not also fine the company in respect of the agreements which it entered into with its agent. Any modification by the Commission of its point of veiw in this connexion must necessarily affect the amount of the fine.

to (1) (bb)

SZV adheres to its view that the Commission is not authorized to impose a fine in connexion with the agreements

entered into with trade representatives, even if the latter infringe Article 86. This argument is not invalidated by the Commission's claim that the abuse consists of the 'system' adopted by SZV. It appears that the Commission blames SZV for only using trade representatives and for preventing them form working for other producers in the territory covered by the agreement. Even if this is in fact what happened, the legal inferences drawn by the Commission are wrong. According to the case-law of the Court an agreement which, considered as a separate agreement, does not contravene Article 85, could nevertheless be prohibited if it forms part of an actual system of agreements which restricts competition appreciably. According to this case-law agreements forming part of a system and the system as such can be notified by completing the simplified form for a notification of a standard form of agreement (cf. Regulation No 27 of the Commission, of 3 May 1962, OJ p. 1118, and the forms annexed thereto).

Comparable considerations apply so far as the contracts providing for a loyalty rebate are concerned. Contracts can always be notified however they are interpreted under substantive law. If SZV had notified the said contracts, the provisions of Regualtion No 17 would have prevented the Commission from imposing a fine on the company, even under Article 86.

to (1) (cc)

Béghin states that the ground of the decision relating to its size compared with the size of the other companies exporting sugar to Italy cannot justify the amount of the fine imposed upon it. By focusing its attention on the whole of the company's turnover and not on the amount of its exports to Italy the Commission infringed Regulation No 17.

to (1) (dd)

SZV replies that it is not the 'organ of the cartel formed by its associates' but an independent undertaking which sells in its own name and for its own account sugar which it purchases from its associates.

(4) Summary of the rejoinders

The *Commission* replies as follows:

to (1) (aa)

It denies that *Générale sucrière, Say and Béghin,* surrounded by well informed legal advisers, could be blind to the fact that competition is assumed to be a fundamental condition of the common organization of the market in sugar. So far as the Italian market is concerned, the evidence of the concerted action and of its restrictive nature justifies in itself the rejection of their argument; nor, with regard to the invitations to tender for import quotas, have the applicants been able to shut their eyes to the fact that the concerted action restricted competition just at the point where it should have been exerting its influence.

In reply to Pfeifer & Langen, the Commission refers to the passage in the decision (p. 43, Rt. Col.) which states that 'the measures taken by the various undertakings concerned with regard to their agents... (see II E...) must be examined, in order to determine the amount of the fines, in conjunction with the concerted practices in which they engaged (see II A to D)'. This means that the trade representatives contracts entered into by Pfeifer & Langen were only taken into account in the context of the partitioning of the markets. 'Fines have therefore ben imposed upon the undertakings concerned in respect of measures, from which the existence of concerted practices intended to partition the markets has been inferred in a general way, and not in respect of each of the different measures which, when considered separately, amount also to infringements.'

The Commission's reply to *SU* is to blame the applicant for overlooking the

fact that Article 85 prohibits concerted practices even if they only have as their effect the partitioning of the markets. The acts to which exception is taken, by their very nature, could only have been carried out intentionally. Confronted with transactions between producers who are potential competitors, which took, for example, the form of sacks bearing the name SU, which the latter had sent in advance to RT, being filled by RT, it is difficult to accept that there was no intention to eliminate competition. SU knew that RT's sugar enabled it to meet a demand which would otherwise have been met by other suppliers. — The evaluation of SU's conduct, as described in the decision, is not in any way a new departure. In fact the fine does not punish the purchase of sugar as such but the change for the worse of the pattern of supply on the Netherlands market which, in this case, is indissolubly linked to this purchase.

to (1) (bb)

SZV disregards the fact 'that the fines have not been imposed because of the findings contained in subparagraph 3 of Article 1 [of the decision], but because of the concerted practices', as emerges from the findings on page 43 (Rt. Col.) of the decision.

to (1) (cc)

Article 15 of Regulation No 17 relates the amount of the fine to the total turnover of the undertaking in question and not to the turnover within the context of the acts which are criticized.

(b) All the applicants: Unfairness of the fines having regard to the principle in accordance with which they have been imposed or to the amount thereof

(1) Summary of the applications

(aa) *Certain applicants* complain that when the Commission decided to impose a fine or to determine the amount thereof it treated them more severely than other undertakings in a similar situation:

(aaa) *Générale sucrière, Say, Béghin, RT and CSM* call attention to the fact that the fines imposed in previous cases were much lower. *RT* and *CSM* add that, in those cases, the infringements were more serious than those which were found to exist in this case.

(bbb) *Certain applicants* draw comparisons between the way in which the Commission treated other sugar undertakings, and in particular Sucre-Union which was not fined.

- SZAG states that so far as its supplies to Italy are concerned it played the part of an outsider.
- *Industria degli zuccheri* emphasizes that the Commission only made one complaint against Italian producers and did not blame them for infringing Article 86 of the Treaty.
- *Eridania* criticizes the Commission for imposing upon it a fine amouting to 60 % of the total of the fines imposed on Italian undertakings, because this proportion does not in any way represent the relative position of this firm. It submits, by way of comparison, that Sucre-Union is the largest French producer and exporter.
- *SU* states that, since it has only carried on business since 2 January 1971, it can only be blamed for practices occurring in the 1971/72 marketing year. As the duration of the infringements is thus reduced to a very small period, the principle of equality of treatment requires that the company be exempted from any fine.
- *CSM* submits that the fine with which it is punished is too large in relation to the fines imposed by the decision upon other undertakings, after taking into account the turnover of these companies as well as the seriousness and the number of the infringements which they were found to have committed.

— *SZV* calls attention to the fact that the Commission decided not to impose a fine upon WZV and on Pfeifer & Langen in connexion with the clauses prohibiting competition in their trade representatives' contracts. The fact that it evaluated the conduct of these firms under Article 85 and the conduct of SZV under Article 86 does not justify treating these two companies in such a different way.

(ccc) *SZAG* and *SZV* state that, unlike the situation existing in other Member States, the fines are not deductible for tax purposes in Germany. The Commission should have taken this factor into account when it fixed the amount of the fine. It is true that the Court has already rejected this argument; such a view however only appears to be justified if the fines are low which they are not in this case.

(bb) *Several applicants* submit that the fine is not justified or at least out of proportion to the nature of the offence, if account is taken of the limited range of the acts to which exception is taken or of the fact that they were not very serious and caused no demage.

(aaa) *Emiliana, RT, Sucres et Denrées, Industria degli zuccheri, SU, CSM and Pfeifer & Langen* state that, as the prices they applied were low, the profit they made from the practices at issue was not unfair.

The main submission of *RT, Sucres et Denrées and SU* is that the amount of the fine can only be fixed according to the profits made out of the unlawful behaviour. *SU* adds that this link stems from the connexion established by Article 15 of Regulation No 17 between the turnover of an undertaking and the amount of the fine. *Sucres et Denrées* also argues that Italian consumers actually benefited from the practices to which exception is taken, because its operations enable freight rates to be reduced and consumers to be supplied regularly. *Pfeifer & Langen* states that in its main sales area consumers are able to purchase sugar at prices which are not fundamentally different from those applied ten years ago in spite of the considerable increase in production costs.

(bbb) *RT* states that, with regard to the duration of the infringements none of the documents referred to in the decision relate, in so far as RT is concerned, to the 1968/69 marketing year, with the exception of the letters of nonacceptance of the requests for supplies from Netherlands operators and these refusals were justified by the fact that at that time RT, being out of stocks, had itself to import sugar from the Netherlands.

(ccc) *Sucres et Denrées* submits that there was not much interference with competition. Further, so far as sales in Italy are concerned, this company merely acted as commission agent, receiving a commission fixed according to the amounts supplied and not to the price applied, in which it therefore had no direct interest.

(ddd) *SADAM* confirms that the only act for which it is blamed by the Commission is the contract entered into with the Ferrero company for the supply of 15 000 quintals of sugar imported from other Member States.

(eee) *SZAG* states that it emerges from the findings on page 45, (Rt. Col.) of the decision that Sucre-Union did not put into practice the concerted action with SZAG. However, an attempt, which was moreover abortive, cannot be punished; at least the fine should be reduced, as the concerted action has not had any serious consequences.

(cc) *Certain applicants* state that the fine bears no relation to their economic position.

(aaa) *Volano* bases its argument on the fact that it is only a small undertaking

which was faced with difficulties during the whole of the period covered by the decision.

(bbb) *Sucres et Denrées* calls attention to the fact that it is not a producer and that, having regard to its share of the market, the fine is unjustified.

(ccc) *SADAM* states that it only controls a very small part of the Italian market and is not therefore able to restrict competition.

(ddd) Similarly, *Cavarzere* submits that it is a small undertaking compared to the majority of Italian producers.

(eee) *CSM* takes the view that the fine is excessive if account is taken of its share of the market and of the comparative influence it exerts on the Netherlands market.

(fff) *Pfeifer & Langen* is of the opinion that the finding that this company 'because of its production and influence within WZV is the largest undertaking in the western part of Germany' (decision, p. 45, Lt. Col.) gives a false impression of the actual size of this company.

(dd) *Several applicants* regard the institutional or economic circumstances surrounding these acts which are critized as amounting at least to attenuating circumstances.

(aaa) *RT, Sucres et Denrées, Cavarzere, Industria degli zuccheri and CSM* submit that these acts, which are criticized should be considered in the light of the scope and effect of Community regulations and, if need be, national regulations.

— *RT* and *Sucres et Denrées* argue that under the interventionist system, which both the Community and Italy have adopted, there is very little competition left which can be restricted.
Sucres et Denrées adds that the Commission and Italy are jointly responsible for the practices relating to the Italian market; similarly, the Commission is responsible for the practices relating to the export refunds, because it tampered with the machinery for granting these refunds.
— *Cavarzere* requests the Court to consider also the 'particular circumstances in which the Italian market operates'. *Industria degli zuccheri* states that, if there had not been an Italian regulation, the acts to which exception is taken would not have taken place.
— *CSM* submits that Community regulations did not aim at promoting as lively competition as possible and increasing trade between Member States to the maximum possible extent.

(bbb) *RT* states that its conduct was prompted by the size of its surpluses and the absence of any commercial organization abroad.

(ee) *RT* and *Eridania,* with reference to Article 15 (2) of Regulation No 17, submit observations on the way in which the turnover of the undertakings concerned should be calculated for the purpose of determining the fine.

RT states that the Commission can only base its argument on the volume of the disputed transactions; there is therefore a case for excluding from sales by this company those relating to raw sugar or effected on the Belgian and Italian markets and also on the markets of third countries.

Eridania submits that, to the extent to which the Commission determined the fine with reference to the turnover of this company, it should take account of:

— a series of heavy tax burdens imposed upon Italian undertakings, but not, or only on a smaller scale, upon other Member States;
— the fact that the turnover of the said undertakings is artifically inflated by the 'sovraprezzo';

— the fact that Eridania also carries out operations in sectors other than the sugar sector and that in this case such operations cannot be taken into consideration.

(ff) *RT, Industria degli zuccheri and SZV* state that the Commission could have attained the objective sought by the decision by adopting less drastic methods:

RT submits that before the Communication the Commission never once sent it any warning, although it asked it — without success — for an interview with the object of obtaining the Commission's policy directives.

Industria degli zuccheri takes the view that the Commission could merely have ordered that the practices to which exception is taken should be discontinued and that fines would be imposed in case of non-compliance with such an order.

SZV calls attention to the fact that, even before the adoption of the decision, it had definitely decided not to continue to grant loyalty rebates.

(gg) *RT* requests the Court to order production of the minutes of the meeting of the Advisory Committee referred to in Article 10 of Regulation No 17 with the object of ascertaining whether this committee was consulted on the amount of the fine and what opinion it gave in this connexion.

(2) Summary of the statements of defence

to (1) (aa) (aaa)

The *Commission* replies that it imposed the first fines in July 1969. In the meantime the moment had come to make it clear that it intended henceforth to punish infringements of the rules of competition severely. Nevertheless, in these proceedings, it only fixed moderate fines, which are for the most part well within the maximum amounts authorized by Article 15 of Regulation No 17. In particular:

— the fines imposed on *Générale sucrière, Say and Béghin* are in each case less than 1 % of the turnover of the company concerned; the fine imposed upon *RT* is only 2 % of the turnover;
— the fines imposed on *Générale sucrière, Say and Béghin* were fixed at amounts, which are much lower than the fine imposed on RT; the Commission thus took account of the fact that the responsibility of the first three companies was not so great and, so far as Générale sucrière is concerned, that this company also exported sugar to Italy for independent purchasers;
— the fine imposed on *CSM* would probably have been even higher if the Commission had taken into account the damage caused by this undertaking to consumers;
— the fine imposed upon *RT* was fixed with reference to this company's heavy responsibility in the implementation of the practices to which exception is taken throughout the entire territory of the common market, to the economic importance of the firm and the dominant position which it has in a substantial part of the common market.

to (1) (aa) (bbb)

The Commission's reply to *SZAG* is that its infringement is particularly serious since it prevented the free movement of goods within the common market. With regard to Sucre-Union's conduct, it was evaluated as a whole; in its commercial operations in Italy and the Netherlands this undertaking acted to some extent independently.

The Commission's reply to Industria degli zuccheri is that it had to take into account the seriousness of this company's infringement, which is due to

the fact that the customer attaches special importance to sugar and that the said infringement impeded the attainment of one of the fundamental objectives of the Treaty and caused damage to consumers, in particular by cutting down their freedom of choice. The fine imposed upon Industria degli zuccheri is less than 1 % of its turnover.

The Commission's reply to *SU* is that the partial effect of the questionable dealings of this company was to maintain for no good reason the price of sugar in the Netherlands at a level higher than that in the adjoining region which had a surplus; the advantages which SU obtained from this situation were bound to be substantial.

The Commission's reply to *CSM* is that the proportions which the fines imposed on the various undertakings bear to each other was determined with the greatest care and the greatest possible degree of objectivity.

to (1) (aa) (ccc)

The Commission did not have to take into account the way fines are treated for tax purposes in the various Member States. The case-law of the Court mentioned by *SZAG* and *SZV* applies irrespective of the amount of the fine.

to (1) (bb) (aaa)

The Commission's replies to *Emiliana, Industria degli zuccheri and Pfeifer & Langen* are similar to those reproduced above, to (1) (aa) (bbb), reply to Industria degli zuccheri.

In its reply to *Emiliana* the Commission calls special attention to the fact that this firm always associated itself with the operations of the importers group by taking advantage, although to a lesser degree than Eridania, Industria degli zuccheri and Cavarzere, of the results of the invitations to tender in which it participated on all but two occasions, by tendering — except in the case of one tender — the same proportions of the 'sovraprezzo' as those of the other undertakings of the said group. Its award was about 5 % of the total amount awarded to the members of the group. The fine which was imposed upon it is less than 1 % of its turnover.

The Commision's reply to *RT* and Sucres et Denrées is that the decision puts in perspective the argument that these companies did not obtain the intervention price when they exported.

Regulation No 17 does not provide that there should be any link between the amount of the fine and any profit made from the illegal course of conduct; only the seriousness of the infringement is important.

The Commission's specific reply to *Sucres et Denrées* is that it is useless to assert that consumers did not suffer any damage as a result of the concerted practices relating to the Italian market, because these practices were not notified to the Commission.

With regard to the arguments put forward by *SU* cf. to (1) (aa) (bbb) above, reply to SU.

So far as *CSM's* arguments are concerned, cf. to (1) (aa) (aaa) above, reply to CSM.

The Commission's specific reply to Pfeifer & Langen, is that, as the fine imposed on this company is between 0·1 % and 1 % of its turnover, it is very much less than that imposed upon RT, which shows that the Commission considered that Pfeifer & Langen was less to blame.

to (1) (bb) (bbb)

The Commission replies that it also produced ample evidence of the infringements found to have been committed by RT for the 1968/69 marketing year (concerted practice

relating to the Netherlands market; abuse of dominant position). The refusal to export to the Netherlands could not be justified on the ground that RT had run out of stocks when it received the enquiries, because there were then large stocks of sugar in Belgium and RT had at that particular time supplied SU with sugar.

to (1) (bb) (ccc)

The Commission states that the fine imposed on *Sucres et Denrées,* which is less than 1 % of its turnover, is much lower than the fine imposed on RT; the Commission therefore took into account the fact that Sucres et Denrées was less to blame.

The part played by the undertaking in its capacity as an independent dealer in sugar is very important. So far as exports to Italy are concerned it is estimated that it deals in about 250 000 metric tons per annum. As Sucres et Denrées indicated in its reply to the Communication that these exports cover 15 % of its turnover, it can be inferred that the total amount which it deals in annually amounts to at least 1 700 000 metric tons. Further, it is one of the largest dealers in foodstuffs in the world.

to (1) (bb) (ddd)

The Commission repeats the considerations upon which it based its argument in the decision in order to justify the principles in accordance with which the fine was imposed on *SADAM* and the amount.

to (1) (bb) (eee)

Cf. (1) (aa) (bbb) above, reply to SZAG.

to (1) (cc) (aaa)

The fact that *Volano* may have been in financial difficulties cannot justify the infringement which it committed. Moreover, to the knowledge of the Commission, the balance sheet of the company for the year ending 31 December 1972 showed a net profit of Lit. 9 057 910.

to (1) (cc) (bbb)

Cf. (1) (bb) (ccc) above, reply to *Sucres et Denrées.*

to (1) (cc) (ccc)

SADAM's economic position on the Italian market gave it the chance to exploit the opportunities for competition on this market. The company always associated itself with the operations of the importer's group and took advantage, although to a lesser extent than Eridania, Industria degli zuccheri and Cavarzere, of the results of the invitations to tender in which it participated, except on one occasion, by tendering the same proportions of the 'sovraprezzo' similar as those of the other members of the said group.

The amount of sugar which it was awarded represented 6·3 % of the total amount awarded to members of the group. The fine imposed on SADAM is less than 1 % of its turnover.

to (1) (cc) (ddd)

The Commission submits arguments similar to those put forward to (1) (cc) (ccc) above, by stating that *Cavarzere* was awarded 14·1 % of the amount allocated to members of the group in question. The Commission did not attribute the whole of the production and operations of the 'gruppo padano' to Cavarzere.

to (1) (dd) (aaa)

The Commission's reply can be inferred from its arguments which are summarized above.

to (1) (dd) (bbb)

The Commission's reply can also be inferred from its arguments summarized

above. In addition it alleges that RT cannot justifiably base its argument upon the absence of any commercial organization abroad, since it is the practices to which exception is taken which have made it difficult to set up such an organization.

to (1) (ee)

In its reply to *RT* the Commission calls attention to the fact that Article 15 of Regulation No 17 refers especially to 'turnover in the preceding financial year of each of the undertakings participating in the infringement'.

to (1) (ff)

In reply to RT the Commission submits that the investigations carried out by its inspectors, on the basis of Article 14 of Regulation No 17 and in the presence of two of RT's senior managers, began on 12 January 1971 at the company's place of business. The authorization specified the subject matter and purpose of the investigation by expressly referring to Articles 85 and 86 of the Treaty. By its decision of 28 July 1971 the Commission imposed on RT a fine for having produced incomplete documents at the time of the said investigations. By letter of 31 May 1972 the Commission informed RT that it had initiated against it the procedure specified in Article 3 (1) of Regulation No 17. In its letter of 20 August 1971, RT asked the Commission to 'consult with the officials responsible for our policy for the sugar trade within the Community with a view to settling the problems with which the Commission appears to be concerned'. The Commission however did not have to comply with such a request. It carried out the procedure within the framework and the limits prescribed by Regulations No 17 and No 99/63.

The Commission's reply to SZV is that, if this undertaking realized later on that it was better to abolish the loyalty rebate, this fact is no defence to the complaint that it intentionally committed an infringement.

to (1) (gg)

The Advisory Committee was in fact consulted, at its meeting of 5 December 1972, about the amount of the fine to be imposed on *RT.*

(3) Summary of the replies

to (1) (aa) (aaa)

With regard to the reasons which the Commission put forward to justify the large fines imposed in this case compared with the fines in previous cases the applicants define their positions as follows:

According to *Générale sucrière, Say, Béghin and Sucres et Denrées,* it is only right that the punishment for infringements of a serious and similar character should be the same. There are many other ways in which the Commission can make its intentions clear; the method it chose meant that it was imposssible to distinguish between the warning and the punishment.

Industria degli zuccheri states that, as the Commission itself admits, fines in the earlier cases were imposed for the first time in 1969; moreover the period of time taken into consideration in the present cases began to run in 1968.

Pfeifer & Langen submits that the earlier fines were imposed on much larger undertakings than Pfeifer & Langen. Furthermore the freedom of action of these undertakings was not cut down by regulations similar to those which are a feature of the common organization of the markets in the sugar sector.

Eridania's reasoning is similar to that put forward by Industria degli zuccheri and Pfeifer & Langen. It emphasizes in addition that consumers did not suffer

any damage in this case although they did in certain earlier cases; however, the main purpose of the fines should be to confiscate the illegal profit made out of the infringement.

to (1) (aa) (bbb)

SU submits that the Commission proceeds on the basis of the mistaken premise that the prices applied corresponded to those mentioned in SU's and CSM's catalogues, that is to say were 3 to 7 % above the intervention price. But in fact they only exceeded this latter price by 1/3 to 5/8 %.

CSM states that the arithmetical ratio between the fines imposed respectively on SU and itself is 4 to 3, whereas these two companies' shares of the market were 63 % and 37 % respectively.

Eridania states that its arguments developed under 1 above should at least lead to a reduction of the fine.

to (1) (bb) (aaa)

Emiliana states that it is a victim of and not a party consciously engaging in the concerted practices. During the period under consideration it was only a small undertaking.

RT submits that, in the Commission's first report on its competition policy, it indicated that undertakings engaging in practices designed to eliminate competition and thus causing serious damage to the interests of consumers must expect heavy fines. Having regard to the size of the fine imposed upon RT full particulars of the damage caused to consumers was therefore to be expected. But no such particulars were given for the very good reason that no such damage was caused.

Industria degli zuccheri states that the practices in question had the beneficial effects referred to in Article 85 (3) of the Treaty. Even if these practices could not be treated as falling within the exemption provided by this provision because they had not been notified to the Commission, nevertheless the before-mentioned effects must be taken into account in connexion with the fine. Further, the Commission should have taken into consideration, 'the modest profits' made by the Italian undertakings.

CSM takes the view that the Commission has not succeeded in showing that the trend of ex-works prices in the Netherlands would have been different if the practices to which exception is taken had not taken place.

to (1) (bb) (ccc)

Sucres et Denrées replies that the figures mentioned by the Commission, which moreover fail to justify the amount of the fine, are inaccurate or have been misinterpreted. During the marketing years under consideration, the amounts of sugar intended for the Italian market, the deliveries of which were centralized and coordinated by Sucres et Denrées, ranged from 65 000 to 200 000 metric tons. The figure of 1 700 000, is also incorrect; further the Commission omitted to mentioned that most of the operations carried out by the company have nothing to do with the common market.

to (1) (cc) (aaa)

Volano states that, although it in fact accepted the proposal of Eridania and other producers to use the supply channels in question, it only used them now and then and to an extent which was limited but vital until its failure to make a profit led it to terminate its sugar operations.

to (1) (cc) (ccc)

SADAM states that its considerations reproduced under 1 above refute the assertion that its economic position on the Italian market enables it to make use

of the opportunities for competition which there are said to be on this market. It also refutes the Commission's allegations relating to its 'common interest' with the importers' group and the profit which it is said to have made from the invitations to tender.

Its situation is very uncertain for reasons which this society explains in detail.

The amount of the fine is considerably higher than the net profit margins obtained by the company through the import operations in question. It is unfair to compare the fine with the invoice price, instead of taking into account also reorganization costs, current amortization and the inadequate profits.

In the earlier cases the Commission only imposed a fine on the largest of the undertakings concerned.

to (1) (ff)

Industria degli zuccheri submits that the fact that the infringement lasted three years cannot amount to aggravating circumstances, since the Commission was in a position to cut down this period considerably by calling upon the undertakings without delay to put an end to the conduct which is criticized, the sanction for failure to do so being a penalty payment, or by adopting the procedure provided for in Article 12 of Regulation No 17 (Inquiry into sectors on the economy).

to (1) (gg)

RT states that the Commission gave no particulars of the nature of the opinion of the Advisory Committee on the amount of the fines to be imposed. It must therefore be concluded that this opinion was unfavourable. *RT* as well as *Eridania* request the Court to order the Commission to produce this opinion.

(4) Summary of rejoinders

The *Commission* replies as follows:

to (1) in general

The Commission's reply to the complaint of *Eridania, Cavarzere, Industria degli zuccheri, SADAM and Emiliana,* that the fines imposed are heavy is that the fine plays a major part, not only as a sanction, but also as a deterrent. This is particularly true in the Community; in fact the means at its disposal for keeping the conduct of undertakings under constant and close supervision are much more limited than those available to the authorities responsible for ensuring compliance with the rules of competition on the United States market, the only one which is economically the same size. The infringements in question are of a most serious kind, since their aim was to separate a national market from the Community market, thus running counter to an essential objective of the Community, namely the establishment of a single market. If the amount of the fines appears to be high in absolute terms, they are not however if account is taken of the size of the undertakings concerned and their turnover.

The whole of these considerations allow the conclusion to be drawn that if, at a time when the Community's competition policy had gone beyond its initial phase, a fine in the region of 1 % of the turnover for an infringement of such seriousness were to be considered excessive, it is difficult to imagine the cases where the Commission could impose a comparable fine, and even more difficult to visualize cases where it could impose fines reaching the higher limit provided for by Regulation No 17. The powers which it derives from this text may well therefore to be substantially undermined, which could prove to be unfair to smaller undertakings and, above all, have a serious effect on the efficacy of the competition policy.

to (1) (aa) (aaa)

In reply to *Générale sucrière, Say, Béghin and Sucres et Denrées,* the Commission

submits that, as undertakings became more familiar with the rules of competition, infringements such as those committed in this case will be less easy to justify and therefore more serious. Decisions rather than declarations of principle will be the ideal way of applying the said rules. Moreover the Commission imposed in other cases fines exceeding 1 % of the turnover of the undertakings concerned, so that the fines in this case appear to be relatively low.

The Commission's reply to *Eridania* and *Industria degli zuccheri* is that the first fines which it imposed in July 1969 were in respect of infringements commenced several years before. On the other hand, the infringement committed by the applicants originated at the end of the 1968/69 marketing year, that is to say in 1969, a time which cannot be regarded as an 'initial' period.

to (1) (aa) (bbb)

The Commission's reply to *SU* is a detailed statement of the reasons why it adhers to its assertions relating to the price level applied in the Netherlands and Belgium.

The Commission's reply to *CSM,* is that, although an undertaking's share of the market and its influence on the market are factors to be taken into account because they form part of the basis of assessment of the fine, no mathematical ratio between them has to be calculated. The fine imposed on CSM is no heavier than SU's fine, on the contrary it is much smaller, since the seriousness and duration of the infringements which were committed — the only criteria laid down by Regulation No 17 — were the same for both undertakings.

to (1) (bb) (aaa)

The Commission's reply to *RT* and *Sucres et Denrées* is that it did not find that the infringements of the Treaty were at the expense of consumers, but was of the opinion 'that account must be taken... of the fact that the product concerned is of particular importance to the consumer' (decision, p. 43, Rt. Col.). With special reference to *RT,* the Commission states that the complaints which were found to exist 'are not to be evaluated in terms of price competition but ... may have a considerable long-term effect on the price level'.

In reply to *CSM,* the Commission explains why, in its opinion, the Netherlands price level would have followed the trend of Belgian prices if RT had competed in the normal way.

In reply to *Emiliana* the Commission calls attention to the fact that this company cannot be regarded as a small undertaking. In fact, during the 1971/72 marketing year it was on its own the seventh largest of the 21 Italian sugar factories; further, if the production of the undertakings which it controls is added to its own production the final figure is 694 752 quintals.

to (1) (bb) (ccc)

As Regulation No 17 does not establish any link between the amount of the fine and the profits made from the concerted practices, *Sucres et Denrées'* argument based on the way it is remunerated is irrelevant.

Sucres et Denrées does not state why the figure of at least 1 700 000 metric tons, taken by the Commission as the total annual amount of business transacted by the company, is inaccurate. The Commission's statement that the average amount of business transacted by Sucres et Denrées each year is 250 000 metric tons of sugar for Italy is confirmed by certain documents.

to (1) (cc) (bbb)

The fact that *Sucres et Denrées* is not a sugar producer is not decisive, as the Commission has shown that this

company as a powerful international dealer owning large amounts of sugar played a leading part in the grouping of exporters and importers on the Italian market.

to (1) (gg)

The Commission is under a duty to keep the minutes of the meeting of the Advisory Committee confidential; it will only produce them if the Court was to order their production.

IV — Summary of the parties' replies to certain questions raised by the Court, of the observations of the opposite parties on these replies and of the hearing of the witnesses

After the end of the written procedure the Court, within the context of one or more of the nine complaints raised by the contested decision, asked certain applicants and the Commission a series of questions, giving the opposing parties each time the opportunity of submitting their observations on the replies to the said questions;

Further, within the context of the sixth complaint, the Court ordered that four persons be heard as witnesses;

The said replies and observations as well as the statements of the witnesses may be summarized as follows:

1. The first complaint (concerted practices for the protection of the Italian market; cf. III 1. above)

A — Within the context of this complaint — and of the second to the fourth and the sixth to the eight complaints — the Court invited the Commission to give in chronological order full particulars of the various stages of the administrative procedure so far as the applicants referred to below are concerned and in particular to give the dates of the opening of the inquiry, of service of the notification of objections, of the submission of written observations (including any supplementary observations) and of the hearing of the persons concerned. This invitation relates to cases 40/73 (SU), 42/73 (CSM), 50/73 (SADAM), 54/73 (SZAG), 55/73 (SZV), 56/73 (Pfeifer & Langen), 113/73 (Industria degli Zuccheri) and 114/73 (Eridania).

The *Commission* produced a chronological table containing the particulars which had been requested. It emerges from them that, so far as all the beforementioned applicants are concerned, the inquiry was opened on 21 May 1969; that the notification of objections was sent to these applicants on 24 July 1972 and was received by them between 25 July 1972 (SZAG) and 1 August 1972 (SZV); that the said applicants replied by letters dated between 26 and 29 September 1972, receipt of which was noted at the record office of the competent department of the Commission between 27 and 4 October 1972; that the hearing of the persons concerned took place on 17 October 1972; that Eridania (on 30 October 1972) and SZAG and SZV (on 31 October 1972) sent letters containing observations supplementary to those made at the hearing of 17 October 1972, 'in accordance with the right granted to undertakings heard by Mr Jaume (cf. p. 6 of the minutes)', whereas the other applicants simply requested — by letters of 9 to 21 November 1972 — that the draft minutes of the hearing drawn up by the Commission's departments be amended; finally all the beforementioned applicants signed the minutes of the hearing between 8 and 30 November 1972.

SU defines its position to this information and states that there is nothing in the minutes in the hearing of 17 October 1972 to justify the inference that the undertakings had the opportunity, or that their attention was

drawn to the opportunity, of submitting new arguments after the hearing.

Pfeifer & Langen emphasizes that the period of two months which the applicant is allowed in order to define its position on the notification of objections is out of all proportion to the period approximately three years during which the inquiry lasted.

B — Within the context of Case 48/73 (Sucres et Denrées), the Court invited the Commission to give it particulars of the stage reached in and the object of the proceedings for failure to fulfil an obligation under the Treaty which it has brought against the Italian Republic in relation to certain parts of the Italian sugar regulations (cf. I 4. above).

The *Commission's* reply, which reached the Court Registry on 19 March 1975, is that on 4 December 1974 it sent the letter initiating the said proceedings and that it had not yet received the observations of the Italian State. The subject-matter of the proceedings is the method of financing the aids granted by Italy to sugar beet growers and to the sugar industry, which appears to it to be incompatible with Articles 9 or 95 of the Treaty. The Commission in fact takes the view that the special tax called 'sovrapprezzo' which is used to finance the aids authorized by Article 34 of Regulation No 1009/67 is, either a charge having equivalent effect to a customs duty, or an example of taxation imposed upon the products of other Member States in excess of that imposed on similar domestic products. The question also arises whether the Italian system is compatible with Article 30 *et seq.* of the Treaty, to the extent to which it determines the maximum quantities covered by the invitations to tender. Nevertheless in the proceedings brought against Italy the Commission has not yet put forward this submission, having regard to the fact that in its view the invitations to tender depend upon the 'sovrapprezzo' and must therefore cease to function if the latter was abolished.

2. The second complaint (concerted practices for the protection of the Netherlands market; cf. III 2 above)

A — Within the context of this complaint and also of the sixth complaint, the Court invited SU, the applicant in Case 40/73, and the Commission to make their submissions for or against the economic continuance, from July 1968 onwards, of the different associations the names of which include the words 'Suiker Unie'.

SU takes the view that two different cooperative societies which used or still use the name 'Suiker Unie' must be distinguished. The first was formed in 1966 by four cooperative societies which, having decided to dismiss the idea of immediate economic integration, nevertheless agreed to cooperate with a view to achieving later a closer degree of integration. The first 'Suiker Unie', which changed its name to 'Suiker Unie Beheer' when the present 'Suiker Unie' was formed, had no assets and did not carry on any business. The present 'Suiker Unie' was formed in 1970 by individual directors of the four cooperatives in order to unite under it all their members and to take over all their assets and liabilities. As the object of 'Suiker Unie Beheer' was attained when the four cooperatives merged, it was liquidated in 1971 without there being any legal successor.

The *Commission* summarizes and clarifies the arguments developed in its pleadings by a chronological table. It emphasizes the continuity of management by submitting that apart from one person all those who were members of the 'bureau' dealing with day to day matters of the present 'Suiker Unie' in were formerly members of the corresponding 'bureau' of the old 'Suiker Unie'.

SU states that, if the Commission takes the view that the present 'Suiker Unie' is liable for any infringements of Articles 85 and 86 committed by the former association having the same name, it

should set out in the decision the legal and factual basis of this liability.

B — Within the context of Cases 40/73 (SU) and 56/73 (Pfeifer & Langen) the Court invited the Commission to produce for the Court file an extract of the written observations submitted by SU and Pfeifer & Langen during the administrative proceedings, from which it emerges that the companies defined their position on Pfeifer & Langen's deliveries to Netherlands producers.

The *Commission* states that these two undertakings did not expressly define their positions during the administrative proceedings on the question of these deliveries. It quotes from the notification of objections passages showing that the latter in fact referred to the deliveries in question and also extracts from the written observations of SU and Pfeifer & Langen, which make it clear that the applicants well understood the complaint made against them.

Pfeifer & Langen replies that the passages in the notification of objections which are quoted are a general and abstract summary which nowhere mentions participation by the applicant in the partitioning of the Netherlands market. Similarly the latter's observations cannot be interpreted as its reply to a complaint which was not made against Pfeifer & Langen, namely an alleged participation in the partitioning of the Netherlands market. The company produced a list of its exports, which also included the disputed deliveries, solely for the purpose of attacking the Commission's argument that the sugar trade between Member States was very small.

3. The third complaint (concerted practices for the protection of the market of the western part of the Federal Republic of Germany; cf. III 3. above)

A — Within the context of Cases 47/73 (RT) and 56/73 (Pfeifer & Langen) the Court invited the Commission to state the facts upon which it bases its assertion that RT and Pfeifer & Langen also engaged in concerted practices relating to the west German market *during the 1968/69 marketing year.*

The *Commission* admits that the French text of the decision, and it was the French version which was served on RT, contains, in the first article of the operative part, the finding that the market of the western part of Germany was protected 'for the marketing years *1969/70* onwards'; the same mistake is found in the statement of defence in Case 47/73. However it is quite clear from the statement of the grounds upon which the decision is based and from the wording of the operative part of the German, Dutch and Italian versions served on the parties as well as from all the versions published in the *Official Journal,* that the Commission found that there had been these infringements from the marketing year *1968/69* onwards.

Replying more directly to the Court's invitation the Commission referred back to a series of documents which it produced as an annex to its pleadings and in particular to the correspondence between RT and Hottlet relating to two contracts entered into in October 1968 in which Hottlet undertook to denature the sugar subject thereto.

RT takes the view that it is justified in keeping to the text of the decision which it received. With regard to the evaluation of the documents in question it refers back to the pleadings which it delivered in the written procedure and, especially in connexion with the obligation to denature sugar, to its explanations repeated under 4 above.

B — The Court, also within the context of Cases 47/73 (RT) and 56/73 (Pfeifer & Langen), invited the applicants to reply to a series of questions giving each time separate replies for each of the marketing years from 1966/67 to 1971/72.

(a) The following are the questions which RT alone was asked to answer:

(1) How much raw sugar was produced by RT?

(2) What happened in the end to all this raw sugar?

Give separate answers showing how much raw sugar was:

- processed by your undertaking into white sugar;
- sold to other refiners (give the nationality of the purchasers, distinguishing in the case of Germany sales to Pfeifer & Langen or WZV and to other refiners);
- used for other purposes (what purposes?) or stocked because it could not be sold?

(3) How much raw sugar have you bought from other Belgian producers?

(4) What was your refining capacity? Support your figures with appropriate technical data.

(5) State why, in your opinion, systematic sales in Germany would have been conditional on the setting up of a commercial organization, even though the export dealers Export and Hottlet appear to have been in a position to procure German customers for you and sugar is mainly a homogeneous product.

RT's replies and, where necessary the Commission's observations may be resumed as follows:

to (1) to (3)

RT produces the following figures for its financial years which are closed on 15 September each year (whereas the decision refers to marketing years, within the meaning of the agricultural regulations, ending on 30 June each year):

(In metric tons)

	1966/67	1967/68	1968/69	1969/70	1970/71	1971/72
Stock brought forward	25 022	19 965	15 857	29 655	18 934	24 476
Production + purchases during the financial year						
— Production of RT's factories	89 646	136 282	128 340	144 301	131 458	205 744
— Purchases						
— 'traditional'	33 944	42 398	30 641	33 898	31 640	42 651
— 'occasional' from other Belgian producers	611	289	550	263	270	215
Total sugar available	149 223	198 934	175 388	208 117	182 303	273 086
Processed into white sugar by RT	129 258	183 077	145 733	168 476	135 193	169 513
Exports (foreign refiners)						
— Germany (= Pfeifer & Langen	—	—	—	8 964	22 634	25 018
— Other countries	—	—	—	11 743	—	59 135
Stock carried forward	19 965	15 857	29 655	18 934	24 476	19 420

The applicant states that the so-called 'traditional' purchases were made at sugar factories producing raw sugar only which they traditionally place at the disposal of RT.

to (4)

RT on the basis of detailed calculations puts its annual capacity of white sugar at about 200 000 metric tons. This capacity should be compared, not only with the amounts of raw sugar mentioned in the table above, but also with the large amounts of syrup (the 'effluent' of a sugar factory) accumulated in the various sugar factories of its industrial group. It produces figures relating to the amounts of these low quality products at its disposal and to the amount of white sugar which they yield. Taken together these figures show that the company's available supplies were so much in excess of its refining capacity that it found itself under 'inexorable pressure to export'.

On the other hand, in the *Commission's* view, RT's figures show that the latter never used up its refining capacity, to which must be added that of Oreye, a sugar factory of which the applicant is a majority shareholder.

The Commission also emphasizes that the distance by road between Oreye and RT's factory at Liers — from which some of the raw sugar sold Pfeifer & Langen comes — is 18 km, whereas Liers is 147 km from Pfeifer & Langen's refinery at Elsdorf.

to (5)

RT replies that, since the systematic sale of a product in a foreign country means selling it direct to consumers or distributors, such a sale of necessity implies the setting up of a commercial organization in that country. Export and Hottlet did not procure German customers for RT but bought from it sugar for resale in Germany. In the majority of cases Export and Hottlet's German customers were themselves the importer-exporters, so that there can be no question of systematic sales by the said Belgian dealers.

The *Commission* replies by referring back to arguments developed during the written procedure and in particular recalls attention to the fact that many requests from German dealers met with refusals.

(b) The following are the questions which Pfeifer & Langen alone was asked to answer:

(1) How much white and raw sugar was produced by your undertaking?
(2) How much of the raw sugar produced by your undertaking have you refined?
(3) How much raw sugar have you bought from producers other than RT?
(4) What was your refining capacity? Support your figures by appropriate technical data.

Pfeifer & Langen's replies and the Commission's observations may be summarized as follows:

to (1) to (3)

Pfeifer & Langen produces the following figures:

(In metric tons)

	1966/67	1967/68	1968/69	1969/70	1970/71	1971/72
Raw sugar						
— produced by Pfeifer & Langen	30 800	36 400	29 200	33 900	38 950	37 200
— bought from producers other than RT	139 200	127 400	133 700	140 540	124 110	134 000
White sugar produced by Pfeifer & Langen	158 759	199 214	150 214	173 530	170 524	203 347

It points that it refined itself the whole of its production of raw sugar.

The *Commission* points out that the figures are misleading, as those given for the production of white sugar only correspond to that part of white sugar produced in one operation and to which must be added white sugar produced by refining the abovementioned quantities of raw sugar (own production and purchases). Thus, if the 1971/72 marketing year is taken as an example, the production of white sugar was altogether some 360 000 and not 203 347 metric tons. The Commission emphasizes that according to Pfeifer & Langen's own figures the amounts of raw sugar bought from producers other than RT hardly varied during the years in question.

to (4)

Pfeifer & Langen produces some calculations from which it infers that its refining capacity amounts to about 260 000 metric tons per annum.

The *Commission* challenges the accuracy of some of the factors used for these calculations; to sum up, it seems to the Commission to be in keeping with the facts to estimate Pfeifer & Langen's annual capacity at 180 000 to 200 000 metric tons. This shows that purchases of raw sugar from RT were not necessary to keep the plant working at normal capacity, after taking into account Pfeifer & Langen's own production of raw sugar and purchases from producers other than RT.

(c) The following questions were put to RT and also to Pfeifer & Langen:

(1) Is not the statement that RT would have run the risk of losing Pfeifer & Langen as a customer for raw sugar if it had supplied large quantities of white sugar to the German company's customers inconsistent with the many reasons put forward by Pfeifer & Langen to show that purchases of raw sugar from RT were in the interest of the purchaser?
(2) Explain why, in your opinion, RT could not sell in Germany the special qualities of sugar which it could obtain from processing raw sugar, whereas it appears that it exported such qualities to the Netherlands.
(3) Clarify and support with figures the assertion that transport facilities for raw sugar are less expensive than those to which recourse must be had for white sugar.

The applicants' replies and the Commission's observations may be summarized as follows:

to (1)

RT submits that each year negotiations were opened with Pfeifer & Langen and that therefore each year it had to fear that it might lose its purchaser.

Pfeifer & Langen state that its interest in buying from RT was not so predominant as to override all other possible considerations, especially its reluctance to strengthen by large purchases the position of a competitor who, as the question assumes, would have enticed away a considerable number of customers.

The *Commission* calls attention to the fact that Pfeifer & Langen's reply confirms that this applicant purchased from RT in order to prevent the Belgian company from selling white sugar freely in the western part of Germany.

to (2)

RT replies that the 'special qualities' referred to by the question are essentially lump and pearl sugar. The reason why it was able to sell lump sugar in the Netherlands is that its purchaser in this country, namely CSM, does not have the necessary equipment to manufacture these qualities; on the other hand; Pfeifer

& Langen does. Further there is a technical difference between the German and Belgian lump sugar, the former consisting of lumps weighing 4 g sold in 1/2 kg boxes, and the latter being manufactured in lumps weighing 6 g and sold in boxes of 1 kg.

Pfeifer & Langen states that, in order to penetrate the German market with special qualities of sugar, RT had to set up its own distributive network in the Federal Republic of Germany and produce sugar meeting the requirements and habits of the German consumer so far as the weight and shape of the lumps are concerned.

The *Commission* replies that in order to set up a distributive network RT could have applied to German wholesalers; further it could have supplied direct food purchasing associations. The trade is normally responsible for the storage of special qualities, as in shown by a document produced by Pfeifer & Langen. So far as the argument based on the differences of form, density and weight is concerned, the Commission takes the view that these differences have no influence on the consumer's choice.

to (3)

RT replies that, although raw sugar is transported in lorries or tippers which are simply covered with canvas, and unloaded by shovel or grab, without any sanitary precautions being taken, white sugar, on the other hand, can only be transported by hermetically sealed road tankers provided with special equipment for emptying.

Pfeifer & Langen states, and its argument is approximately the same, that the transport of white sugar entails, so far as the method of loading and unloading and fitting out the means of transport is concerned, additional expenses.

The *Commission* does not dispute that the transport of raw sugar is less expensive. Nevertheless this fact is in itself no answer to the question whether RT succeeded in selling, in competition with Pfeifer & Langen, white sugar on the latter's market; the effect of transport costs is not so marked in the case of a more expensive product.

4. The fifth complaint (economic pressure brought to bear on Belgian exporters; cf. III 5 above)

In the context of Case 47/73 (RT), the Court invited:

(1) RT and the Commission to define their positions on the question whether it is necessarily unfair conduct and therefore an abuse, taking into account in particular the implications of Community regulations for a sugar producer to make a dealer agree only to resell a specific quantity of sugar *for denaturing;* RT was also invited to state, and to support its statement with figures, whether each time it sold sugar for denaturing it applied a price lower than its usual prices;

(2) The Commission to define its position on the following questions: If it has to be accepted that the incorporation of the denaturing clause in the contracts entered into between RT, on the one hand, and Export and Hottlet, on the other hand, is not an abuse, do the documents produced for the Court's file justify, in your opinion, the statement that the infringement of Article 86 began during the 1968/69 marketing year?

The parties' replies may be summarized as follows:

to (1)

On the question of principle, *RT* refers to the explanations it gave during the written procedure.

So far as the volume and the prices of its exports to the Netherlands and Germany

are concerned, it produces the following figures:

1968/69 marketing year

During this marketing year:
- the applicant sold 19 786 metric tons of granulated sugar for denaturing in the two countries mentioned above; the price for the Netherlands was Bfrs 1 061.50, whereas the price for Germany amounted, on average to Bfrs 1 082.64;
- it only sold to the Netherlands for denaturing;
- the average sale price of granulated Belgian sugar for export to Germany for purposes other than denaturing was Bfrs 1 090.

1969/70 marketing year

During this marketing year, RT only exported 4 000 metric tons of granulated sugar to Germany for denaturing; the average price was Bfrs 1 068.

The *Commission* states that under the system of denaturing premiums producers could:
- either denature the sugar themselves, collect the denaturing premium to which they were entitled and charge a price equal to the normal price for sugar less this premium;
- or sell the sugar before it is denatured, leaving it to the wholesalers or the consumer to denature it and collect the premium.

In fact the producers, and in particular RT, always chose the second option and charged the normal sugar price, inserting nevertheless a clause in the agreement under which the wholesalers or consumers agreed to denature the sugar and produce proof that they had in fact done so.

RT replies that it can prove that in 1968/69 and 1969/70, it denatured itself 31 624 and 38 944 metric tons respectively. RT was not one of the undertakings which made its customers agree to denaturing clauses, on the contrary it was the trading houses which, when they applied to RT to buy sugar, stated that the sugar was intended for denaturing. In these circumstances RT took this fact into consideration when making its offer. It emerges from the figures reproduced above that RT, when selling sugar for denaturing, always applied prices lower than those which it applied when selling sugar for human consumption; the Commission moreover admitted this fact in the contested decision (p. 26 to 27 under Section 15).

The Commission replies that the maximum sale prices for denaturing mentioned by RT were exceeded in certain contracts entered into in 1968/69 and 1969/70 and that RT did not give any figures for the 1970/71 and 1971/72 marketing year.

to (2)

The *Commission* states that the reply to Question 2 mentioned above is a direct consequence of its observations relating to Question 1. During the 1968/69 marketing year insistence on the denaturing clause was the most important method adopted by RT to limit dealers' freedom of action, as is shown by a series of contracts which the applicant entered into with Export or Hottlet.

5. The sixth complaint (economic pressure brought to bear on Netherlands importers; cf. III 6 above)

Cf. I 4 above.

The questions put to the witnesses related to the facts in the passages reproduced below from a note of 8 June 1970 drawn up by Mr Lemaire, sales director of the Export company, for the attention of Baron Kronacker, the President of this company (Annex I 133 to the statements of defence):

'The Netherlands sugar industry (Suiker Unie and CSM) approached the traditional Netherlands sugar trade (Dudok de Wit + Internation + Jacobson) through Mr Lindeboom, sales director of Suiker Unie, in order to make representations to it on the question of the import operations which these commercial houses dealing in French granulated sugar agreed with Sucre-Union Paris (the trading company of the French sugar-beet cooperatives) to carry out for the 1969/70 marketing year.

These import operations were made possible by changes in the value of the French franc before the devaluation of the latter in August 1969. These operations initially covered 30 000 metric tons of white French sugar, Holland quality, and subsequently increased to a total of 70 000 metric tons.

Having regard to the size of these operations a special agreement was entered into between the Netherlands trade and the sugar manufacturers of this country, under the terms of which the traders agreed to maintain a domestic sales price which was not to place sugar manufacturers at a disadvantage when they marketed their sugar.

This is why Netherlands traders could not later on take any interest in our business of importers of Belgian sugar to the Netherlands, the price of which was lower than the internal Netherlands price and also than the price fixed in the agreement for marketing French sugars entered into between the producers and the Netherlands trade.

This agreement also provides that the final amounts of French sugar to be sent to the Netherlands shall be packed in 50 kg paper bags and 1 kg packets bearing the trade-mark of the Netherlands manufacturers and in particular of Suiker Unie, after these producers have repurchased these amounts from the trading houses.

At the time of Mr Lindeboom's (of Suiker Unie) meeting with the Netherlands import trade he asked that in future, for the 1970/71 marketing year, they should refrain from undertaking such import operations; otherwise he would make it impossible for the Netherlands processing industry (milk etc. ...) to effect traditional imports on a duty-free entry basis, as the sugar was to be re-exported after processing, by meeting himself the requirements of the said processing industry on the terms prevailing on the world market.

The Netherlands trade has not yet decided how to reply to this threat.

On the contrary it sought together with the Netherlands sugar industry to find out whether the Netherlands import requirements, of about 80 000 metric tons could be met from the other EEC countries and at the EEC price for the 1970/71 marketing year.

The Netherlands sugar manufacturers did not react to this invitation from the import trade but intimated, *in fine,* that it might consult the trade, at the proper time, on these questions.

(a) The evidence of Mr *Lemaire* may be summarized as follows:

The beforementioned note repeats exactly and completely the content of one or more conversations which he had at the time with Mr Dudok de Wit. He asked for these talks to be arranged in order to explain the difficulties, which his undertaking had encountered in selling Belgian sugar in the Netherlands through the normal channel of Netherlands dealers.

When he was asked whether 'the agreement', which, according to the note, was entered into between the Netherlands producers and dealers, had been entered into as a result of pressure or freely, the witness stated that he was not in a position to give an accurate reply to this question, as he did not have a first-hand knowledge of the facts.

(b) The evidence of Mr *Dudok de Wit,* who was at the time a director of the trading company bearing the same name, may be summarized as follows:

At that time he had several personal telephone conversations with Mr Lemaire when the situation to which the note refers was discussed.

The contacts between the Netherlands dealers and producers after the French sugar referred to in Mr Lemaire's note was imported were arranged on the initiative of the dealers who had experienced difficulty in selling this sugar within the period stipulated in the contract.

When asked what were the 'representations' which the producers made to the dealers on the question of these imports, Mr Dudok de Wit replied that the Netherlands industry had probably become aware of the disturbing effect which the relatively large amount of imported sugar must have on the Netherlands market. Mr Lemaire's note gives a false impression by stating that there was an undertaking by Netherlands dealers to maintain 'a domestic sale price which was not to place sugar manufacturers at a disadvantage when they marketed their sugar'; in fact there was no agreement on this point. The initiative for the resale to the Netherlands industry of part of the sugar purchased in France was taken by the dealers, but the industry was perhaps content to keep this competition away from the market. Although he did not remember the exact price applied on this resale, the witness is of the opinion that it was a good bargain for the industry but 'that it didn't make a fortune'.

The statement in the note that Mr Lindeboom 'requested' the Netherlands trade 'to refrain from undertaking such import operations' for the 1970/71 marketing campaign, 'as otherwise he would make it impossible for the Netherlands processing industry (milk, etc...) to effect traditional imports on a duty-free basis — as the sugar was to be re-exported after processing — by meeting himself the requirements of the said processing industry on the terms prevailing on the world market' is inaccurate. The truth is simply that the Netherlands sugar industry's intention to import itself — which was not new and was being implemented by progressive stages — was in itself a threat. In its contacts with Mr Lindeboom the question of an increase of sugar imports by the sugar industry was discussed but Mr Lindeboom did not specifically put the whole question to it in the form of a threat. The dealers could never promise not to undertake 'such import operations', because the price they would thereby pay would be their very existence.

The last amounts of French sugar caused the Netherlands dealers embarrassment, because they had to pay in respect of a large par of the consignment which had been purchased a countervailing charge which reduced the benefit of the cheap price resulting from the actual de-valuation of the French franc.

It is correct that dealers, in their capacity as exporters, depend on Netherlands producers, so that 'we must always pay attention to what we do to the sugar industry'.

According to the witness it is quite possible that in his talks with Mr Lemaire he was deliberately rather vague so as not to offend Mr Lemaire by telling him to his face that he did not intend to buy Belgian sugar. It may also have been the case that, during his talk with Mr Lemaire, he did not express himself as impartially as he did during the hearing, because he was, at the time of the talks, 'annoyed for the following reason: the Netherlands industry is a large [potential] threat to the Netherlands trade because it is going to import itself'.

(c) The evidence of Mr *Sanders,* deputy director of the Jacobson firm, may be summarized as follows:

According to his recollection it was the dealers who, in the course of their regular contacts with the Netherlands sugar industry, took the initiative to sell part of the sugar which they had purchased in France to the latter. The very low rate of the French franc before the official devaluation allowed dealers to import French sugar and this situation led them to enter into a contract covering large quantities of sugar. When France officially devalued the franc and a levy was applied to the import of French sugar, the dealers found it difficult to sell part of the sugar purchased. As they had to sell this part quickly and only the Netherlands industry was able to purchase the relatively large quantities at short notice, the dealers attempted to sell 15 000 metric tons to this industry and succeeded in doing so. The producers were not probably very enthusiastic about this transaction whereas the dealers were 'very pleased with the sale'.

There would have been no point in the Netherlands industry insisting that the dealers cease importing specific quantities of sugar; in fact if this sugar had not been imported by dealers it would have been imported by others. The producers may have told the dealers that they did not approve of these imports but the dealers could not stop doing their job.

When Mr Lemaire was asked about the 'representations' which SU and CSM made according to the note, the witness said that at that time there were sufficiently large stocks of sugar in the Netherlands and that the Netherlands industry regarded competition as a disadvantage.

The assertion in Mr Lemaire's note that the dealers had undertaken with the Netherlands producers to maintain a certain price level for selling those amounts of French sugar which had not been resold to producers is not correct; for economic reasons which the witness stated in detail this assertion is 'a little surprising'.

Within the witness's knowlede Netherlands manufacturers did not threaten dealers in order to stop their traditional imports on a duty free basis — as the sugar was to be re-exported after processing — by meeting themselves the requirements of the processing industry. Such an attitude would have been surprising; in particular, since SU was an agricultural cooperative, it could only with difficulty have competed with its own product by importing; finally, Mr Lindeboom should have known that the dealers were better established on the world markets. It may be that during a conversation someone said in the heat of the moment 'if you do not stop importing we shall do this or that'; but such remarks were not likely to make any impression on dealers who did not feel that they were immediately threatened. Moreover the producers could not be certain that such imports would be possible in the future as Community regulations relating to sugar imports coming from third countries can be modified from one marketing year to another.

(d) The evidence of Mr *Lindeboom,* director of SU, may be summarized as follows:

He did not ask dealers not to undertake such import operations during the 1970/71 marketing year. The witness began his career in the Netherlands trade which he has always liked. In particular he maintained friendly relations with Mr Kopmels of the Jacobson firm who has in the meantime died.

During one of his periodic conversations with Mr Kopmels he explained to him that he was worried by the possible effect on domestic Netherlands prices of offers of French sugar at 5 to 12 % lower than these prices owing to the rate of exchange and told him that, as SU, is a cooperative for sugar-beet growers, it should ensure that the price for beet as fixed by Community regulations is not endangered. Moreover the Belgian trade

and one German undertaking had exposed Netherlands operators to severe competition by selling at very low prices to large Netherlands undertakings.

The idea that Mr Kopmels was quite willing to be threatened by his friend, who was younger than him is absurd. The nature of the threat attributed to SU is 'laughable', because, if SU intended to compete with importers to the condensed milk industry, it would have done so with its own sugar instead of preventing its sale by importing sugar from the world market.

When Mr Lindeboom was asked whether the dealers promised on their own initiative to give up such imports in future he replied in the negative. Moreover, since he took up his employment with SU he has only had business talks with Mr Kopmels but never with Mr Sanders or Mr Dudok de Wit.

Mr Lindeboom finally challenged that part of Mr Lemaire's note concerning an undertaking by dealers to adhere to a certain price level. It was only a question of the need both for producers and dealers to maintain a certain 'self discipline', which they both in fact did. In particular, dealers maintained the same prices as those applied by the sugar industry, although there were no agreements to this effect.

The Netherlands producers never acted in a way which was contrary to the interests of the trade and the witness can prove this by referring to contracts which were concluded after 1970.

6. The eighth complaint (agreements entered into by Pfeifer & Langen with its agents restricting their opportunities for importing and exporting within the Community; cf. III 8 above)

Within the context of Case 56/73 (Pfeifer & Langen) the Court invited:

A — *Pfeifer & Langen:*

(a) to produce for the Court's file:
- either all the trade representatives' contracts which it entered into with the twelve agents referred to in pages 48 and 49 of its reply (the Anrath ... Wolf firms), to the extent to which these contracts contain clauses of the type referred to in the contested decision (prohibition, without consent, of the sale of sugar from other producers; the obligation only to resell Pfeifer & Langen's sugar within a specific area and to specific categories of purchasers);
- or only one or more of these agreements, if the remaining contracts are drawn up in terms similar to the contracts produced for the Court's file; if this is the case, Pfeifer & Lagen shall indicate, by giving the name of each agent concerned, to which contracts produced for the Court's file the contracts which have not been produced are similar;

(b) to the extent to which relations between Pfeifer & Langen and its agents' of WZV have not been determined by an agreement, to indicate whether and, if need be, to what extent, it made these agents accept the restrictions referred to under (a) above. If necessary, Pfeifer & Langen shall produce for the Court's file all correspondence between it and the agent in question, to the extent to which this correspondence can be regarded as determining the contractual relations between the partners;

(c) to answer the following questions:
(1) Do your agents also work for other sugar producers?
(2) If your answer to this question is in the affirmative, who are these producers (WZV, members of WZV, other firms)?
(3) (The following question is only asked to the extent to which the answer is not found in the

documents to be produced for the Court's file).
What were the purposes (human consumption in Germany, denaturing, export to third countries, exports to other Member States) for which the agents, if they intended to act as trade representatives for other sugar producers, (aa) obtained your consent once and for all; or (bb) had to apply for such consent for each transaction or (cc) were subject to an absolute prohibition?

(4) To the extent to which consent had to be obtained in each case: give particulars of the cases where applications for such consent were made, granted and/or refused.

(5) Do your agents also sell as independent dealers (Eigenhändler) sugar from other producers?

(6) If your answer to this question is in the affirmative, the Court asks you *'mutatis mutandis'* the same questions as those asked in 2 to 4 above;

B — *The Commission:*

— to clarify the complaints it makes on the one hand against Pfeifer & Langen and, on the other hand, against WZV. In particular: did not only WZV but also Pfeifer & Langen make its agents undertake only to sell to wholesalers, he processing industry and similar undertakings (cf. decision, p. 27 to 28, 40), and forbid them to sell outside the respective areas which WZV had assigned to them?

to A (a)

Pfeifer & Langen states that the relations between itself and the representatives mentioned on pages 48 and 49 of its reply were governed, until 13 June 1970, by a contract in standard form drawn up in 1948. The applicant annexed to its repy a copy of this standard form contract; this incluces *inter alia* he following clauses:

Clause 1:

'The Pfeifer & Langen undertaking grants [for example: Messrs Gebrüder Lück of Cologne] (hereinafter called "the representative") the right to sell its sugar as an agent in the name and for the account of Pfeifer & Langen. Pfeifer & Langen shall decide whether to agree or to refuse to enter into any particular transaction.'

Clause 2

'The representative's territory includes the places situated within the boundaries marked on the plan annexed hereto.'

Clause 3

'The representative shall receive for all orders carried out in its territory whether or not effected by the representative a commission equal to Pf. 25. For sales to the centres at Rewe and Edeka the commission shall be Pf. 15 per 100 kg and Pf. 5 by way of an advance for advertising expenses, that is to say Pf. 20. To the extent to which deliveries are made to members of the Rewe and Edeka centres whose place of business is in a territory for which another representative has been granted selling rights the representative shall pass on the whole of the commission relating to these deliveries, less the advance for advertising costs, to the representative in that territory ...'

Point 6

'The representative shall not represent other sugar factories, except with the written consent of Pfeifer & Langen, nor deal in sugar from the Pfeifer & Langen undertaking or elsewhere, for his own account.'

The applicant points out that, in order to understand this contract in standard

form, it must be borne in mind that, until the entry into force of Regulation No 1009/67, the international and even the national sugar trade was subject, so far as the Federal Republic of Germany is concerned, to restrictions imposed by the laws of this State.

On 1 July 1970 the applicant entered into identical contracts with the representatives listed in the reply; by way of example the applicant produces for the Court's file the contract entered into with the Gebrüder Anraths firm. This contract contains *inter alia* the following clauses:

Clause 1

'Pfeifer & Langen grants the representative the right to sell as an agent, in the name and for the account of Pfeifer & Langen, all its range of sugar for human consumption.

The representative is an independent trader within the meaning of Article 84 of the Commercial Code [German] empowered to enter into contracts. During the continuance of this agreement the representative shall promote in all respects and to the maximum possible extent the interests of Pfeifer & Langen ...'

Clause 2

'The right to represent Pfeifer & Langen is granted for the territory designated by Pfeifer & Langen as: [for example: Territory 72 Düsseldorf]. So far as the boundaries of this territory are concerned, reference must be made to the plan attached to this contract and referred to as Annex 1.'

Clause 3

'Pfeifer & Langen grants the representative the exclusive right to sell in the designated territory and, consequently, territorial protection for its range of sugar for consumption. Certain special cases are excepted from this grant, for instance transactions effected with Edeka's organizations, with GEG, Rewe, etc., which shall be the subject-matter of a separate agreement.

The representative undertakes for itself and any undertakings, [commercial] travellers or sub-agents who it may employ not to sell in the specific territory delineated in Annex 2 in which Pfeifer & Langen is interested any other sugar for human consumption coming from a domestic or foreign source. Every exception from this agreement must be limited in time and confirmed in writing by Pfeifer & Langen.

This exclusivity agreement does not apply, unless and until this clause shall be cancelled, to the transactions carried out by the representative for the benefit of the "Nordwestdeutsche Markenzucker-Vertriebs GmbH & Co. KG", at Bielefeld/Cologne and the "Westdeutsche Zuckervertriebs-Gesellschaft mbH & Co. KG" in Cologne.'

Clause 5

'The representative shall devote the whole of its time and attention to the sale of sugar in accordance with direction given to by Pfeifer & Langen ..."

The applicant also produces a copy of a standard form contract which it entered into with the beforementioned representatives from 2 January 1973 and which no longer contains a clause prohibiting, without consent, the sale of sugar from other sources.

to A (b)

Pfeifer & Langen cooperated, without any written representatives contract or any correspondence on the question of the terms of such a contract, with the Gebrüder Lück, Emil Meyer's Sohn and Hunekuhl undertakings. It produces however two contracts entered into with Emil Meyer's Sohn in January 1966 and

Hunekuhl on 20 June 1973 respectively. The substratum of the first agreement was removed by the introduction of the common organization of the markets in sugar; so far as the second agreement is concerned it was only signed in November 1973.

Although therefore at the time when the events in this action occurred there were no written representatives contracts with Lück, Emil Meyer's Sohn and Hunekuhl, the terms of verbal agreements corresponded however in essence to the clauses in the written representatives contracts. From the beginning of January 1973 at the latest the company also informed these firms that they would not in future be under any express or implied duty to work exclusively for the applicant.

to A (c) (1) to (6)

To *Pfeifer & Langen's* knowledge only the Hunekuhl firm also acted *for* other sugar producers, either as a trade representative, or as a commission agent for the Nordzucker company.

On the other hand, the applicant's representatives sold, *as independent dealers,* sugar which came from other producers and, so far as the applicant is aware — was intended for human consumption. It is no longer possible to identify the latter or to give particulars of specific cases, because each time the application for consent was made and granted orally and also because the applicant's management did not make any entries recording how the applications were dealt with. Although Pfeifer & Langen did not grant any blanket consent on a once and for all basis, it however never witheld its consent to any application by a representative for permission to act for a third party. It did not incorporate the clause at issue in these proceedings in the 1970 contracts in order to prevent its representatives from selling sugar coming from other sources, but to make them notify them of transactions carried out on behalf of third parties, and the purpose of such notification was to be certain at any given point in time that representatives were not acting to a great extent, or predominantly, for another sugar producer. In these circumstances there was no reason for the responsible members of the applicant's staff to pay any particular attention to the applications for consent or to make written entries in connexion with them.

The *Commission* points out that the applicant has not stated whether the transactions which its representatives carried out for their own account related to the applicant's market. In any event the fact that the representatives acted as independent dealers confirms the Commission's argument that some of them occupy an important position in the foodstuffs trade.

The Commission does not find the statement that the applicant never refused its consent convincing. The applicant has not said whether the third parties for whom these operations were carried out were WZV, the other members of WZV, the other German producers or producers from other Member States. The Commission is not convinced either that the only purpose of the exclusivity clause was to check that the applicant's representatives devoted most of their time to its affairs, since, in order to carry out a check, all they had to do was to consider the volume of the transactions carried out for the applicant.

to B

The *Commission* states that it takes the view that in fact both Pfeifer & Langen and WZV, on the one hand, made their agents undertake only to sell to wholesalers, the processing industry and similar firms and, on the other hand, prohibited sales by them outside the territories which they had been assigned.

The agreements entered into by WZV with its commission agents contain

restrictions relating to the territory in which the commission agents could operate, to the customers with which they were authorized to effect transactions and to the sale of sugar coming from other producers (cf. Annexes I 134 to 136 to the statements of defence). The contracts entered into by Pfeifer & Langen with its trade representatives contained express restrictions relating to the territory in which the said representatives could operate and to the sale of sugar coming from other producers.

In order to make clear the nature of the complaints which it makes against Pfeifer & Langen, on the one hand, and against WZV on the other hand, the Commission describes the system of marketing adopted by WZV and its members. Further it states, with figures in support, that Pfeifer & Langen was responsible for more than 50 % of the production of all the members of WZV, but that — compared with other members — this undertaking sold a smaller proportion of its production through WZV. The Commission concludes from this that there is a 'closed system' which makes it possible to prevent the commercial undertakings concerned from exporting WZV's or Pfeifer & Langen's sugar and from importing into their sales territory sugar coming from producers established in other regions of the common market. Moreover, when the Commission refers to its pleadings, it shows that it blamed both WZV and Pfeifer & Langen for preventing the import and export of sugar in this way at the commercial level and in WZV's sales territory.

The fine was imposed on Pfeifer & Langen not because the agency agreements — taken separately — are incompatible with the provisions of Article 85 (1), but because it engaged in the concerted practice having as its object the partitioning of national markets.

Pfeifer & Langen replies that the Commission has not produced the information which the Court requested. The comparison between its sales and those of WZV proves nothing since it has no influence on the conduct of this firm; it only owns 20 % of its share capital and cannot decisively influence its decisions. Moreover it has ceased to be a member of WZV, so that now there is no connexion between the two undertakings.

7. The ninth complaint (concerted practices at the invitations to tender for refunds on exports to third countries; cf. III 9 above)

Within the context of the ninth complaint, and of Cases 41/73 (Générale sucrière), 43/73 (Say), 44/73 (Béghin), 47/73 (RT, and 48/74 (Sucres et Denrées), the Court invited:

(1) Générale sucrière, Say, Béghin, RT and Sucres et Denrées and the Commission to give particulars, giving separate figures for white and raw sugar, of the amounts which each of the said applicants exported to third countries *during the year 1970* (not during the 1970/71 marketing year) following awards made at the invitations to tender;

(2) the Commission to give particulars, giving separate figures for white and raw sugar, of the total amount exported to third countries in 1970 by other undertakings or organs of the Community;

(3) the Commission to state why, in its opinion, the practices relating to export refunds affected *appreciably* trade between Member States and competition within the Common Market.

The replies of the parties may be summarized as follows:

to (1) and (2)

A — Each of *the applicants* has given the figures showing the amounts which it

exported in 1970. The *Commission* has also given figures for this year showing:

— the amounts *awarded* to each of the applicants;

— the amounts *exported* by and *awarded* to Sucre-Union and Lebaudy-SUC respectively, two undertakings which are also affected by the present complaint but which have not lodged any applications;

— the total amounts awarded to undertakings not affected by the decision.

Expressed in metric tons these figures — as well as certain others which are the result of their being added togehter — are as follows (the question marks indicate that information has not yet been supplied):

	Raw sugar			White sugar		
	Applicants figures	Commission's figures		Applicants' figures	Commission's figures	
		Amount exported	Amount awarded		Amount exported	Amount awarded
(1) Générale sucrière	8 938	0	0	57 222	34 608	33 000
(2) Say	15 292	0	0	42 437	16 256	15 500
(3) Béghin	0	0	0	39 852	18 899	18 000
(4) RT [1]	9 275	0	0	45 873	59 431	56 650
(5) Sucres et Denrées	56 316	60 627	60 000	63 449	78 045	74 500
(6) Totals for applicants' (1 to 5)	89 821	60 627	60 000	248 833	207 239	197 650
(7) Sucre-Union	?	0	0	?	28 332	27 000
(8) Lebaudy-SUC	?	0	0	?	17 125	16 700
(9) Totals for undertakings affected by the decision (6 to 8)	?	60 627	60 000	?	252 696	241 350
(10) Other undertakings	?	?	0	?	?	155 600
(11) Total exports which were the subject of the invitations to tender (9 and 10)	?	?	60 000	?	?	396 950

1 — With regard to *RT's* exports of white sugar, it gives two sets of figures; one showing the amount of sugar covered by the export licences which it was granted (25 499 metric tons) and the other showing the amount of sugar covered by the export licences granted to Belgian dealer-exporters Export and Hottlet (20 374 metric tons); these two figures added together amount to 48 873 metric tons.

The *Commission* states that its figure of 56 650 metric tons showing the amounts awarded 'to RT' included:

— 21 150 metric tons awarded to Export from March 1970 onwards and it was from this month that Export 'had to follow RT at the invitations to tender' (cf. Annex I 74 to 78 to the statements of defence; Annex II 17. 18 to the statement of defence in Case 47/73);

— 3 000 metric tons awarded to the French company Erstein which is a subsidiary of RT.

When the *Commission* comments on the figures which it has produced it emphasizes that the undertakings affected by the decision were awarded (241 350 + 60 000 =) 301 350 out of 456 950 metric tons, that is to say about two-thirds of the amounts awarded. It adds that the French and German

intervention agencies, for their part, exported 103 350 and 12 900 metric tons respectively which were not subject to the tendering procedures. The most significant figures are those which relate to the amounts *awarded* (and not therefore the figures for the amounts which were *actually exported)* because undertakings had a period of five months within which to export and could exceed the amount awarded by 5 %.

B — In answer to the Commission's reply the applicants define their positions as follows:

RT protests against the fact that the Commission credits it with 3 000 metric tons of white sugar which were in fact exported by Erstein by submitting that it only owns 34 % of the share capital of this undertaking and does not interfere with the management of this undertakings.

Générale sucrière and *Sucres et Denrées* submit that, when the Commission insists on taking the date of the award and not the date when the sugar was actually exported, it misses the point of the question put by the Court. Sucres et Denrées add that, just as export licences obtained during the year 1970 could be used for exporting sugar in 1971, from the beginning of 1970 sugar could be exported on the basis of licences issued in 1969. The company moreover states that, according to the Commission's figures, it was the only successful tenderer for raw sugar.

Générale sucrière states that for the purpose of assessing the present complaint the amounts exported by Sucre-Union, Lebaudy-SUC, Erstein and Export cannot be imputed to the applicants. The company also calls attention to the fact that the volume of sugar exports, which it has notified, include amounts exported following not only the tendering procedures for sugar on the free market but also the tendering procedures for intervention sugar, although it did not however give the respective figures.

C — The *Commission* states that the difference between its figures and the applicants' may be due to the fact that certain amounts awarded in 1970, or amounts for which the applicants obtained export licences during that year, were not exported until 1971. However the figures produced by both sides are on the same scale.

to 3

The *Commission* recalls the decision's findings on the economic importance of the applicant undertakings. Almost all the amounts awarded in 1970 went to Belgian and French undertakings. The aggregate amount awarded to undertakings which engaged in the concerted action (241 350 + 60 000 = 301 350 metric tons) is the same as the production of Générale sucrière and is approximately twice the average annual amount of Italian imports during the 1968/69 to 1971/72 marketing years. It must therefore be admitted that, if there had been no concerted action, there would have been a marked difference between the competitive situation of the applicants; in fact, because the undertakings in this case were not certain how much they would be awarded, some of them had to consider the possibility of finding outlets within the common market. As is shown by Annex I 77 to the statements of defence RT itself declared that the concerted action had as its object the 'abolition of the struggle to sell quantities of sugar on the domestic market'.

RT replies by reminding the Commission again of the possibility that it can discontinue an invitation to tender.

Générale sucrière challenges the argument that the concerted action ensured that undertakings were certain to be awarded specific amounts; the

Commission's own figures show that a not inconsiderable part was awarded to undertakings not affected by the decision.

Sucres et Denrées submits that, in order to gauge the effect of the alleged concerted practice, the amounts exported by the applicants must be compared with the total Community production of white sugar, which it and RT both estimate at about 7 000 000 metric tons. It cannot be maintained that the 252 696 metric tons of white sugar exported by the undertakings to whom exception is taken (about 3·5 % of Community production) could cause a shortage of sugar supplies on the domestic market, because other undertakings, owing to the fact that they had participated in the invitations to tender, exported sugar estimated by the Commission to amount to 155 600 metric tons and the intervention agencies according to the information supplied by the Commission, exported 116 250 metric tons to third countries.

Law

General

I

1 The subject-matter of the present applications is Commission Decision No COM (72) 1600 of 2 January 1973 which was addressed and notified to the applicants and to other undertakings as well and published at a later date in OJ L 140 of 26. 5. 1973, pp. 17 to 48, to which the quotations in this judgment refer.

2 Article 1 of the decision makes nine complaints spread over the 1968/69 to 1971/72 sugar manufacturing years relating each time to one or more of the beforementioned undertakings. They together blame each of the latter undertakings for having committed one or more infringements of Article 85 of the EEC Treaty, of Article 86 thereof or of both of the said Articles.

3 Subparagraphs 1 to 4 of the said Article 1 (1) refer to four concerted practices which had as their object and effect, in breach of Article 85, the protection of the sugar markets of Italy, the Netherlands, the western and southern parts of Germany respectively.

4 Paragraph 2 of this Article states that 'in the context of the abovementioned concerted practices' the Commission found that certain 'measures constitute in themselves infringements of Articles 85 and 86'.

5 Paragraph 3 of Article 1 finds that the undertakings to which it refers, in breach of Article 85, engaged in concerted actions, at the time of the invitations to tender for refunds on exports to third countries, in connexion with the amount of the refunds for which applications were made and also the quantities which were offered.

6 Article 2 requires the undertakings to which the decision is addressed to 'put an end immediately to the infringements found as aforesaid'.

7 Article 3 imposes fines ranging from 100 000 to 1 500 000 u. a. on each of the applicants, whereas the other undertakings referred to in the decision have not been fined.

8 Finally Article 4 gives the names of the undertakings to which the decision was addressed.

9 Each of the applicants by lodging applications at the Court Registry between 12 and 23 March 1973 brought an action mainly for the annulment of the contested decision so far as it affected each of them.

10 If the Court should confirm Articles 1 and 2 of the decision, some of the applicants submit that in any event the fines imposed on them by Article 3 should be cancelled or at least reduced.

11 Because these cases are related it is advisable that for the purpose of the judgment they be dealt with jointly.

II

12 Before dealing with each of the nine complaints separately it is advisable to consider a general question, namely whether, as several applicants assert, the

common organization of the sugar market is arranged in such a way that it eliminates any effective competition.

13 The provisions relating to this organization provide in particular for the fixing of a minimum price to be paid by sugar manufacturers for the purchase of sugar beet, a threshold price, a target price and intervention prices at which national agencies have to buy the sugar which they are offered, the collection of an import levy and the grant of export refunds, of denaturing premiums and, for the chemical industry, refunds to producers.

14 The common organization of the sugar market unlike those of the other agricultural markets also provides that each Member State shall fix, on the basis of the quantity allocated to it for each factory or undertaking producing sugar in its territory, a basic quota and a maximum quota, it being understood, on the one hand, that Member States shall collect from the manufacturer a production levy on sugar which is outside the basic quota but within the maximum quota and, on the other hand, that the quantity of sugar in excess of the maximum quota shall not be disposed of on the domestic market.

15 From the economic point of view the main features of the sugar market are that sugar is for the most part a homogeneous and standardized product, that transport costs of sugar are relatively high and that freight rates make the transportation of sugar beet over long distances out of the question.

16 It is beyond doubt that, as the beforementioned system of national quotas stopped production moving gradually to areas particularly suitable for the cultivation of sugar beet and, in addition prevented any large increase in production, it cut down the quantities which producers can sell in the common market.

17 This restriction together with the relatively high transport costs, is likely to have a not inconsiderable effect on one of the essential elements in competition, namely the supply, and consequently on the volume and pattern of trade between Member States.

18 Similarly the fact that a uniform intervention price was fixed for all Member States except Italy was likely to prevent a rapid increase of intra-Community

trade capable of making competition more intense and all the more so because, on the one hand, the original Member States with the exception of Italy and Luxembourg were able to meet their requirements to a greater or lesser extent from their own production and, on the other hand, the sugar factories with very few exceptions were more favourably located in relation to the areas of consumption of their respective countries than the producers of the other Member States.

19 However the Community system also contains elements which either promote the development of trade between Member States and, consequently, effective competition, or at least are likely to moderate the opposite effects arising out of the beforementioned facts.

20 In the first place the distinctive feature of this system — which moreover has allowed areas having a surplus as well as areas having a deficit to continue in being — is the disappearance of intra-Community barriers.

21 Further the 'prices' fixed or provided for by the Community system are not sale prices for dealers, users and consumers and, consequently, allow producers some freedom to determine themselves the price at which they intend to sell their products.

22 Moreover there is a good deal of evidence on the Court's file, including statements by several applicants, to show that, when the opportunity presented itself, the sale price, far from appearing to the persons concerned to be a value predetermined in practice by Community rules, was the subject of tough negotiations.

23 Finally the common organization of the market has no appreciable effect, even indirect, on certain matters which are also capable of being the subject of, or ensuring effective competition, such as the volume of demand and conditions of sale other than those relating to the price or quality of service.

24 Whatever criticisms may be made of a system, which is designed to consolidate a partitioning of national markets by means of national quotas, the effects of which will be examined later, the fact remains that if it leaves in practice a residual field of competition, that field comes within the provisions of the rules of competition.

III

25 As several of the complaints made by the Commission blame the undertakings concerned for having engaged in 'concerted practices' within the meaning of Article 85 of the Treaty, it is advisable to restate the scope of this concept and the way in which it must be applied in a case of this kind.

26 The concept of a 'concerted practice' refers to a form of coordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition, practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market.

27 Such practical cooperation amounts to a concerted practice, particularly if it enables the persons concerned to consolidate established positions to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers.

28 In a case of this kind the question whether there has been a concerted practice can only be properly evaluated if the facts relied on by the Commission are considered not separately but as a whole, after taking into account the characteristics of the market in question.

Chapter 1:

Complaint of a concerted practice having as its object the protection of the Italian market

29 Under subparagraph 1 of Article 1 (1) Eridania, Zuccherifici, Cavarzere, Industria degli Zuccheri, Romana, Volano, Emiliana, SADAM, Sermide, on the one hand, and Sucres et Denrées, Béghin, Sucre-Union, Say, Générale sucrière, Lebaudy-SUC, RT and SZAG, on the other hand, are blamed for having since the end of the 1968/69 marketing year committed infringements of Article 85 (1) by engaging in a concerted practice having as its object and effect the control of deliveries of sugar on the Italian market and consequently the protection of that market.

I — Summary of the relevant statements of the decision and of the main arguments of the parties

30 The Commission takes the view that the conduct of the applicants amounts to a concerted practice prohibited by Article 85 of the Treaty in that 'all competition on the Italian market between the beforementioned French, Belgian and German suppliers and the group of Italian importers was eliminated'.

31 The restrictions on competition are 'particularly obvious, because, on the one hand, the suppliers share out between them, according to the quotas, the amounts to be supplied ... and, on the other hand, the French and Belgian suppliers concentrated their offers through Sucres et Denrées, the Italian producers being represented by the Eridania company'.

32 'Had it not been for the sales between producers ... the sugar manufacturers of the countries having a surplus would have sold their sugar individually on the Italian market, fixing the quantities, prices and distributive networks' so that it must be acknowledged that 'in consideration of the amounts sold to their competitors, the producers thus give up any independent commercial operations on the Italian market'.

33 The disputed practices amount to a restriction of competition which may affect trade between Member States and have an adverse effect on attainment of the objectives of a single market between Member States.

34 To the extent to which the applicants do not dispute the conduct for which they are blamed by the decision they submit that it does not fall within the prohibition laid down in Article 85 of the Treaty, because, on the one hand, Community rules together with the measures taken by national authorities left no opportunity for any competition on the Italian sugar market which was capable of being prevented, restricted or distorted and because, on the other hand, the practices complained of were the inevitable consequence of the said measures.

35 The Commission replies, on the one hand, that Community and Italian regulations did not prevent effective competition and that, on the other hand, the Italian measures did not compel the applicants to behave as they did.

II — Examination of the submission

36 It is advisable to examine first of all what effect the Italian rules and other measures adopted by the Italian authorities have on the evaluation of this dispute.

37 1. During the years in question the 'Comitato interministeriale dei prezzi' (Comité interministériel des prix, Interdepartmental Committee on prices), an Italian public body, (hereinafter called 'CIP') adopted a series of orders ('provvedimenti') including the grant of aids intended mainly to benefit Italian operators (sugar beet producers, sugar factories, sugar exporters) and payable by the 'Cassa conguaglio zucchero' (Sugar equalization fund), an Italian public body (hereinafter called 'Ccz'), which under the relevant legislation was assigned the task of arranging 'the requisite equalizations with a view to integrating by progressive stages the Italian sugar economy into that of the Community in order to attain a common market in the sugar sector'.

38 These aids are financed by a levy ('sovrapprezzo') of Lit. 23 per kg, which was equivalent to the difference between the prices applied in Italy and the Community derived intervention price applicable in this country and was imposed upon national as well as imported sugar. However the levy on imported sugar was reduced for the purpose of offsetting the cost of foreign sugar, to the extent to which it exceeded the cost of national sugar and thus facilitating imports up to the amount considered necessary to make good the amount by which national production fell short of demand.

39 Provision was made for this reduction because the requirement of the whole of the 'sovraprezzo' together with the impact of transport costs would have made it impossible to import Community sugar into Italy, since foreign suppliers could not have offered their products at a price higher than the maximum price fixed by the Italian authorities, which according to CIP would have been 'contrary to the objectives which were pursued'.

40 The said orders provided for the organization by Ccz of public invitations to tender open to all operators wishing to import at least 1 000 metric tons of Community sugar, and covering the amount of the reduced 'sovraprezzo' which the persons concerned were prepared to pay, provided that the total amounts which might be awarded and therefore benefit from a reduced 'sovraprezzo' were not to exceed the ceiling fixed on each occasion by CIP.

41 Since the principle upon which this system is based is the intention of the Italian administration to obtain from successful tenderers the highest amount of the 'sovraprezzo' having due regard to the maximum prices, Ccz was given the power to fix secretly the proportion of the 'sovraprezzo' which it considered to be adequate ('prezzo congruo') and award import quotas according to the quantity and amount of the 'sovraprezzo' offered by the applicants.

42 For the purpose of ensuring that imports are effected in accordance with the prescribed conditions the persons concerned must give security of a relatively high amount under the applicable provisions which provide that the whole of the 'sovraprezzo' must be paid if the said conditions are not fulfilled.

43 Since 'all commercial operators cannot have an organization which enables them to take part in open tenders', CIP authorized Ccz to allow not more than 1 000 metric tons to be imported outside the invitations to tender and in consideration of a reduced 'sovrapprezzo', provided that, if the total amount for which applications were made in this way exceeded 10 000 metric tons, the quantities for which each applicant applied were reduced in proportion.

44 Order issued at a later date stated that the amounts imported outside the invitations to tender were be to reserved for industrial consumers and were not to exceed in the aggregate 20 % — later 25 % — of the maximum amount fixed for each invitation to tender.

45 The clear objective of the invitations to tender and imports outside these invitations to tender was only to permit the quantity of sugar to be imported which was absolutely necessary to make good the amount by which national production fell short of demand.

46 After having abolished the system of maximum consumer prices in force before the establishment of the Community system the Italian authorities 'in order to shield Italian consumers from increases which are not due to variations of Community prices' issued in 1969, Order No 1236, which in fact achieves this result by means of a decision under which the maximum limits of the 'price differentials' for the various qualities and kinds of sugar, of the charges for packaging the product as well as the trading margins on the sale of this product to the consumer must remain 'those which are determined by

a comparison with the quotations in Order No 1119 of 1965' both for sales by producers and to the consumer.

47 Circular No 1237 which followed Order No 1236 gave the ex works price of sugar, from which the maximum standard consumer price is directly derived, since it is the result of adding together items, of which some are taken from the Community provisions fixing the derived intervention price and the remainder from the provisions adopted by CIP.

48 It appears that maximum prices, which applied not only at the consumption but also at the production level, applied in particular to sales of sugar to industrial consumers.

49 Although the Italian Conseil d'État annulled Order No 1236 and Circular No 1237, attention must be drawn to the fact that, on the one hand, this decision was not made until 29 February 1972, and, on the other hand, that it confirmed that the disputed measures were in substance lawful and finally that the beforementioned system of prices continued in fact to be applied.

50 2. A — The Commission does not seriously deny that these regulations as well as the way in which they have been implemented affected the applicants' conduct to which exception is taken.

51 In the first place in the enumeration of the particulars of this complaint the Commission refers, *inter alia,* to the invitations to tender organized by Ccz and records in particular 'that ... the importers' group took approximately 75 % of the total amount of imports put up for tender (decision p. 24 under C 13), all the sugar taken by Eridania or any other member of the group was supplied by the suppliers' group (loc cit.) and that the concerted action between producer-importers is evident... from the fact that they offered similar rates of the "sovrapprezzo" at the invitations to tender (in practice from the fact that they made joint purchases pursuant to agreements and distribution arrangements agreed upon beforehand') (statement of defence in Case 114/73, p. 58), a practice which had the effect that 'invitations to tender [were unable] to play the part assigned to them' (loc. cit. p. 42).

52 Further the Commission blames the applicants in a more general way for having 'made use of the Italian rules in order to restrict opportunities for

competition' (rejoinder in Case 48/73, p. 17) and asserts that these rules 'do not explain everything' (loc. cit., p. 19), which is tantamount to an admission that they at least explain certain aspects of the applicants' actions.

53 Moreover a 'report on an investigation into invitations to tender', Annex No 16 to the Statement of Defence in Case 44/73, drawn up by agents of the Commission (Directorate-General for Competition) states *inter alia* that 'the procedure in fact adopted at invitations to tender undoubtedly encourages the concerted action by Italian producers to control all imports of sugar'.

54 Finally the Commission has not refuted certain statements, which Eridania produced, partly as evidence upon which it relies, namely, on the one hand, that the Italian Government never concealed the fact that it always 'wanted and requested' Italian producers 'to take part in and proceed ... to import the requisite quantities of sugar to make good the amount by which national production falls short of demand' and to do so 'in a rationalized way' that is to say by concerted action, and, on the other hand, that the said Government 'always pursued the fundamental objective of a uniform price for sugar ...., both for consumption as food and for the sugar processing industry' (reply in Case 114/73, p. 57, 78 to 79; cf. also the application in this case, p. 25).

55 Nor has the Commission refuted the statements, which Sucres et Denrées produced as evidence upon which it relies, that, on the one hand, a senior Italian official informed Sucres et Denrées 'of the need to harmonize supplies above and below the Franco-Italian frontier, in such a way that a uniform price can be maintained on Italian territory ..., an absolutely essential economic and social requirement for the Italian authorities' and, on the other hand, that 'the system of invitations to tender ... was adopted as a means of obtaining such a uniform price, thanks to the undertaking given by the principal Italian importer to maintain the said uniform price' (application in Case 48/73, p. 18 to 19).

56 Moreover these statements tally with the aims indicated in the regulations in question, in that they are designed to limit imports to the minimum required to make good the amount by which Italian production falls short of demand, to harmonize the cost of foreign sugar with that of national sugar and to keep prices in Italy at a uniform level and relatively low.

57 B — Apart from these considerations the said regulations — together with the influence exerted by the Italian authorities on the operations of the producers concerned — were in many respects likely to bring

about the concentration of demand in Italy in the hands of the large producers and the formation of groups of producer-importers and also of supplier-exporters.

58 First of all quota restrictions on imports benefiting from a reduced 'sovrapprezzo' considered together with the risks attaching to the invitations to tender were likely to induce the persons concerned to share out the supply as well as the demand and to come to an agreement on the amount of the 'sovrapprezzo' to be offered, with the object of preventing one or the other of them from being excluded from the supplies in question, because the amount of the 'sovrapprezzo' which he offered was too low.

59 This is in particular what happens, on the one hand, to foreign suppliers forced to sell large surpluses and, on the other hand, to small Italian producers who cannot deal in large amounts.

60 Further, fixing large minimum amounts (1 000 metric tons) for each individual tender submitted for an award — together with the absence of any independent distributive network and the fact that it was almost impossible for industrial consumers, who have no storage facilities and more often than not have to obtain their supplies on a day to day basis, to take part in the invitations to tender — of necessity resulted in Italian producers, in accordance with the wish of the national authorities, alone being able to attend the invitations to tender and this was bound to make foreign suppliers offer the said producers a large proportion of the sugar which they intended to export to Italy.

61 Moreover, the fact that the amounts for which applications for the purpose of importing were made outside the invitations to tender were reduced in proportion when they exceeded in the aggregate the ceiling of 10 000 metric tons was likely to dissuade those concerned from making use of this system of importing and induce them to obtain their supplies direct from national producers.

62 Further the said fixing of minimum quantities could force small Italian producers, who were anxious to continue to be able to participate in import operations, to cooperate with their counterparts who carry on business on a larger scale.

63 The centralization of both supply and demand may be considered to be the result of the Italian regulations and was encouraged in addition by the fact that, because of the size of the amounts put up for tender, buyers found that there was a strong incentive for them to turn to exporters, whose output was adequate, who could guarantee regular bulk deliveries and enter into agreements at attractive prices, mainly because they could get unusually satisfactory freight rates which railway undertakings could not have offered for smaller amounts.

64 These circumstances could, on the one hand, induce producer-exporters to appoint a sole agent, namely Sucres et Denrées, which could give the necessary guarantees for the successful completion of these operations, to carry out the export operations, and, on the other hand, also induce producer-importers to centralize negotiations by giving Eridania, a large Italian producer, the necessary authority.

65 3. All these considerations show that Italian regulations and the way in which they have been implemented had a determinative effect on some of the most important aspects of the course of conduct of the undertakings concerned which the Commission criticizes, so that it appears that, had it not been for these regulations and their implementation, the cooperation, which is the subject-matter of these proceedings, either would not have taken place or would have assumed a form different from that found to have existed by the Commission.

66 It emerges from the contested decision that the Commission has not made sufficient allowance for the effect of those regulations and has consequently overlooked a crucial factor in the evaluation of the infringements which it alleges.

67 4. Further the object and effect of Italian regulations and the way in which they have been implemented was to match supply exactly with demand and thereby remove a vital element of normal competition.

68 Furthermore the system described above has substantially reduced the opportunities available to the parties concerned to negotiate a price which would have resulted from the free market forces of supply and demand.

69 In addition, the Italian regulations impeded, indirectly but fundamentally, the buyer's freedom to choose his supplier and vice versa.

70 Moreover the only effective competition, which these regulations, at least ostensibly, allowed to remain, namely competition relating to the amounts of the 'sovrapprezzo' to be tendered for the purposes of the adjudications to tender, was likely to increase a not inconsiderable item of the cost price of any purchaser and, consequently, the prices applied when the sugar awarded is resold, whereas the provisions of the Treaty relating to competition are on the contrary designed, *inter alia,* to prevent cartels allowing its members to apply unjustified prices.

71 Although, as has been indicated earlier, the system of national quotas, by tending to partition national markets, only leaves a residual field for the operation of the rules of competition, that field is in turn to a great extent fundamentally restricted in its scope by the special organization of the Italian market.

72 These considerations show that the conduct complained of could not appreciably impede competition and does not therefore come within the prohibition of Article 85 of the Treaty.

73 Subparagraph 1 of Article 1 (1) of the contested decision must therefore be annulled.

Chapter 2

The complaint of a concerted practice having as its object the protection of the Netherlands market

74 Subparagraph 2 of Article 1 (1) of the contested decision blames SU and CSM, on the one hand, and RT and Pfeifer & Langen, on the other hand, for having 'since the 1968/69 marketing year (Pfeifer & Langen only since the 1970/71 marketing year)' — that is to say from the 1968/69 to the 1971/72 marketing year — 'committed infringements of Article 85 (1) by engaging in a concerted practice having as its object and effect the control of deliveries of sugar on the Netherlands market from Belgium and the western part of Germany and consequently the protection of that market'.

Section 1: Preliminary submission: the 'Cooperative Vereniging Suiker Unie (UA' (SU) was not a legal entity during part of the period to which this complaint refers

75 I — SU submits that it only commenced business on 2 January 1971 so that there is no foundation for the finding in the decision that the applicant committed infringements 'from the 1968/69 marketing year'.

76 Similarly the Commission infringed Regulation No 17, and in particular Article 15 (2) thereof, by imposing on the applicant a fine for an infringement which it could not have committed during most of the period under consideration.

77 The Court file shows that in 1966 four Netherlands sugar producing cooperatives, the members of which were beet growers, formed an association known as 'Coöperatieve Vereniging Suiker Unie UA', hereinafter called 'the former association', having as its object, in particular, the coordination of the operations of the said cooperatives which had to carry out the instructions of the association, especially for making the best possible use of plant, investments and prices.

78 Prompted by the wish to attain closer cooperation amounting to an actual merger the four cooperatives formed on 16 July 1970 a company also called 'Coöperatieve Vereniging Suiker Unie UA', which brought together under its wing the members of the said cooperatives as direct participators, commenced business on 1 January 1971 and is the applicant in this case.

79 After the former association had changed its name to 'Coöperatieve Vereniging Suiker Unie Beheer UA', it ceased trading when the applicant commenced business and was dissolved with effect from 1 June 1971.

80 The four cooperatives which were members of the former association were dissolved on 31 December 1970 and on 1 January 1971 the applicant assumed all their rights and liabilities.

81 The applicant states that it cannot be held responsible for acts and things done by the former association which is not its predecessor ('rechtsvoorganger') and which had neither any goodwill nor any assets which it could have transferred to the applicant, quite apart from the fact that a transfer of goodwill is not known in Netherlands law.

82 The applicant is only the legal and economic successor of the four cooperatives, the names of which moreover never included the words 'Suiker Unie'.

83 Even if it must be treated as the legal successor of the former association, there is a case for taking account of the fact that this association was not liable for the obligations arising out of the decision, which were the direct liability of SU.

84 II – As the applicant assumed all the rights and liabilities of the four cooperatives of the old association, it must be treated as the economic successor both of the old association and of its members, which indeed is what those members intended.

85 The applicant moreover does not deny that the name 'Suiker Unie' always covered the same undertakings, which were run for the most part by the same persons and had their registered offices at the same address.

86 It does not even claim that its conduct on the sugar market differed from that of the former association.

87 In these circumstances, so far as the sugar market is concerned, the main feature of the conduct of the applicant and its predecessor was its obvious continuity, which means that the whole of this behaviour must be attributed to the applicant.

88 Therefore this submission is unfounded.

Section 2: Procedural and formal submissions

I — Submissions concerning the administrative procedure

1. Premature publication a breach of the principle that everyone has the right to a fair trial

89 SU, CSM and Pfeifer & Langen blame the Commission for having infringed the principle that everyone has the right to a fair trial by issuing certain public statements giving the impression that the infringements alleged had been found to exist. What is more they did so before the undertakings concerned had even been able to define their position on the complaints affecting them.

90 Thus the Commission deprived itself of the opportunity of determining impartially the facts of the case and the arguments put forward by the applicants.

91 There is nothing in the Court's file to support the presumption that the contested decision would not have been taken or would have been drawn up in a different way, if the public statements which are the subject-matter of this submission had not been made, whether or not they are open to criticism under another legal head.

92 Moreover the decision has not upheld all the complaints set out in the notification of objections.

93 This submission must therefore be dismissed.

2. Unduly short time-limits for submission of observations

94 SU, CSM and Pfeifer & Langen submit that by granting the undertakings concerned a time-limit of only two months for submission of their observations on the notification of objections the Commission infringed Article 11 of Regulation No 99/63 under which in fixing the time-limits provided for by this regulation 'the Commission shall have regard to the time required for preparation of comments'.

95 The time-limit fixed in this way was too short, especially if account is taken of the fact that the Commission itself took more than two years to carry out its investigation.

96 According to Article 11 the time-limit in question 'shall not be less than two weeks' which shows that, when the Commission fixed it at two months, it granted the undertakings concerned a period much longer than the minimum prescribed by this article.

97 Further, since Article 11 also requires the 'urgency of the case' to be taken into account, the Commission, because it considered, rightly or wrongly, that it was faced with a series of cartels of a particularly damaging kind, could have come to the conclusion that it was bound to expedite the administrative procedure with a view to being able to bring the course of conduct complained of to an end as quickly as possible.

98 A comparison, on the one hand, of the time which elapsed between the opening and closing of the investigation and, on the other hand, of the disputed time-limit of two months is irrelevant, as the Commission had to collect a considerable number of facts relating to a large number of undertakings whereas each of the latter only had in the main to explain its own conduct.

99 This submission cannot therefore be upheld.

3. Failure by the Commission to have taken into account certain facts put forward by the applicant

100 SU submits that the Commission infringed Article 19 (1) of Regulation No 17 and Article 1 of Regulation No 99/63, when a member of the Commission stated at a press conference on 18 December 1972 that none of the undertakings affected by the decision had submitted that it fixed the price of sugar in agreement with the competent authority of the respective Member State, even though SU expressly stated in the administrative procedure that it had done so.

101 These articles show that, before taking a decision and consulting the Advisory Committee on Restrictive Practices and Monopolies, the Commission is under a duty to give undertakings concerned 'the opportunity of being heard on the matters to which the Commission has taken objection'.

102 SU's statements show that it had the opportunity of defining its position on the point in question.

103 If a member of the Commission has given the press incorrect information concerning statements put forward by an undertaking during an administrative procedure, this does not prove that the Commission did not take the said statements into consideration.

104 The submission is therefore unfounded.

4. Infringement of Article 4 of Regulation No 99/63

105 According to SU the Commission infringed Article 4 of Regulation No 99/63 which reads — 'The Commission shall in its decision deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views'.

106 The decision treats the purchases of the Netherlands producers from RT and Pfeifer & Langen as separate infringements, whereas the notification of objections merely regarded them as evidence of a concerted practice.

107 It is clear from the letter and spirit of the decision that the Commission does not maintain that deliveries from producer to producer as such are unlawful but has inferred the illegality of these operations from the fact that they are constituent parts of concerted practices.

108 As the decision does not differ from the notification of objections on this point the submission is unfounded.

II — Submissions relating to the drafting and notification of the decision

1. Infringement of the right to defend by the adoption of a single decision; infringement of the first paragraph of Article 191 (2) of the Treaty and of Article 3 of Regulation 1 (1)

109 A — SU and CSM blame the Commission for having infringed their right to defend themselves by adopting a single decision, although it was taking action relating to a large number of undertakings and a series of alleged infringements which were not connected with each other.

110 This procedure left the undertakings to which the decision was addressed uncertain as to the exact nature of the complaints made against each of them individually and might lead to the infringements which an undertaking may have committed being attributed to another undertaking as well.

111 There is no reason at all why the Commission should not make a single decision covering several infringements, even if some of the undertakings to which it is addressed are unconnected with some of these infringements, provided that the decision permits each addressee to obtain a clear picture of the complaints made against it.

112 As the contested decision fulfilled this requirement so far as SU and CSM is concerned, this submission is unfounded.

113 B — SU submits that the Commission has infringed paragraph 2 of Article 191 of the Treaty and also Regulation No 1 (3) by sending it not only the Dutch version of the decision but also the German, French and Italian versions and without calling attention to the fact that the Dutch text alone is authentic so far as SU is concerned.

114 Community institutions are under a duty to send an undertaking to which a decision is addressed a copy of that decision in the language of the Member State to which this undertaking belongs.

115 As this requirement was fulfilled in this case, the fact that the Commission also sent the applicants copies of the decision in other languages is not such as to call into question its validity.

116 Therefore this submission cannot be upheld.

2. Infringement of Article 190 of the Treaty

117 SU and CSM submit that some of the assertions in the statement of the reasons upon which the decision is based are too vague to fulfil the requirements of Article 190 of the Treaty.

118 Even if it is assumed that the passages to which SU and CSM have drawn attention were not drawn up with the accuracy to be desired, this fact has neither prevented the applicants nor the Court from grasping the nature and extent of the complaint made by the Commission and from determining whether it is well-founded or unfounded, so that there can be no question of an infringement of any essential procedural requirement within the meaning of Article 173 of the Treaty.

119 To the extent to which this submission aims at disputing the facts alleged by the Commission or their evaluation by the latter it belongs to the substance of the case.

120 Therefore it cannot be upheld.

3. Lack of clarity in the operative part of the decision

121 SU, CSM and RT submit respectively that the Commission has infringed an essential procedural requirement, the principle of legal certainty or Regulation No 17 (3) in that, either subparagraph 2 of Article 1 (1) of the decision does not accurately describe the courses of conduct which constitute the infringement and which the applicants are called upon to put an end to under Article 2 of the decision, or that it is impossible to ascertain from this latter provision, even if it is considered in the light of the statement of reasons upon which the decision is based, whether sales from producer to producer, owing to the fact that they have been treated as being unlawful *per se*, must be discontinued.

122 In order to evaluate this submission it is advisable to refer not only to the operative part of the decision which is of necessity concise but also to the statement of the reasons upon which the decision is based.

123 If the operative part of the decision, which is criticized, is considered in the light of the statement of reasons, it shows with sufficient clarity conduct for which the applicants are blamed and which they must put an end to pursuant to Article 2 of the decision.

124 So far in particular as the deliveries from producer to producer are concerned, it has already been stated that they were not regarded as being prohibited as such, but that the Commission inferred their illegality from the fact that they are constituent parts of concerted practices.

125 This submission must be rejected.

Section 3: Submissions on the substance of the case

I — Infringement of Article 85 of the Treaty

126 The essence of the submissions put forward by SU, CSM, RT and Pfeifer & Langen is that, in the absence of any concerted action, the courses of conduct for which the applicants are blamed do not amount to concerted practices, so that by applying Article 85 of the Treaty to these courses of conduct the Commission was in breach of this provision.

1. Summary of the relevant statement in the decision

127 The practices, for which the applicants or some of them are blamed, can be subdivided into three groups of actions or omissions.

128 The first complaint made against them is that they channelled very nearly all exports in the Netherlands to specific consignees or destinations, namely Netherlands producers, certain industries, which these producers had permitted them to supply, and for denaturing or export at a later date to third countries.

129 Further they are blamed for having refused to supply operators wishing to import sugar into a neighbouring Member State.

130 Finally the Commission made the complaint against RT, on the one hand, and SU and CSM on the other hand, that they respectively compelled Belgian and Netherlands dealers to adopt their policy.

2. Examination of the submission

A — The relations between RT, on the one hand, and SU and CSM, on the other hand

(a) The evidence

(aa) The evidence relating to the actual conduct of the applicants

1. Channelling of Belgian exports to specific consignees or destinations

131 It is clear from several documents on the Court's file that RT and other Belgian producers which it controls (Raffinerie Notre-Dame at Oreye; Sucreries des Flandres at Moerbeke-Waas), in general and in connexion with specific deliveries to Netherlands customers other than SU or CSM systematically laid down that Export and Hottlet should only deliver the amounts in question to certain groups of consignees or certain destinations.

132 Thus RT in a letter to Export of 24 July 1969 (Annex 1 43 to the statements of defence), after having reminded this firm that it 'informed it earlier of our policy towards our foreign colleagues' forbids them to export to the Netherlands, for the consumer market, the amounts of sugar originally sold for denaturing but which can no longer be used for this purpose because of the abolition of the denaturing premium.

133 The minutes dated 23 April 1970 of a meeting between this company and RT on 20 April 1970 (Annex I 74 of the statements of defence) which Export drew up, state that 'Mr Rolin of RT took exception to Export's operations during the 1969/70 marketing year in the Netherlands and to the purchases from independent manufacturers not long before the commencement of the sugar marketing year'. This passage can only be understood in the context of the other documents on the Court's file as meaning that RT blamed Export for having supplied, possibly with the help of Belgian manufacturers independent of RT, Netherlands customers other than those to which RT intended to restrict its exports.

134 RT in a telex message to Export of 20 August 1970 (Annex I 82 to the statements of defence), after having taken note that Export had accorded its agreement with the policy to be adopted on the Netherlands market, informs this firm that 'we are therefore making sugar available to you for the Netherlands condensed milk industry . . .'.

135 Export in a telex message of 20 August 1970 (Annex I 83 to the statements of defence) states that it agrees to comply with the 'cartel' concluded between RT and the Netherlands producers and makes it clear that under the terms of this cartel it must not supply in the Netherlands sugar 'for human consumption' or 'the sweet manufacturing industry', whereas it remains free to do business with the milk processing and chemical industry as well as the 'denaturing trade'.

136 The milk products industry is mentioned, sometimes together with SU, as the only Netherlands customer to be taken into account in a series of other documents, namely a telex message from RT to Export of 20 August 1970, a confirmation of sale by Export to Jacobson of 1 October 1970, a telex message from Export to Jacobson of the same date, two letters from Oreye to Export of 2 and 7 October 1970, a contract for sale of Hottlet of 16 December 1970, nine purchase contracts or contracts for sale entered into by Export or Hottlet with RT, other Belgian manufacturers or Jacobson between 16 December 1970 and 7 January 1972, a telex message from Export to RT of 17 September 1970, a letter from Export to Oreye of 5 October 1970, a telex message from Export to RT of 21 September 1970 (Annexes I 84, 88, 89, 91 to 97, 100 to 104, 112 to 114 to the statements of defence).

137 A confirmation of purchase from Export to RT of 5 October 1970 (Annex I 128 to the statements of defence) reads: 'Destination: Holland, in principle only the milk processing industry, sugar intended for the ultimate takers-purchasers-consumers which the Netherlands sugar industry permits to be supplied . . .'.

2. Refusal to supply

138 Some of the documents confirm this description of RT's restrictive policy because they show that they sometimes refused to accept offers to purchase from Netherlands operators other than sugar producers and the milk products and chemical industries.

139 Thus either RT or Export or the sugar marketing organization (le Comptoir sucrier) of Antwerp, by letters of 14, 23 August, 2 and 3 September 1968 (Annexes I 44 to 47 to the statements of defence), acting in accordance with instructions from RT or other Belgian producers controlled by RT refused offers to purchase from such operators, on the ground that the amounts available left no scope for export.

140 Export confirms in an internal memorandum of 23 April 1970 (Annex I 75 to the statements of defence) that 'the refiners' policy makes it impossible' to take advantage of the opportunities to export 'on the frontier regions of Benelux' in spite of the fact that there is a large demand in the Netherlands.

3. The obligation imposed by RT on Belgian dealers and by SU and CSM on Netherlands dealers to adopt the policy described above

141 So far as the relations between RT and the Belgian dealers are concerned most of the documents quoted show that RT insisted that these dealers, and in particular Export, only supply sugar within the Netherlands to Netherlands producers, the milk processing industry, the chemical industry or for the purpose of denaturing.

142 Export in a telex message to RT of 19 August 1970 (Annex I 81 to the statements of defence) says 'Holland: on basis of the Netherlands' import requirements of EEC sugar, we agree principle mentioned at lunch the day before yesterday to carry on business in accordance with your plan, that is to say deliveries between sugar producers through traditional Belgo-Netherlands trading organizations, on terms satisfactory for Export. To give effect to your proposal, we are getting in touch with Netherlands business houses on these questions ...'.

143 RT by a telex message of the same date in answer to the beforementioned telex message (Annex 82 to the statements of defence), after having stated that it was 'very pleased indeed' with Export's statement that it was in agreement, goes on to say that 'we are therefore making sugar available to you for the Netherlands condensed milk industry to be handled through the long established trade ... on the other hand if the Netherlands sugar industry were to ask us to supply its own requirements, any exports of Belgian sugar would likewise be handled with the help of our business houses. It follows from the

beforementioned arrangements that you will refrain from making any other initiatives on the Netherlands market so that the pattern of this market is not disturbed'.

144 Export replied by a telex message of 20 August 1970 (Annex I 83 to the statements of defence) giving particulars of the terms of the arrangements made as follows: 'Export confirms that it agrees to follow RT ... in working out an agreement with SU and CSM ... for the 1970/71 sugar marketing year upon the following lines:

1. Export gives up dealing in Belgian sugar with Netherlands purchaser-consumers in connexion with what we call the particular requirements in the Netherlands, that is to say, on the one hand, for sugar in its original state for human consumption and, on the other hand, for sugar for the factories manufacturing sweets to be consumed in the Netherlands ... This sweet manufacturing industry does not include the milk processing industry. The denaturing trade and the chemical industry are also excluded from the trade which Export has given up.

2. Giving up this trade by Export is linked ... so far as the Netherlands import requirements of EEC sugar are concerned ... with the condition that the deliveries to be carried out between Belgian and Netherlands sugar manufacturers in order to supply this Netherlands market shall be effected through the long established Belgian and Netherlands trade ...'.

145 With regard to the relations between SU and CSM, on the one hand, and the Netherlands dealers, on the other hand, a note of 3 September 1970 sent by Mr Kronacker of Export to Mr Rolin of RT (Annex I 86 to the statements of defence) refers to a statement of Mr Rolin that 'the three traditional Netherlands importers gave an undertaking to SU and Centrale [CSM] not to import sugar for consumption in the Netherlands except with their consent' and, on the other hand, that 'he [Mr Rolin] was given an undertaking by CSM and SU that, if there is any demand for sugar for consumption, these firms will approach RT in order to ensure that this demand is met and RT undertakes to do business through us', that is to say through Export.

146 A telex message of 24 September 1970 from Jacobson to Export (Annex I 87 to the statements of defence) states that 'The sugar of which we have to take delivery is intended for purchasers which the Netherlands industry will readily agree can be supplied'.

147 A telex message from Export to Jacobson of 1 October 1970, which confirms a sale (Annex I 89 of the statements of defence) states under the heading 'special clauses', that 'the exclusive right granted by RT' — that is to say the exclusive right to sell its granulated sugar which it granted Export and Hottlet for the 1970/71 marketing year — 'derives from an undertaking given by the three old established Netherlands business houses that Belgian granulated sugar comprised in this and later contracts in the 1970/71 marketing year will only be delivered to the ultimate takers-purchasers-consumers which the Netherlands sugar industry (CSM — SU) agrees can be supplied'.

(bb) The evidence relating to the question whether the conduct referred to above was concerted

148 Some of the documents quoted above mention the existence of a concerted action, namely the telex message from Export to RT of 20 August 1970, the note from Export to RT of 3 September 1970, the telex message from Jacobson to Export of 24 September 1970, the telex message from Export to Jacobson of 1 October 1970 and the confirmation of purchase sent by Export to RT on 5 October 1970.

149 A report of a discussion between representatives of RT and Export on 20 April drawn up by Export (Annex I 74 to the statements of defence) mentions 'obligations undertaken by RT within the framework ... of the concerted action between European refiners' by virtue of which 'a series of direct transactions between refiners to the producer' — the last two words should probably read 'or producers' — 'cease to form part of the business relations between RT and Export' in ... the Netherlands (on the one hand the manufacture of CSM type lump sugar with if necessary exchange of the raw material or a certificate of exchange, on the other hand, 'supplying granulated sugar for industrialists to customers of CSM/SU, at the request of and through the latter)'.

150 In a report by Export dated 6 May 1970 of the discussions between representatives of the same firms on 30 April 1970 (Annex I 76 to the statements of defence) there is the sentence 'The basic principle about which Mr Maisin' of RT 'is adamant is the following one: Export must adopt RT's policy towards its European partners. He defines this policy as follows: no movement of goods from country to country save by agreement between producer and producer'.

151 A telex message from RT to Export of 20 August 1970 (Annex I 84 to the statements of defence) states that: 'In the case of the Netherlands import requirements of sugar for consumption in the Netherlands, you cease to deal with any transactions other than the requests made by the Netherlands sugar industry which intends to keep control of this market. The Netherlands sugar industry, as you moreover have confirmed to us, told us that at present the situation in the Netherlands does not justify import operations. Since we do not intend to do anything at all in connexion with consumption in the Netherlands which is not approved by our Netherlands colleagues, there is no need to examine at the moment transactions in Belgian sugar for these outlets ... supplying the milk products industry is another matter ...'

152 RT points out to Export in a letter of 31 August 1970 (Annex I 85 to the statements of defence) that 'so far as the Netherlands are concerned we do not want to do anything which might upset SU or CSM, just as they do not want to do anything which would disturb us'.

153 Export in a letter of 10 October 1970 to Jacobson confirming a sale (Annex I 88 to the statements of defence) — after having pointed out that RT granted this firm and Hottlet for the 1970/71 marketing year the exclusive right to sell its granulated sugar for export and after emphasizing that RT did not intend to do anything on the Netherlands market 'which has not been approved by its two Netherlands colleagues' — states that these exclusive rights 'derive from an undertaking given by three old established Netherlands business houses that the Belgian granulated sugar comprised in this and the later contracts in the 1970/71 marketing year are intended to be delivered to the ultimate takers-purchasers-consumers which the Netherlands sugar industry (CSM — SU) agrees can be supplied'.

154 Export in a telex message to a German dealer of 14 September 1970 — which refers to a telex message of 11 September in which the said dealer referred to 'different customers in the Netherlands ... which urgently need offers' (cf. Annexes I 107, 108 to the statements of defence) — mentions *inter alia* that 'regarding the Netherlands market for which you asked us also offers and wrote to us for rather immediate selling possibilities of around 15 000 tons of Belgian crystal sugar on the 1970/71 crop, we confirm you positively that our main Belgian sugar manufacturers, the RT group, working themselves in close contact (through trade intermediaries) with the Netherlands industry groups CSM and SU, for the Netherlands consumption home market, are not presently sellers for such destination, outside their traditional refiners

channel, and anyway waiting for Netherlands sugar manufacturers eventual demands'.

155 Further the existence of a concerted action between RT and the Netherlands producers is also supported directly and indirectly by certain other documents (letter from the sugar marketing organization of Antwerp (Comptoir sucrier d'Anvers)) to a Netherlands customer of 3 September 1968; internal memorandum of Export of 23 April 1970; telex message from Export to RT of 20 August 1970; telex message from Export to RT of 20 August 1970; memorandum from Export to RT of 3 September 1970; telex message from Jacobson to Export of 24 and 30 September 1970; telex message from Export to RT of 14 and 17 September 1970; telex message from Export to Jacobson of 1 October 1970; confirmation of a purchase by Export to Naveau of 31 July 1970: Annexes I 47, 75, 83, 86, 87, 89, 90, 108, 112, 128, 129 to the statements of defence).

(b) Evaluation of this evidence

(aa) Its evidential value

156 RT submits that, although the beforementioned documents of Export correctly reproduce the statements made by RT to this firm and the documents relied on by the Commission are 'damning', they must not however be taken 'literally'.

157 As in fact Export had unsuccessfully tried to obtain from RT the exclusive right to sell RT's sugar and feared, wrongly, that it would be gradually eliminated from RT's operations, the latter, in order to reduce the tension between these two companies, 'did not want to explain frankly to Export that it was in its own interests to eliminate agents in certain transactions' so that it 'seemed commercially speaking to be more advisable to take refuge behind its foreign colleagues'.

158 If the statements in question corresponded to the facts 'it would be very naive to suggest that an undertaking like [RT] cannot be reasonably assumed to have recorded them in writing'.

159 SU and CSM together submit that correspondence between third parties, namely RT and Export, cannot be used against them and in particular

because RT's statements as to the need not to upset Netherlands producers are based on mere speculation by RT and because Export, owing to the strained relations between itself and RT which were a matter of common knowledge, had obviously applied itself to the task of preparing a case detrimental to the latter.

160 Although the documents in question as well as the other documents produced for the Court's file by the Commission show that RT and Export disagreed on the extent of the area in which the latter was to be allowed to operate and on how much freedom of action it should be permitted to enjoy, it is difficult to accept that RT simply invented what it said or wrote concerning its relations with SU and CSM.

161 So far as what RT calls the 'naivety' of any written admission of having engaged in a concerted action and endeavoured to implement it, attention must be drawn to the fact that it would be even more unusual for a very large producer to simulate in letters and documents conduct likely to lay it open to sanctions, merely in order to reassure a dealer who economically almost wholly depends upon it.

162 Further the summary assertion that the statements in issue must not be taken 'literally' leaves wide open the question to what extent RT intends to admit or deny the truth of these statements, and consequently, does not even amount to a serious attempt to reject this evidence adduced by the Commission.

163 Further it is useless to deny the evidential value of the documents in question on the ground that Export recorded or kept them for the sole purpose of rendering RT liable to be proceeded against by the Commission.

164 Contrary to the view of SU and CSM there is no reason why the Commission and the Court should not accept as evidence of an undertaking's conduct correspondence exchanged between third parties, provided that the content thereof is credible to the extent to which it refers to the said conduct.

165 In particular the statements in the documents in dispute tally with the actual way the parties concerned have behaved on this market.

166 Having regard to all these circumstances it must be held that these documents form a body of consistent evidence and that their contents correspond, at least for the most part, to the facts.

(bb) The existence of the alleged concerted practices

167 1. All these findings show that the applicants in fact behaved in the way alleged by the Commission.

168 It can therefore be taken for granted that almost all the exports in the Netherlands of RT and the producers which it controls were channelled to Netherlands sugar producers, the milk products or chemical industries or for denaturing, that RT hardly ever supplied the long established customers of the Netherlands producers and that it forced Belgian dealer-importers to adopt this policy of channelling deliveries to specific consignees.

169 Large amounts were channelled in this way to a restricted number of consignees or destinations as is shown by the actual figures produced by RT in Annex 4 to its reply.

170 These figures, which even though they are sometimes higher and sometimes lower than those mentioned by the Commission, are nevertheless of the same order of magnitude, show that RT, during the whole of the four marketing years to which the decision refers, supplied SU, CSM and the Netherlands milk processing industry respectively with 40 741, 35 099 and 48 000 metric tons of refined sugar, in the aggregate with 123 840 metric tons, which are large figures even if the 10 587 metric tons of granulated sugar which CSM consigned to RT for processing and which RT later re-exported to the Netherlands as refined sugar are deducted from these figures.

171 It emerges from the statistics submitted by the Commission (Annex I to the rejoinder in Case 47/73, table VI) that the 'controlled' deliveries — that is to say the deliveries from producer to producer, to the milk processing industry, for denaturing or export at a later date to third countries — increased respectively during each of the four marketing years in question to 70 %; 28·4 %; 79·3 % and 70 % of the total amount of Belgian exports to the Netherlands; the Commission states that the relatively low figure of 28·4 % is explained by the fact that in 1969/70 two-thirds of these exports were effected by Belgian producers who were not dependent on RT.

172 2. SU and CSM submit that since the concept of 'concerted practices' presupposes a plan and the aim of removing in advance any doubt as to the future conduct of competitors, the reciprocal knowledge which the parties concerned could have of the parallel or complementary nature of their respective decisions cannot in itself be sufficient to establish a concerted practice; otherwise every attempt by an undertaking to react as intelligently as possible to the acts of its competitors would be an offence.

173 The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells.

174 Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

175 The documents quoted show that the applicants contacted each other and that they in fact pursued the aim of removing in advance any uncertainty as to the future conduct of their competitors.

176 Therefore the applicants' argument cannot be upheld.

177 SU and CSM also submit that because their conduct on the market corresponded to the habitual attitude adopted by a producer in their situation, it does not amount to a concerted practice.

178 RT submits a similar argument but in more specific terms, namely 'that ... an important element in the legal concept of a "a concerted practice" is the

causal connexion which must exist between the alleged concerted action and the practices which were adopted' and which is absent 'if these practices are the natural consequence of market conditions which would have been the same even if there had been no contacts between producers'.

179 The documents produced are sufficient proof that SU and CSM intended to ward off the risk of competition from RT, to which they could by no means be certain that they would not be exposed, if there was no concerted action, having regard to the considerable over-production of Belgian sugar, the short-fall of Netherlands production, the fact that Belgian prices were below Netherlands prices, that Belgian dealers wanted to export large amounts freely and also bearing in mind the opportunity which all these factors offered RT of at least supplying the frontier regions of the Netherlands.

180 Therefore the concerted action in question and the practices whereby it was implemented were likely to remove any doubts the Netherlands producers had as to their chances of maintaining — to the detriment of the effective freedom of movement of the products in the common market and of the freedom enjoyed by consumers to choose their suppliers — the position which they had established.

181 3. The applicants' submission that Article 85 of the Treaty does not prohibit deliveries from producer to producer.

182 This submission is irrelevant, since the Commission does not maintain that such deliveries are illegal *per se* but infers that these operations are illegal from the fact that these deliveries were a constituent element of the concerted action.

183 Further, contrary to the view expressed by SU, it is immaterial that the latter, as it has stated, purchased most of its sugar from RT not directly but through intermediate traders.

184 In fact the determining factor is that RT, which certainly did not give middlemen the right to select the consignee, intended to and in fact did supply SU, even though it made Export and Hottlet a party to these transactions.

185 The documents quoted show that RT forced Belgian dealers to adopt its policy of channelling Belgian exports to the Netherlands, with the result that the participation of these dealers in all or part of the contested deliveries cannot modify their evaluation.

186 4. SU and CSM submit that they were never asked to approve the destination of Belgian sugar to be exported to the Netherlands.

187 This argument, as is shown by the documents quoted, disregards the fact that RT and the Netherlands producers agreed on the basic criteria to be applied in concert when selecting the consignees or destinations of Belgian deliveries to the Netherlands and in fact adopted them.

188 5. The argument of SU and of CSM that not inconsiderable quantities of Belgian sugar were imported into the Netherlands outside the supply system which is criticized, such as supplies negotiated by a German firm and coming from the production of Belgian manufacturers other than RT, cannot either be taken into consideration.

189 The fact that such deliveries took place, which moreover the Commission does not dispute, in no way defeats the argument that RT, the only Belgian producer blamed in the decision, as well as SU and CSM engaged in a concerted practice concerning the destination of the Belgian company's production.

190 6. Finally with regard to CSM's argument that the Netherlands producers did not and could not offer RT any consideration for the policy of taking their interests into account which the latter adopted towards them, attention must be drawn to the fact that this submission, and its legal basis can moreover be disputed, would only be likely to weaken the foundation upon which the complaint of concerted practices is based, if the rest of the available evidence were insufficient, but not if the existence of such practices is clearly apparent from the documents on the Court's file.

191 It emerges from all these considerations that the practices in this case did not in any way result from independent decisions by the producers concerned but were concerted between them because they knowingly substituted for the

risks of competition practical cooperation between them, which culminated in a situation which did not correspond to the normal conditions of the market, even taking account of its special nature, and allowed Netherlands producers to maintain positions which they had established to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers.

192 Therefore the applicants have in fact engaged in concerted practices having as their object and effect the protection of the Netherlands market.

(cc) The question whether the concerted practices were capable of affecting trade between Member States and whether they had as their object or effect the prevention, restriction or distortion of competition within the common market

193 The concerted practices in question have affected trade between Member States because they were related to sales of sugar between Belgium and the Netherlands.

194 Their object and effect is to ensure that sugar manufactured by RT or by Belgian producers, which this company controls, was only exported to the Netherlands in such a way that it did not compete there with sugar manufactured by Netherlands producers.

195 The object and effect of the said practices which limit or control markets and also share markets within the meaning of Article 85 (b) and (c) was to interfere with competition.

(dd) The question whether the concerted practices affected trade between Member States and interfered appreciably with competition

196 With regard to the question whether the concerted practices in question affected trade between Member States and interfered appreciably with competition it is advisable to ascertain whether there are grounds for assuming that, if the said practices had not been carried out, a large proportion of the very big amounts, which RT channelled or got the Belgian dealers to channel to the consignees and destinations referred to above, would have been supplied to other customers established in the Netherlands in competition with Netherlands producers.

197 An affirmative answer to this question is given by some of the documents quoted which show that, if RT had not imposed its restrictive policy on Belgian dealers, they would have been able and willing to make such deliveries in not inconsiderable quantities.

198 All these considerations show that RT, SU and CSM have engaged in concerted practices which affected trade between Member States and appreciably interfered with competition, and have therefore infringed Article 85 of the Treaty.

B – The relations between Pfeifer & Langen, on the one hand, and SU and CSM on the other hand

199 Since Pfeifer & Langen denies that it also concerted its commercial policy with SU and CSM, it is advisable to consider whether the facts and the documents upon which the Commission relies prove that there was such an infringement for the period commencing 1 July 1970 which alone is the relevant period in these proceedings.

200 The Commission takes the view that the concerted action is established, on the one hand, by certain documents produced for the Court's file and, on the other hand, by the very large supplies by the company to Netherlands producers whereas the quantity of sugar supplied to other Netherlands customers was minimal.

201 (a) After extracting from the said documents those which were straight away found to have no relevance to the complaint as set out in the operative part of the contested decision there are left two internal memoranda and 'a note' drawn up by Export on 23 April and 6 May 1970 giving a report of discussions between this firm and RT (Annexes I 74 to 76 to the statements of defence).

202 These documents relied on by the Commission in the present context to prove the refusals by Pfeifer & Langen to supply Netherlands customers who were not producers, only refer specifically to the relations between Export and RT and also between Belgian operators, on the one hand, and possible French, German, Netherlands and Italian customers, on the other hand, and do not refer at all to the course of conduct adopted or to be adopted on the Netherlands market by German producers.

203 To the extent to which the said documents refer to cooperation on a much larger scale throughout the whole of the Community the expressions used by Export 'the concerted action between European refiners' and 'Tirlemont entered into an agreement with the other refiners of the common market under which they granted each other exclusive rights, and this agreement shows that marketing in the country of destination is reserved to the refiners of that country' — without prejudice to their possible relevance in other contexts, — appear to be too vague and general even to constitute evidence of a practice between Pfeifer & Langen and SU or CSM and especially as the Commission has itself expressly stated that it dropped its original argument that there was a general concerted action between all the large Community sugar producers and only found that there were a series of infringements in specific localities.

204 (b) With regard to the sugar supplied by Pfeifer & Langen to the Netherlands the Commission has not challenged the figures produced by Pfeifer & Langen which show that during the 1970/71 and 1971/72 marketing years the latter only supplied large quantities (altogether 15 000 metric tons) to the Limako undertaking, a subsidiary of SU, whereas the amounts supplied during this period to CSM (1·4 metric tons) and to third parties (1·05 metric tons) were minimal.

205 It is not denied that Limako carries on business mainly as an exporter of sugar, that the beforementioned 15 000 metric tons — as the type of packing chosen and the fact that Pfeifer & Langen delivered this tonnage direct to a warehouse at the port of Rotterdam moreover prove — were initially intended to be and were in fact re-exported to third countries except for a limited amount which SU processed into liquid sugar.

206 Therefore, as the delivery in issue is not a delivery from producer to producer within the meaning adopted by the contested decision — that is to say a delivery to another operator in his capacity as a producer and designed to avoid any competition with him on his 'own' market — it cannot be regarded as adequate evidence of any concerted action between SU and Pfeifer & Langen.

207 (c) With reference to the fact that only a small amount of sugar was supplied by Pfeifer & Langen to Netherlands customers who were not producers, there was according to the Commission's evidence (cf. Annex I to

the rejoinder in Case 56/73, table I) a short-fall in German production in 1970/71, whereas in 1971/72 both German and Netherlands production was in surplus.

208 Further the German price level does not appear to have been below that of the Netherlands.

209 In these circumstances it may not have been in the interests of Pfeifer & Langen to investigate the Netherlands market in order to sell sugar there on an occasional and sporadic basis instead of continuing to supply its long established customers who usually provided it with a guaranteed market.

210 The effect of all the preceding arguments is that, since the Commission has not adduced adequate evidence of the infringement for which it blames Pfeifer & Langen under subparagraph 2 of Article 1 (1) of the contested decision, this provision must be annulled to the extent to which it states that Pfeifer & Langen, on the one hand, and SU and CSM on the other hand, engaged in a concerted action.

II — Infringement of Regulation No 26 of the Council

211 CSM and RT submit that, even if it is assumed that the courses of conduct to which exception is taken are concerted practices within the meaning of Article 85 of the Treaty, they are none the less lawful because they come within the second exception specified in the first sentence of Article 2 (1) of Regulation No 26, according to which Article 85 (1) of the Treaty shall not apply, *inter alia*, to concerted practices which are 'necessary for attainment of the objectives set out in Article 39 of the Treaty'.

212 1. CSM submits that without the purchases from RT its plant and distributive network would not have been fully utilized, so that it would not therefore have been able to offer beet growers a price above the minimum price laid down by Community rules.

213 The contested decision therefore wrongly failed to apply the beforementioned provision of Regulation No 26.

214 There is no need to consider whether only the payment of a price above the said minimum price was likely to 'ensure a fair standard of living for the agricultural community', represented in this case by beet growers, which is the objective referred to in Article 39 (1) (b) of the Treaty.

215 It is only necessary to record that in any case CSM has not attempted to show with any degree of accuracy that only its purchases from RT enabled it to offer such a price to the said producers.

216 This submission must therefore be rejected.

217 2. RT objects to the statement in the contested decision (p. 43 Lt. H. Col.) that the beforementioned exception of Regulation No 26 cannot benefit the applicants because 'the practices in question are not part of the means provided to this end by Community rules' in order to guarantee the employment and standards of living of beet growers.

218 On the contrary RT takes the view that it was absolutely essential to adopt its particular policy in an attempt to obtain in the case of the sale of sugar produced within the maximum quota, receipts equal to the intervention price 'guaranteed to producers' and to which the latter were entitled in order to be able to pay beet growers the minimum price for sugar beet prescribed by Community rules.

219 In fact RT was unable to obtain the intervention price by selling sugar to the Belgian intervention agency, as the Belgian authorities informed it that they did not want such sales.

220 In these circumstances the applicant found that it was forced, on the one hand, to prevent customers, to which it had sold sugar for denaturing and at a relatively low price, reselling it on the market for human consumption at a price lower than the intervention price and, on the other hand, to refuse to accept offers to purchase at a price which was too low, when it could obtain a better price by selling direct to certain large purchasers.

221 As provided for in Article 9 (1) of Regulation No 1009/67 the intervention agencies 'shall be required' to buy in the sugar offered to them and the producer concerned can insist that this requirement is observed.

222 So far as sugar sold at a relatively low price for denaturing is concerned, a producer, acting independently, may be justified in endeavouring to prevent this sugar being sold at too low a price on the market for human consumption, but the objectives of Article 39 of the Treaty do not however in any way require that this producer pursues this aim by means of concerted practices.

223 With regard to RT's preferential treatment of 'large producers' its argument is tantamount to saying that direct sales to Netherlands consumers, in competition with Netherlands producers, could enable the latter to obtain more advantageous prices, so that RT's policy was at least not designed to further and certainly not 'necessary' for the attainment of the objective set out in subparagraph (e) of Article 39 (1) of the Treaty, namely 'to ensure that supplies reach consumers at reasonable prices', which is just as important as the objective of ensuring a fair standard of living for the agricultural community.

224 With regard to the latter objective RT did not submit any specific argument and in particular produced no figures which amount at the very least to *prima facie* evidence of the statement that failure to apply Regulation No 26 (2) meant that it was no longer possible to pay beet growers the minimum price prescribed by Community rules.

225 This submission cannot therefore be upheld.

226 The effect of these considerations is that the applications of SU, CSM and RT must be dismissed to the extent to which they relate to the concerted practices engaged in by these three applicants, while subparagraph 2 of Article 1 (1) of the contested decision must be annulled to the extent to which it finds that Pfeifer & Langen, SU and CSM engaged in a concerted practice.

Chapter 3:

The complaint of a concerted practice having as its object the protection of the market of the western part of the Federal Republic of Germany

227 Under subparagraph 3 of Article 1 (1) of the contested decision, as published in the Official Journal, Pfeifer & Langen, on the one hand, and RT, on the

other hand, are blamed for having committed 'from the 1968/69 marketing year onwards infringements of Article 85 (1) by engaging in a concerted practice having as its object and effect the control of deliveries of Belgian sugar on the market of the western part of Germany and consequently protection of that market'.

228 In its written reply to the questions put by the Court the Commission admitted that 'in the French version of the contested decision sent to RT', it pointed out that the infringement in question only commenced in 1969/70.

229 The Commission asserts that this was due to a mistake, whereas RT states that it abides by the text of the decision of which it was notified.

230 On the one hand the notification of objections indicated with sufficient clarity that the Commission intended to find that the applicant had engaged in a concerted practice having as its object the protection of the western part of Germany, which began during the 1968/69 marketing year.

231 On the other hand the pleadings produced by the applicant during the written procedure and in particular pages 4 and 12 of and Annex 5 to the reply show that this is also the interpretation which the applicant placed on the contested decision.

232 In these circumstances there are grounds for assuming that the decision found that there was a concerted practice which had as its object the protection of the market of the western part of Germany and was engaged in from the 1968/69 marketing year onwards.

Section 1: Procedural and formal submissions; submission on the substance of the case that Regulation No 26 of the Council has been infringed

I — Submissions already dealt with in the second chapter

233 RT's submissions that the operative part of the contested decision lacked clarity and that Regulation No 26 had been infringed, which were also made in connexion with the second complaint, must be dismissed for the reasons given during the earlier examination of this complaint.

234 Similarly reference must be made to the earlier arguments in support of Pfeifer & Langen's submissions that the principle that everyone has the right to a fair trial has been infringed and that the time-limits for submissions of observations were unduly short.

II — Infringement of the right to defend

235 Pfeifer & Langen submits that the reasons for certain statements in the notification of objections are either not given or the statements themselves are inaccurate.

236 The examination of the question whether the Commission has or has not proved the infringement alleged is part of the substance of the case.

III — Infringement of the accepted principles for the taking of evidence

237 Pfeifer & Langen complain that the Commission based the complaint made against it upon facts which cannot justify the conclusion that there was a concerted practice but which can be explained by reasons in no way connected with any concerted action.

238 Further the Commission cannot be permitted, for the purpose of proving an infringement, to rely on statements of persons who are not parties to the proceedings and are not in a position to give evidence as to the facts which they allege but can at best express an opinion on events in which they have not taken part.

239 These arguments which are designed by the applicant to persuade the Court that the Commission has not proved the infringement for which it is blamed are part of the substance of the case.

Section 2: Submission on the substance of the case that Article 85 of the Treaty has been infringed

240 The essence of the submissions of RT and Pfeifer & Langen is that, since there was no concerted action, the courses of conduct for which the applicants are blamed, to the extent to which they were in fact adopted, did

not amount to concerted practices, so that the Commission, by applying Article 85 of the Treaty to these courses of conduct, infringed this provision.

I — Summary of the relevant statements of the decision

241 The practices for which the applicants are blamed are made up of four groups of actions or omissions.

242 They are first of all blamed for having channelled most of the exports of white sugar coming from the RT group into the western part of Germany to specific consignees, namely Pfeifer & Langen or, for specific purposes, namely denaturing or subsequent export to third countries.

243 With regard to the relatively small volume of Belgian exports to the beforementioned region, which were not channelled in this way, the RT group is blamed for having compelled Belgian dealers, and in particular Export, only to undertake such exports with Pfeifer & Langen's consent or by applying a price aligned on the German company's price.

244 Further RT instructed Export to refuse, openly or covertly, offers from German non-producers wishing to import Belgian sugar.

245 Finally, the Belgian company supplied Pfeifer & Langen with very large quantities of raw sugar instead of refining it itself and exporting the white sugar refined in this way to the German firm's sales area.

II — Examination of the submission

1. White sugar

A — The evidence

(a) The evidence of the actual conduct of the applicants

(aa) Channelling of Belgian exports to specific consignees or particular destinations

246 1. Several confirmations of purchases by Export or Hottlet either to RT or to other Belgian producers (Annexes II 28, 35 to the statement of defence in

Case 47/73) show that these dealers undertook only to resell the sugar purchased under these transactions for denaturing.

247 RT, in a letter of 24 July 1969 to Export (Annex I 43 to the statements of defence) — after confirming that Belgian sugar is at the present time exported to Germany for human consumption whereas it was originally sold for denaturing — states that 'these deliveries for human consumption ... are only possible at prices less than those for which German producers ask; the latter consequently deeply deplore the pressure brought to bear on their market by Belgian sugar', and goes on to say: 'Having informed you earlier of our policy towards our foreign colleagues and having received your assurance of sincere cooperation, I must now insist that the operations now being carried out in Germany be concluded as soon as possible and that in any event no new business of this kind be initiated ...'.

248 When Hottlet purchased from RT and sold to a customer two consignments of sugar and the customer later requested Hottlet to release it from the obligation only to use this sugar for denaturing, RT witheld its consent and claimed compensation from Hottlet, because as a result of these events the latter did not take delivery from RT of the remainder of the said consignments (cf. in particular letter of RT to Hottlet of 16 December 1969, Annex I 42 to the statements of defence).

249 Export, in a report of 20 April 1970 recording a conversation between RT and Export (Annex I 74 to the statements of defence), after referring to 'RT's obligations undertaken in the context of the rationalization of the European sugar industry' and of the 'concerted action between European refiners' records that 'in this way a series of direct transactions between refiners to the producer' — the last two words should probably read 'or producers' — cease to form part of the business relations between RT and Export in ... Germany (trade with Pfeifer & Langen)'.

250 An internal memorandum drawn up by Export of 23 April 1970 (Annex I 75 to the statements of defence) states 'Tirlemont has entered into an agreement with the other refiners of the German market granting each other exclusive rights, under which marketing in the country of destination is reserved to the refiners of that country. Consequently no place is reserved for Export ... In Germany the volume of imports has been negligible since the revaluation of the DM. Nevertheless there are opportunities for trade in the frontier regions ... of Germany ... The refiners' policy ensures the failure of this regionalization ... It is doubtful whether we can obtain a quota, because RT

will not wish to guarantee a policy which runs counter to the agreements it has entered into with the other refiners'.

251 Several documents which originated between 19 December 1968 and 15 August 1970, and in particular a series of purchase contracts concluded by Belgian dealers (Annexes I 28 to 32, 34, 35, 41, 43, 129 to the statements of defence) looked at as a whole show that the latter, in accordance with the wishes of RT and the other producers acting at the request or on the advice of the latter, undertook or were prepared to give an undertaking not to export the sugar covered by these documents for human consumption to the other countries of the common market including Germany.

252 Export in one of these documents (letter to Naveau of 31 July 1970, Annex I 129 to the statements of defence) states that RT 'generally' sold in Germany but 'to our knowledge, through special relationships between colleagues who are large producer-refiners, either direct or through its subsidiaries'.

253 Export in a telex message to a German dealer of 25 September 1970 (Annex I 143 to the statements of defence) complains that another German firm which bought sugar from RT through Hottlet did not honour its undertaking not to resell this sugar in North-Rhine Westphalia.

254 2. According to the statistics produced by the Commission in Annex 1 to the rejoinder in Case 47/73 the pattern of Belgian exports of white sugar to Germany during the period covered by the proceedings, expressed in metric tons, is as follows:

Marketing year	Total exports	'Controlled' exports				
		Deliveries to Pfeifer & Langen or to WZV	Deliveries made with the agreement of Pfeifer & Langen	Deliveries for denaturing or export to third countries	Deliveries at an adapted price	Total
1968/69	23 800	800	—	19 400	—	20 200
1969/70	23 800	900	700	11 700	—	13 300
1970/71	16 700	200	—	2 500	13 300	16 000
1971/72	24 500	2 600	—	1 600	14 400	18 600
Total	88 800	4 500	700	35 200	27 700	68 100

255 According to these statistics, 11 300 of the 20 700 metric tons (88 800 less 68 100) of free exports to Germany came from small Belgian producers so that throughout the marketing years in question the free exports of RT or the RT group could at most have been 20 700 less 11 300 = 9 400 metric tons and, moreover, it is not certain whether they were all sold in Pfeifer & Langen's sales area.

256 Although these figures do not always tally with the figures produced elsewhere either by the applicants or by the Commission, their order of magnitude is not however seriously disputed.

257 It must moreover be borne in mind that in this connexion it is more important to know the pattern of sugar exported by RT, or by the producers which it controls, direct or through the dealers Export and Hottlet, than the volume of exports by Belgian producers independent of RT.

(bb) The obligation imposed on agents only to undertake free exports of sugar with the consent of Pfeifer & Langen or by applying a price aligned on the German company's price

258 Export in a letter to Moerbeke-Waas of 15 September 1969 confirming a purchase of 5 000 metric tons of sugar (Annex I 54 to the statements of defence) states under the heading 'destination': 'Sales to the Federal Republic of Germany for human consumption shall be subject to the approval of the Pfeifer & Langen firm'.

259 Export states in a report of 30 April 1970 on discussions which took place between Mr Maisin of RT and a representative of Export (Annex I 76 to the statements of defence): 'The basic principle upon which Mr Maisin is adamant is as follows: Export must adopt RT's policy towards its European partners. RT defines its policy as follows: No movement of goods from country to country, save by agreement between producer and producer'.

260 When a German dealer, on behalf of a customer established at Aix-la-Chapelle, asked Export by a telex message of 11 September 1970 (Annex I 106 to the statements of defence) to make him an offer of 15 000 metric tons at the price of BFrs 1 095·93, Export in a telex message in reply of 14 September 1970 (Annex I 107 to the statements of defence) — after

stating that, 'after having taken close contracts with the German Pfeifer & Langen refiners of Köln, Tirlemont told us that they would not, properly speaking, decline any bid or refuse any offer for the German market. Their target being by no way to disturb the Pfeifer & Langen home market, they asked the Köln refiners to inform them about their internal prices, delivered points of destination in the Ruhr area, as well as close the Belgian border (Aachen for instance)' — gives some price calculations on the basis of German prices and adds that 'the Tirlemont group says ... that they might be possibly sellers of Belgian ... sugar for the German consumption market ... if they could get such price, even if it is in line (and specially for that reason) with the German internal price, Pfeifer & Langen German clients will have practically no interest at all to change of suppliers'.

261 It emerges from a series of telex messages following this correspondence and exchanged between 14 and 21 September — namely five from Export to RT, one from Export to the said German dealer and one from RT to Export (Annexes I 108 to 112, 114, 115 to the statements of defence) — when they are read together that:

— Export endeavoured to persuade RT to meet the German dealer's request through its agent.

— Mr Rolin (of RT) told Mr Lemaire (of Export) that he wished 'to do nothing which would disturb the pattern of the German sugar market so far as Pfeifer & Langen's customers (in the Rhineland and the Belgian frontier region) are concerned'; considered that 'the German price ... corresponds to BFrs 1 180 per 100 kg (according to information with which Pfeifer & Langen supplied him)'; brought down 'this ex-Belgian sugar factory price in the following way' (calculations then follow their result being that the sugar is offered at BFrs 1 120 ex-Belgian sugar factories).

— After long discussions an agreement was concluded between Export and RT on the basis of BFrs 1 100, but it came too late with the result that the deal never materialized.

— With regard to RT Export refers to its 'successive refusals based on the principles it has adopted for intra-Community sales of sugar' and also to its intention 'already mentioned by Mr Rolin to Baron Kronacker [of Export] (memorandum on the conversation ... of 31 August 1970 on the agreement by German manufacturers — Pfeifer & Langen Köln — not to buy sugar beet from the Belgian sugar factory at Liers) and to Mr Lemaire not to do anything which may disturb the pattern of the German sugar market'.

— Export complained that, following information which reached it from Germany, RT had in the meantime sold to Pfeifer & Langen at a price below that offered by Export.

262 It is evident from a series of confirmations of or offers to purchase sent either by Export or Hottlet to Belgian producers (RT, Couplet, Oreye) or by Oreye to Export (Annexes I 55, 91, 92, 113, 119 to the statements of defence) between 17 September 1969 and 7 October 1970 that these producers asked in the case of sales to Germany a higher ex works price than that which they were willing to accept in the case of sugar to be sold elsewhere (BFrs 1 100 per 100 kg instead of BFrs 1 092·50 according to a letter from Oreye to Export of 7 October 1970).

(cc) Refusal to sell

263 La Sucrerie et Raffinerie de Donstiennes in a letter to Export of 12 August 1970 (Annex I 130 to the statements of defence) states that RT 'advised it not to enter into any export contracts at the present time'.

264 Export says in a telex message of 10 September 1970 to a German dealer (Annex I 105 to the statements of defence): 'Regarding the German market, for which you asked us an offer, we would like to ask you to wait a bit before getting offers from us, due to the fact that our principal sugar manufacturer, the RT group, is not on the market at the moment for such destination'.

265 It appears from some of the documents which have been quoted — namely the telex message of Export to a German dealer of 14 September 1970 and also the series of telex messages exchanged during the period from 14 to 21 September 1970 between RT and Export and between the latter and the German dealer — that RT either refused, albeit covertly, to supply nonproducers established in Pfeifer & Langen's sales area or offered such operators who were prospective purchasers or procured that they be offered a price which might well put them off, although there was a considerable demand in Germany which Export wished to meet.

266 This situation is also confirmed by a telex message from a German dealer to Export of 2 November 1970 (Annex I 116 to the statements of defence), in which, after referring to several telex messages which he had sent to Export,

he says: 'We would ... as we told you many times in the above telexes and on many phone conversations we had together ... very much like to conclude business with your company in Belgian crystal sugar for the West German market for the new 1970/71 crop. We are prepared to try at the maximum to reach the level where business could be concluded. We would like from your side to get orders and bids to enable us to be in a position to materialize such business. We await your comments, orders and bids with the keenest interest'.

267 A German firm in a letter to Export of 11 November 1970 (Annex I 118 to the statements of defence) which also confirms this situation, after stating that it entered into several large contracts — probably with German business houses — goes on to say that during the negotiations preceding each of these agreements 'we consulted you but unfortunately — and we must repeat this — we did not receive any offers from you which arrived in sufficient time and at a sufficiently interesting price to enable us to compete. Now it is only a question of meeting possible additional requirements which will happen from time to time'.

268 Finally GEDELFI of Cologne, a wholesale buyer of foodstuffs, in a letter to the GEMAS company in Brussels of 10 March 1972 (Annex II 9 to the statements of defence in Cases 54 to 56/73) states: 'In den letzten 4 Jahren ist von der GEDELFI kein Zucker aus EWG-Ländern importiert worden. Unsere vergeblichen Versuche vor einigen Jahren sind Ihnen aus unseren Gesprächen bekannt. Damals haben wir auf unsere Anfragen keine Offerten erhalten. Gegenwärtig werden auf Anfragen Offerten genannt, die sich aber aus Frachtgründen und deshalb Preisgründen nicht realisieren lassen'. ('During the last four years GEDELFI has not imported any sugar coming from EEC countries. Our discussions have made you familiar with the unsuccessful attempts we made some years ago. At that time our enquiries were not followed up by any offer. At present our enquiries produce offers, which for reasons connected with freight and therefore prices are not acceptable').

(b) The evidence relating to the question whether the conduct referred to above was concerted

269 The Commission takes the view that some of the documents referred to above show that there was a concerted action, namely the letter of RT of 24 July 1969, Export's report of 20 April 1970, Export's memorandum of 23 April

1970, Export's letter to Moerbeke-Waas of 15 September 1969, the telex message of 14 September 1970 from Export to a German dealer as well as the series of telex messages during the period from 14 to 21 September 1970 between Export and RT or a German dealer.

270 Further, the Commission submits that RT's reserved attitude towards prospective German purchasers other than Pfeifer & Langen cannot be due to a decision which the Belgian company took independently in accordance with its objective interests, since the large Belgian sugar surplus (174 000, 251 000, 193 000 and 277 000 metric tons respectively during each of the four marketing years in question; cf. Annex 1 to the rejoinder in Case 47/73, table I) compared with the by no means inconsiderable demand from the Western region of the Federal Republic of Germany ought in the normal course of events to have provided RT with an incentive to compete with Pfeifer & Langen on the market of the said region

B — The evaluation of the evidence

271 (a) With regard to the evidential value of the documents which have been quoted RT and Pfeifer & Langen put forward arguments similar to those submitted by RT, on the one hand, and SU and CSM, on the other hand, in relation to the same or other documents prepared by Export or to the documents sent to Export by RT in the context of the second complaint; these arguments were set out in Chapter 2 and must be dismissed for the reasons therein stated.

272 More particularly Pfeifer & Langen's argument that Export's statements are not credible, as the interests of this firm conflicted with those of RT, cannot be upheld.

273 Although it is true that the effect of RT's sales policy was that many transactions in which Export wanted to participate did not take place or were effected without Export's participation, this conflict of interests does not alter the fact that, according to RT's own statements, Export has correctly recorded the statements which the latter made to it and that, for the reasons given when considering the second complaint these declarations must be regarded as truthful.

274 In these circumstances the documents produced by Export are admissible in evidence and may be used also against Pfeifer & Langen.

275 (b) It is clear from the documents which have been mentioned that the applicants in fact adopted on the market the course of conduct averred by the Commission.

276 There are therefore grounds for holding that it has been proved that the greater part of the white sugar exported by RT and by the Belgian producers which it controls to the Western part of the Federal Republic of Germany was supplied in such a way as not to compete effectively with Pfeifer & Langen's products, either because it was channelled to Pfeifer & Langen, WZF, for denaturing or subsequent export to third countries or because it was sold with Pfeifer & Langen's consent or at a price aligned on the latter's price.

277 The amounts exported in these circumstances amounted during the whole of the four marketing years in question to 68 000 metric tons and were therefore very large.

278 Furthermore there is no doubt that RT instructed Export to refuse, openly or covertly, to sell to German non-producers wishing to import Belgian sugar.

279 (c) 1. Pfeifer & Langen submits that RT's statement in its letter of 24 July 1969 'that German producers deeply deplore the pressure brought to bear in this way on their market by Belgian sugar' does not mention it by name.

280 Nevertheless there appears to be no doubt that this firm, which is expressly mentioned in other documents which have been quoted, was one of the producers which made such complaints, in particular because, taking into account the relatively short distances, Pfeifer & Langen's sales area was the most suitable of all the various German regions for exports of Belgian sugar.

281 Pfeifer & Langen seeks to minimize the significance of RT's statement by calling attention, on the one hand, to the fact that, if 'German producers were not pleased with foreign imports, their reaction was not surprising' (application in Case 56/73, p. 30) and, on the other hand, to the fact that it

'never attempted to exert any influence on RT when it was deciding what it intended to do' (loc. cit., p. 31).

282 However the beforementioned letter shows clearly that the German producers to which it referred — among whom Pfeifer & Langen must be included for the reasons which have just been mentioned — never at any time kept their dissatisfaction to themselves but told RT about it.

283 If an economic operator accepts the complaints made to him by another operator in connexion with the competition to which the products manufactured by the former operator expose the latter, the conduct of the operators concerned amounts to a concerted practice.

284 2. Pfeifer & Langen asserts that 'assuming that a discussion on prices between RT and the applicant took place, the effect of this discussion ... was most certainly not a refusal by RT to supply the German market but the offer to reserve sugar for export to Germany' and that 'the fact that on this occasion RT attempted to obtain the same price as the applicant is due to elementary commercial common sense' (application in Case 56/73, p. 36).

285 The fact that a vendor aligns his price on the highest price charged by a competitor is not necessarily evidence of a concerted practice but may be explained by an attempt to obtain the maximum profit. The situation is different in this case.

286 In fact it appears from all the documents which have been quoted that RT's chief motive for thus aligning its prices — which moreover is accepted by all parties — was to avoid annoying Pfeifer & Langen, one of RT's important customers for white sugar, by adopting a commercial policy likely to entice some of its customers from the German company.

287 Finally, Pfeifer & Langen's statements considered in the light of the documents referred to can be said to confirm the argument that the alignment of prices in question created a concerted practice.

288 In fact all these factors show, on the one hand, that Pfeifer & Langen does not seriously deny that it communicated its prices to RT and, on the other hand, that this information was requested and supplied for a common purpose

directed against competition, which is a classic example of practical cooperation which the parties concerned knowingly substituted for the risks of competition.

289 3. RT's argument that the practices complained of '[were the consequence of] market conditions and therefore would have been the same even if there had been no contact between producers' has already been rejected in Chapter 2 hereof.

290 4. RT refers to certain of its deliveries to non-producers established in the Rhineland in order to prove that it never systematically adopted a policy directed against competition.

291 However, in order to establish that there are concerted practices within the meaning of Article 85 of the Treaty, it is sufficient to show that competition has been restricted and it is unnecessary to prove that it has been prevented.

292 Furthermore, RT did not seriously deny that the volume of these free deliveries was small.

293 All these factors show that the producers concerned did not individually decide to adopt these practices but came to a mutual understanding to engage in them thereby knowingly substituting practical cooperation between them for the risks of competition; this cooperation culminated in a situation which did not correspond to normal market conditions and enabled Pfeifer & Langen to maintain the position which it had established on the market to the detriment of effective free movement of goods in the common market and of the freedom enjoyed by consumers to choose their suppliers.

294 Therefore the applicants in fact engaged in concerted practices designed to protect the market of the western part of the Federal Republic of Germany.

2. Raw sugar

295 The Commission maintains that Pfeifer & Langen bought quantities of white sugar from RT amounting to 8 361, 24 853 and 23 419 metric tons

respectively for the three marketing years from 1969 to 1972 and that these purchases were also a constituent part of the prohibited concerted practice.

296 The essence of the Commission's argument is that RT was able to refine these amounts itself and that it was in its interests to do so in order to supply the German market with the amounts of white sugar which it produced.

297 Moreover the figures produced by Pfeifer & Langen show that its own production of raw sugar together with additional purchases from producers in North Germany would have been sufficient to utilize to the full this company's refining capacity, which on a proper evaluation is estimated at 180 000 to 200 000 metric tons per annum.

298 According to the table which Pfeifer & Langen has produced the large amounts it purchased in north Germany varied very little in quantity so that it cannot be accepted that purchases from RT were intended to fill a gap.

299 In fact Pfeifer & Langen bought RT's raw sugar at such a high price that it could not even obtain the normal processing margin.

300 The Commission therefore takes the view that the conduct of these applicants cannot be regarded as the usual course of conduct adopted by economic operators in competition with each other and can only be explained by their common wish to make Pfeifer & Langen absorb the amounts of raw sugar in issue, in order to ensure that, after they have been processed into white sugar, they do not compete in Pfeifer & Langen's sales area with the white sugar produced by this firm.

301 The documents referred to earlier only deal with white sugar so that, so far as transactions in raw sugar are concerned, it is necessary to consider whether the conduct which the Commission alleges and regards as a constituent part of the concerted practice can only reasonably be explained by the existence of a concerted action.

302 If, within the framework of a concerted policy intended to protect the respective market shares, which is clearly the aim of the practices relating to

white sugar, it appears that deliveries of raw sugar at a price, which RT finds to be very attractive, may be an additional constituent element of the concerted action, it is no less true that the fact that owing to its refining capacity being inadequate RT regularly despatched raw sugar to different producers is not disputed.

303 On the other hand it has also been shown that Pfeifer & Langen bought regularly large quantities of raw sugar from producers other than RT in order to refine them in its own factories.

304 In these circumstances it cannot be ruled out that this part of the transactions in issue is not to be regarded as a constituent part of a concerted practice but can be explained in a different way.

3. The question whether the concerted practices relating to white sugar affected trade between Member States and interfered with competition

305 The concerted practices in question affected trade between Member States, because they affected the sugar trade between Belgium and the Federal Republic of Germany.

306 Their object and effect was to ensure that the sugar manufactured by RT or by Belgian producers which it controls was in most cases only exported to Germany in such a way that it did not compete with the sugar manufactured by Pfeifer & Langen.

307 The object and effect of the said practices, which limit or control markets and also share markets within the meaning of Article 85 (b) and (c) of the Treaty, was to interfere with competition.

308 For similar reasons, *mutatis mutandis,* to those given when dealing with the second complaint, it must be held that the concerted practices in question affected trade between Member States and interfered appreciably with competition.

309 The consequence of these considerations is that, since the Commission has proved that RT and Pfeifer & Langen have committed an infringement, this submission must be rejected.

310 As subparagraph 3 of Article 1 (1) of the decision does not distinguish between supplies of white and raw sugar, the fact that the infringement relating to the deliveries of the latter sugar has not been proved leads to the finding that there has been no infringement relating to raw sugar.

Chapter 4

The complaint of a concerted practice having as its object the protection of the market of the southern part of the Federal Republic of Germany

311 Subparagraph 4 of Article 1 (1) of the contested decision blames SZAG and Franken, on the one hand, and Béghin and Sucre-Union, on the other hand, for having committed 'from the 1970/71 marketing year onwards ... infringements of Article 85 (1) by engaging in a concerted practice having as its object and effect the control of deliveries of French sugar on the market of the southern part of Germany and consequently protection of that market'.

312 To sum up the decision blames the applicants for having channelled most of the exports to the southern part of Germany to specific consignees, namely German producers.

313 The Commission has stated that this complaint is also directed against SZV and also said at the hearing that it was only through inadvertence that this company was not mentioned in the beforementioned subparagraph.

314 The Commission argues that its intention to make this complaint also against SZV is indicated, on the one hand, in the statement of the reasons upon which the decision was based and, on the other hand, in the introductory part of Article 1 (2) of the decision.

315 For the purpose of determining the persons to whom a decision, which finds that there has been an infringement, applies, only the operative part of this decision must be considered, provided that it is not open to more than one interpretation.

316 Subparagraph 4 of Article 1 (1) sets out clearly the undertakings blamed for the infringement, namely Béghin, Sucre-Union, SZAG and Franken.

317 Therefore there are grounds for finding that this subparagraph does not apply to SZV.

I — The actual conduct of the applicants

318 1. It is agreed that the deliveries from producer to producer expressed in metric tons — apart from 4 600 metric tons of white sugar supplied by Sucre-Union to the 'Grundstücks-Verwaltungsgesellschaft' of Oberursel, which cannot be taken into account as they were not included in the figures set out in the decision — are correctly stated in the following table:

	Béghin to SZAG		Béghin to Franken		Sucre-Union to SZAG		Sucre-Union to Franken	
	White sugar	Raw sugar	White sugar	Raw sugar	White sugar	Raw sugar	White sugar	Raw sugar
1970/71	286	11 200	—	—	—	—	—	—
1971/72	—	13 900	—	9 200	4 500	—	4 000	—

319 2. With regard to the deliveries by the French producers concerned to other operators established in south Germany — hereinafter called 'other deliveries' — the conduct of Béghin and Sucre-Union must be distinguished.

320 A — In the case of Béghin it is not denied that it did not supply such operators.

321 B — In the case of Sucre-Union, although the parties agree that it did supply such operators, the figures on the Court's file do not however enable the volume to be calculated accurately and it is all the more difficult to do so because the information supplied by the Commission is contradictory.

322 In fact, on the one hand, the Commission states (Statement of defence in Case 44/73, No 43) that Sucre-Union supplied 'in 1970/71 larger amounts' — that is to say larger amounts than in the previous marketing years — 'to independent middlemen, but much less in 1971/72', in other words that it made other deliveries during each of the two marketing years in question.

323 On the other hand the statistics for French imports into Germany in Annex 4 of the rejoinder in Case 44/73, in so far as Sucre-Union's other deliveries are concerned, only expressly records 4 000 metric tons supplied in 1970/71 'to a

German dealer', which suggests that this company did not effect any other deliveries in 1971/72.

324 Further in Note 14 to Table V of Annex 1 of the rejoinder in Case 54/73 the Commission claims that in the 1970/71 and 1971/72 marketing years 'other exports to south Germany' — that is to say deliveries other than those effected by Béghin or Sucre-Union to SZAG or to Franken — 'were effected by French producers who did not participate in deliveries from producer to producer', which is tantamount to saying that Sucre-Union did not effect any other deliveries in 1970/71 or in 1971/72.

325 Finally the contested decision (p. 45, last but one paragraph of Section IV (2)) states that there are no grounds for fining Sucre-Union, since it 'always played the part of an outsider as far as this was possible' and 'made, in addition to direct sales to foreign competitors, quite large sales to dealers and to processing undertakings in the market of destination'.

326 In view of these facts it is only right to acknowledge, in favour of the applicants, that the proportion which other deliveries bore to the aggregate amount of sugar exported by Sucre-Union to south Germany during the two marketing years in question, was approximately the same as the proportion of deliveries to German producers.

II — The question whether the beforementioned conduct was concerted

1. The evidence

327 A — (a) The Commission produces in support of this complaint a series of documents, some of which however must be rejected straight away, because they are not relevant so that only those documents hereinafter referred to may be considered.

328 A German dealer sent Sucre-Union on 23 August 1971 a telex message (Annex I 156 to the statements of defence) in which he said: 'Nach heutiger telefonischer Rücksprache mit obiger Firma' — that is to say with a German firm which had bought or contemplated buying from SZV — 'stellte ich fest, daß die von mir unterbreiteten Preise für Mainz und Kempten/Hegge von anderer Seite billiger offeriert wurden. Die Preise sollen in jedem Falle under den Basispreisen liegen, die die Südzucker-Verkaufs-GmbH aufgegeben hat. Ich konnte noch nicht in Erfahrung bringen, ob die aufgegebenen Preise

tatsächlich von der Südzucker-Verkaufs-GmbH sind oder von einem anderen Anbieter. Vielleicht erfahre ich in den nächsten Tagen weitere Einzelheiten, bevor die obengenannte Firma für ihren Bedarf vom 1. 10. bis 31. 12. 1971 Eindeckungen vornimmt. In jedem Falle soll ich unterrichtet werden. Dies zur Kenntnisnahme und erwarte Ihre Stellungnahme hierzu'. ('After my telephone conversation today with the beforementioned undertaking' — that is to say with a German firm which bought or contemplated buying from SZV — 'I discovered that someone else had offered prices below those which I had offered for Mainz and Kempten/Hegge. These prices would in any case be below the basic prices notified by the "Südzucker-Verkaufs-GmbH". I have not yet been able to find out whether the quoted prices come in fact from the "Südzucker-Verkaufs-GmbH" or from another offerer. I shall perhaps obtain further information during the next few days before the firm referred to above begins to cover its requirements for the period 1 October to 31 December 1971. I have in any case asked to be informed. This message is for information: I await your views in this matter').

329 The Commission then goes on to say that 'a German dealer' — whose name was disclosed by the parties during the proceedings and who at that time was Sucre-Union's representative in south Germany hereinafter referred to as 'X' — wrote to Sucre-Union on 29 September 1971 (cf. Annex I 157 to the statements of defence) and said 'As you see the notification to SZV of the names of firms which up till now have bought from us has considerable disadvantages. SZV gets to know in this way which operators have already purchased sugar in France or which intend to do so... I do not consider that it is any longer expedient to pass on to SZV the addresses [of our] customers. It will get to know them in any case if the customers buy less from it than before or if they do not buy anything from it at all.

330 The Commission infers from this letter that Sucre-Union, at the request of SZAG or of SZV, required its German representative to send the list of its customers to one or other of these companies.

331 Finally, in a letter of 10 March 1972 the German firm GEDELFI informed the Belgian firm GEMAS (Annex II 9 to the statements of defence in Cases 54 to 56/73) that 'In den letzten 4 Jahren ist von der GEDELFI kein Zucker aus EWG-Ländern importiert worden. Unsere vergeblichen Versuche vor einigen Jahren sind Ihnen aus unseren Gesprächen bekannt. Damals haben wir auf unsere Anfragen Offerten genannt, die sich aber aus Frachtgründen und deshalb Preisgründen nicht realisieren lassen'. ('During the last four years

GEDELFI has not imported any sugar coming from EEC countries. Our discussions have made you familiar with the unsuccessful attempts we made some years ago. At that time our requests were not followed up by any offer. At the present our enquiries produce offers, which for reasons connected with freight and therefore prices are not acceptable').

332 (b) The applicants in general do not consider that any of the documents produced are conclusive.

333 So far in particular as the letter of 29 September 1971 is concerned Béghin states that the facts set out therein did not apply to it.

334 SZAG formally denies that X ever sent it or SZV a list of customers or gave either of these two companies the names of Sucre-Union's customers.

335 SZAG produces in Annex 1 to its reply a letter of 20 June 1973 from Sucre-Union in reply to a request for information relating to the letter of 29 September in which the company says: 'Beiliegend senden wir Ihnen die Kopie eines von [X] in Brüssel vorgelegten Schreibens, das wir angeblich erhalten haben sollen, wieder zurück. In unseren Akten konnte nicht die geringste Spur eines solchen Schreibens an uns entdeckt werden. Darüber hinaus ist uns dessen Wortlaut absolut unbekannt. Es muß natürlich berücksichtigt werden, daß das Datum des Schreibens weit zurück liegt. Es macht jedoch den Anschein, als sei dieser Brief in einer gewissen Absicht geschrieben worden ... Wir mußten unser Vertragsverhältnis [mit X] lösen, da er uns einen sehr bedeutenden Betrag schuldete und seine finanzielle Lage uns noch ein größeres Defizit befürchten ließ. Seine Schuld hat er übrigens nicht beglichen. In puncto Kundenliste glauben wir nicht, daß wir persönlich eine aufgestellt haben. Wir können auch keine Kopie finden. Wir bedauern jedoch, es nicht getan zu haben. Bei uns sind damals sehr unangenehme Beschwerden eingegangen, da [X], der keine Exklusivität für Deutschland hatte, Offerten an Kunden abgegeben hatte, die bereits über drei andere Verkaufskanäle Zucker von uns bezogen:

(1) Sucre-Union als direkter Verkäufer,

(2) Firma Schlüter & Maack, Hamburg (als Händler),

(3) Unser Vertreter G. Baus, Homburg/Saar.

Es wäre deshalb verständlich gewesen, wenn wir eine gewisse Einteilung des Arbeitsbereiches der einzelnen Verkäufer vorgenommen hätten'. ('Herewith we enclose a copy of a letter which [X] produced in Brussels and which was apparently addressed to us. We have not been able to find any trace at all of it among our papers. What is more we have no idea what it means. Account must obviously be taken of the fact that it is dated a long time ago. It appears however to have been drafted with a specific object in mind ... We had to break off contractual relations with [X] because he owed us a very large sum of money and owing to his financial situation we were afraid that the deficit would get larger. Moreover he has not paid his debt. With regard to the list of customers we do not think that we ourselves made one. We cannot find any copy either. We nevertheless regret that we did not do so. We received at that time some very unpleasant complaints, because [X], who did not have the exclusive rights for Germany, made offers to customers who already bought sugar from us through three other sale channels:

(1) Sucre-Union as a direct vendor,

(2) the Schlüter & Maack undertaking, Hamburg (as a dealer),

(3) our representative G. Baus, Homburg/Saar.

It would therefore have been understandable if we had proceeded to some partitioning of the field of operations of individual vendors').

336 During the hearing SZAG stated that there were other facts which in its view could show that X cannot be believed and even aroused the suspicon that he sent the Commission a 'copy' of a non-existent original, namely of his alleged letter to Sucre-Union of 29 September 1971.

337 B — The Commission mentions the striking fact that Béghin and Sucre-Union supplied German producers with large amounts, and moreover at prices which were particularly advantageous to these undertakings, whereas Béghin did not effect any other deliveries and the volume of Sucre-Union's other deliveries was small.

338 Since (a) the market price in south Germany was about 5 % above the French intervention price, (b) in 1970/71 German producers could not meet the total requirements of this region and (c) several operators established in this region indicated that they were interested in importing French sugar, it was to be expected that Sucre-Union and Béghin — particularly the latter which had

very large surplus stocks of sugar — would have sold sugar on a very large scale to such operators.

339 When Béghin supplied raw sugar to a competitor it gave up refining itself the amounts in question and selling the white sugar produced from this processing on the market of the southern part of Germany; this conduct can only be explained by the wish of the undertakings concerned not to compete with each other on this market.

340 Sales of raw sugar cannot be justified by insufficient refining capacity, since Béghin could have refined in its factories at Thumeries in the north of France all the raw sugar produced at its factories at Sillery near Reims, which indeed is what it did before the two marketing years in question.

341 Béghin's argument that freight rates made such an operation uneconomic comes up against the fact that, on the one hand, Sillery is further away from SZAG's refineries than from Thumeries and, on the other hand, that, the company, instead of transporting the raw sugar to Thumeries and then exporting it, could have found another way of selling sugar to south Germany.

2. The evaluation of this evidence

A — Béghin's deliveries

342 It is first of all held that the letter of 29 September 1971 deals with events with which Béghin was in no way connected.

343 (a) Béghin's deliveries of white sugar to German producers were restricted to 286 metric tons supplied to SZAG and this operation is so small that it cannot constitute evidence of a concerted action designed to protect the market of south Germany.

344 (b) The Commission has been unable to mention a single instance of a refusal by Béghin to supply a non-producer established in south Germany; moreover no such complaint has been made in the decision and cannot be upheld, as the Commission has not refuted this company's contention that it never received an offer to purchase from German dealers or consumers.

345 As the Commission itself stated (decision p. 20, first paragraph of recital 9) 'In Germany the supply of and demand for sugar are, on the whole, in balance' and, since the import requirements of south Germany — which are limited as a result of this state of equilibrium — seem to have been met by other foreign producers, it is not necessarily a matter for comment that a particular French producer kept out of the market of south Germany.

346 (c) With regard to the deliveries of raw sugar by Béghin to SZAG and Franken the Commission was unable to refute Béghin's argument that it would have been uneconomic to refine the raw sugar manufactured at the factories at Sillery, which have no refining plant, at Thumeries and then dispatch the white sugar produced by the refining process to south Germany.

347 Moreover it is not denied that during the two marketing years in question Béghin supplied 75 % and 74 % respectively of the production of its Sillery factory to refiners in France, Italy or third countries and that it has not been alleged that these deliveries, with the exception of the 4 % of the 1971/72 production sold in Italy, also stemmed from a concerted action designed to protect the buyers' market.

348 On the other hand, so far as the interests of SZAG are concerned, it is not denied that the purchases in issue followed a well established practice, as the previous purchases from other producers were even larger than those from French producers.

349 Nor is it denied that SZAG found that the price it paid to Béghin was favourable, whereas the opposite should have been expected if the object of the contested deliveries had been to protect the market in south Germany.

350 Moreover in this case the statement in the decision that 'normally' it is not in the interest of a producer to sell to a competitor, since he could obtain a more favourable price if he supplied dealers and consumers direct, can be partly turned against the author, since it suggests, or at least does not deny, that in the nature of things it may very well be in the interest of the producer-purchaser himself to make additional purchases.

351 In fact large fluctuations of the harvest yields, which may force a producer to have recourse to the production of one of his counterparts in order to be able

to perform his obligations under long term supply contracts with his customers, are peculiar to the sugar market.

352 (d) In addition the Commission submits that in consideration for Béghin's conduct SZAG and Franken refrained from supplying sugar to the Saar which traditionally formed part of the area in which French producers operated.

353 However attention must be drawn to the fact that Béghin stated that it never supplied sugar to this region during the period in question without being contradicted by the Commission.

354 Having regard to all these circumstances it cannot be ruled out that Béghin's deliveries to SZAG and Franken and Béghin's failure to effect other deliveries to south Germany are not the consequence of a concerted action and may be explained in a different way.

B — Sucre-Union's deliveries

355 (a) Since Sucre-Union did not supply SZAG and Franken with raw sugar, the question arises whether the pattern of its deliveries of white sugar in south Germany constitutes sufficiently strong evidence to enable the conclusion to be drawn that the alleged concerted action existed so far as the three beforementioned undertakings are concerned.

356 As has been explained above there are grounds for the assumption that the amounts supplied by the French company to German non-producers were of approximately the same volume as those delivered to SZAG and Franken.

357 This fact is likely to raise doubts as to the existence of a concerted action between the undertakings concerned and in any case of a concerted action which was in fact implemented.

358 Further, certain considerations mentioned in connexion with Béghin's deliveries also apply in this context, in particular the fact that the Commission has been unable to mention a single instance of a refusal by Sucre-Union to sell to a German non-producer, the fact that it could be in

the interests of SZAG and Franken, even if they acted independently, to make additional purchases and finally the conclusions to be drawn from the fact that as a rule the market of south Germany was in equilibrium.

359 (b) There still remains for consideration the question whether, notwithstanding these facts, the letter of 29 September 1971, which is said to have been sent to Sucre-Union by its German representative X, having regard to the pattern of Sucre-Union's exports to south Germany, can prove that the infringement in question was in fact committed.

360 With regard to the question whether there ever was such a letter and, if so, whether its contents are true, X's statements conflict with those of Sucre-Union and SZAG.

361 Even if it must be acknowledged that Sucre-Union and SZAG were actuated by the wish to cooperate in a way which is incompatible with Article 85 of the Treaty, it is hardly likely that this cooperation would have taken the form of conduct as unusual as that mentioned in the said letter, which, in the context of this case, could have meant that a producer might give an actual or potential competitor the opportunity of enticing away his customers or punish them by abolishing a loyalty rebate and thereby destroy the fruits of his previous endeavours and run the risk of losing his customers' confidence.

362 Finally it must not be overlooked in this connexion that the Commission, departing from the position it adopted with regard to Béghin and SZAG, acknowledged that Sucre-Union played the part of an 'outsider' and did not fine it; it is difficult to maintain this view if it has to be conceded that Sucre-Union did in fact take the kind of steps mentioned in the letter in question.

363 In these circumstances it is quite possible that Sucre-Union's deliveries to SZAG and Franken and the limited volume of other deliveries by Sucre-Union to south Germany are not the consequence of a concerted action but can be explained in a different way.

364 The effect of all these considerations is that subparagraph 4 of Article 1 (1) of the decision must be annulled.

Chapter 5

The complaint that RT brought economic pressure to bear on Belgian exporters

365 Subparagraph 1 of Article 1 (2) of the contested decision blames RT for having 'from the 1968/69 marketing year onwards committed an infringement of Article 86 by bringing economic pressure to bear on Belgian exporters with the object of compelling them to restrict their exports'.

I – Summary of the relevant statements of the decision

366 The Commission takes the view that RT brought economic pressure to bear on the Belgian dealers Export and Hottlet, hereinafter called 'the dealers', with the object of compelling them only to resell the sugar supplied to them to specific customers or destinations and to impose these restrictions on their own customers.

367 This pressure consisted 'in refusing to sell sugar to these two dealers, in particular for exporting to third countries – and such sales represent a large proportion of their turnover – if this sugar is resold for the purposes which it [RT] has not authorized'.

368 RT occupies a dominant position on the Belgo-Luxembourg sugar market which is a substantial part of the common market.

II – Examination of the submission

369 RT's main submission is that the Belgo-Luxembourg market is not a substantial part of the common market, that it does not occupy a dominant position on this market and has not abused its position, so that the Commission infringed Article 86 of the Treaty when it applied this provision to its conduct.

1. The question whether the Belgo-Luxembourg market is a substantial part of the common market.

370 RT considers that in view of the relatively small volume of Belgian production and the number of consumers in Belgium and Luxembourg this question must be answered in the negative.

371 For the purpose of determining whether a specific territory is large enough to amount to 'a substantial part of the common market' within the meaning of Article 86 of the Treaty the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered.

372 So far as sugar in particular is concerned it is advisable to take into consideration in addition to the high freight rates in relation to the price of the product and the habits of the processing industries and consumers the fact that Community rules have consolidated most of the special features of the former national markets.

373 From 1968/69 to 1971/72 Belgian production and total Community production increased respectively from 530 000 to 770 000 metric tons and from 6 800 000 to 8 100 000 metric tons (cf. contested decision, p. 18, paragraphs Nos 3 and 5).

374 During these marketing years Belgian consumption was approximately 350 000 metric tons whereas Community consumption increased from 5 900 000 to 6 500 000 metric tons (cf. loc. cit.).

375 If the other criteria mentioned above are taken into account these market shares are sufficiently large for the area covered by Belgium and Luxembourg to be considered, so far as sugar is concerned, as a substantial part of the common market in this product.

2. The question whether RT occupies a dominant position on the Belgo-Luxembourg sugar market

376 According to its own statements RT accounts for 65 % of Belgian production.

377 The Commission submits that in fact the correct figure is 85 %, since the production of the firms Suikerfabrieken van Vlaanderen at Moerbeke-Waas, and Raffinerie Notre-Dame at Oreye — hereinafter called respectively 'Moerbeke-Waas' and 'Oreye' —, having regard to the personal or financial links between RT and each of them as well as the fact that they adopted the sales policy fixed by RT, must be attributed to RT.

378 RT owns at least 50 % of the capital of Moerbeke-Waas and Oreye, five of the persons who manage RT are on the Board of Directors of Moerbeke-Waas, one of the directors of the latter company is on RT's Board of Directors and finally, and this is of special importance, the various documents produced for the Court's file show that these two firms adopted, if not regularly at least frequently, the restrictive sales policy implemented by RT on the markets of the Netherlands and west Germany.

379 Since therefore the production of Moerbeke-Waas and Oreye can be attributed to RT, it can be assumed in this context that RT accounted in practice for 85 % of Belgian production.

380 This figure, which is in itself highly significant, must be evaluated in the light of the negligible volume of sugar imports into Belgium.

381 In these circumstances RT was able to impede effective competition on the market in question.

382 Consequently during the period which has to be considered it occupied a dominant position on this market.

3. The question whether there was an abuse of the dominant position

A — The evidence

383 (a) In order to show that RT has in fact committed the infringement for which it is blamed the Commission relies first of all on a series of documents which it produced at the same time to prove that there were concerted practices designed to protect the Netherlands or the west German market and which have been mentioned above (Chapters 2 and 3).

384 In addition the Commission refers to fifteen purchase contracts entered into between RT and Hottlet between 8 October 1968 and 7 January 1972, to a letter from RT to Hottlet of 19 March 1969 and to several of Export's internal memoranda drawn up between February and May 1970 (Annexes I 41, 78, 131 to the statements of defence; Annex II 17, 18 to the statement of defence in Case 47/73; Annex 3 to the rejoinder in the same case).

385 The findings in Chapters 2 and 3 show that RT succeeded in making dealers abide by its sales policy which was to channel to specific consignees or destinations the exports of white sugar to the Netherlands and the western part of the Federal Republic of Germany.

386 In the Commission's view RT also brought the economic pressure referred to in the decision to bear on dealers to procure their compliance with the practices alleged to have been concerted between the Belgian company and certain French producers relating to the invitations to tender for refunds on exports to third countries which are the subject-matter of the complaint dealt with in Chapter 9.

387 (b) It emerges from letters between RT and Hottlet exchanged between 20 October 1968 and 16 December 1969 (Annex 3 to the rejoinder in Case 47/73) that:

— Hottlet purchased a specific amount of sugar from RT and resold it to a German customer and it was a term of the respective purchase contract and contract for resale inserted at RT's request that the sugar should only be used for denaturing;

— subsequently Hottlet asked RT to release the said customer and itself from this obligation which could no longer be complied with because the denaturing premium had been abolished;

RT nevertheless insisted on absolute performance of the clause in question and in the end required Hottlet to pay Bfrs 1 250 000 by way of damages, because Hottlet, as a result of the events which have just been described, did not take delivery within the prescribed time of 2 500 metric tons of the amount covered by the before mentioned contracts.

388 An internal memorandum of Export 'on the opportunities for cooperating with RT' of 23 April 1970 (Annex I 75 to the statements of defence) after complaining that 'the refiners' policy' does not permit Export to supply the frontier regions of the Netherlands, France and Germany ends as follows: 'It is doubtful whether we can get a quota, because RT will not wish to underwrite a policy running counter to the agreements which it has entered into with other refiners'.

389 Another internal memorandum of Export relating to a discussion which its representatives had on 17 February 1970 with Mr Maisin of RT (Annex I 78 to the statements of defence) reads as follows:

'Raffinerie Tirlemontoise plans to export about 9 000 metric tons of raw sugar which will be delivered to Tate. RT suggests that Export acts in this operation as broker. If Export does so it should abide by the common policy laid down for invitations to tender.

When invited to clarify this last point Mr Maisin admits that this commitment also covers invitations to tender for the export of white sugar. We then reply that our attitude on this point has not altered since last week but for all that is neither fixed nor unchanging.

Mr Maisin then refers to the letters exchanged between Baron Kronacker and Mr Rolin and draws our attention to the fact that if a new "climate" has to be created this can only be done by progressive stages . . .'.

Conclusion

'Raffinerie Tirlemontoise proposes that we should act as broker in its intended (or agreed) sale of 9 000 metric tons of raw sugar to Tate & Lyle.

As consideration it requests us to give up our freedom to attend the invitations to tender for exports of raw as well as white sugar.

It is implied that Raffinerie Tirlemontoise refuses to offer us raw sugar which we are free to sell wherever we like'.

390 On the same date Export's Managing Board made a decision concerning the same questions (Annex II 17 to the statement of defence in Case 47/73) which *inter alia* states 'We agree in a conciliatory spirit and as an indication that we wish to be cooperative not to tender for a refund on raw sugar at the standing EEC invitations to tender which will take place once a week on and after Wednesday 18 February, so that such applications for refunds do not compete with the applications of Franco-Belgian refiners and in particular of Raffinerie Tirlemontoise. (It must be noted that this was a purely formal gesture because, unless Export's supplies of raw sugar were guaranteed by Tirlemont, the only possible Belgian undertaking, it could not reasonably be expected to tender at the invitation to tender for raw sugar: the risk being that if it was a successful tenderer it would be unable in practice to cover its position)'.

391 Baron Kronacker, Chairman of Export, in a memorandum of 26 March 1970 (Annex II 18 to the statement of defence in Case 47/73) wrote as follows: 'It is my wish that we keep in step with Tirlemont. If we do so, we sacrifice our principals, we agree to reduce the amounts in respect of which we attend the invitation to tender for Export and, although we have no say in the matter, we

agree to adopt the prices of the Paris consortium. This of necessity implies that Tirlemont only takes part in the invitations to tender through us ... As compensation for our sacrifices we must be granted a commission of 3/4 % on all transactions.'

392 A memorandum of Export 'on Mr Rolin's oral reply on 21 May 1970 to Baron Kronacker's written proposal of 20 May concerning relations between Export and RT for the 1970/71 marketing year' (Annex I 131 to the statements of defence) states that: 'In addition Mr Rolin still restricts our freedom of action and our opportunities for applying for refunds, such application, according to him, should be made after their amount and level have been coordinated with Mr Bernard, Chairman and Managing Director of Say within the framework of the concerted action agreed in Paris (Say, Béghin, Varsano, Sucre-Union etc.)'.

393 Two telex messages of 19 August 1970 exchanged between Export and RT (Annexes I 81, 82 to the statements of defence) state:

Export's telex message:

'1.Holland: On the basis of the Netherlands' demand for imports of EEC sugar we agree the principle mentioned at lunch the day before yesterday: to carry on business in accordance with your plan, that is to say deliveries between sugar producers through the long established Belgo-Netherlands trading organizations on terms satisfactory for Export. In order to give effect to your proposal we are getting in touch with Netherlands business houses about these questions and technical problems'.

RT's telex message in reply:

'Following your telex message 16.06 hrs of which I was able to inform Mr Rolin by telephone, the latter asked me to let you know that he is very pleased indeed to take note of your agreement with the principle under point 1.

Consequently we are making sugar available to you for the Netherlands condensed milk industry to be dealt with through long established trading organizations ...

On the other hand, if the Netherlands sugar industry were to ask us to supply its own requirements, any Belgian sugar which might be exported would be handled with the help of our business houses.

It follows from the beforementioned stipulations that you will refrain from taking any kind of initiative on the Netherlands market so that its pattern is not disturbed.'

394 Two telex messages of 20 August 1970 exchanged in similar circumstances (Annexes I 83, 84 to the statement of defence) read as follows:

Export's telex message:

'Export records its agreement to join RT as a manufacturer of Belgian sugar in working out an agreement with Suiker Unie and Centrale Suiker Maatschappij as manufacturers of Netherlands sugar for the 1970/71 sugar marketing years upon the following terms:

1. Export gives up dealing in Belgian sugar with Netherlands purchaser-consumers in connexion with what we call the particular requirements in the Netherlands, that is to say, on the one hand, for sugar in its original state for human consumption, and, on the other hand, for sugar for factories manufacturing sweets to be consumed in the Netherlands, the other EEC countries and third countries. This sweet manufacturing industry does not include the milk processing industry.

   The denaturing trade and the chemical industry are also excluded from the trade which Export has given up.

2. Giving up this trade by Export is linked ... so far as the Netherlands' import requirements of EEC sugar are concerned ..., with the condition that the deliveries to be carried out between Belgian and Netherlands sugar manufacturers in order to supply this Netherlands market shall be effected through the long established Belgian and Netherlands trade upon terms which are satisfactory for Export. These last words mean that Export's return on these operations must give it satisfaction, on the one hand with regard to its remuneration per unit of sugar in the form of commission or commercial participation in the form of a margin, and, on the other hand, with regard to the amount of sugar supplied by the Belgian sugar manufacturers, which will be sold to the Netherlands sugar manufacturers on the basis of the Netherlands' import requirements of EEC sugar.'

RT's reply:

'It is clear from your telex message ... that we are in complete agreement on the method to adopt for dealing in Belgian sugar on the Netherlands market' ... 'we do not intend to do anything in connexion with consumption in the Netherlands which is not approved by our Netherlands colleagues.'

395 Export, in a confirmation of sale of 1 October 1970 addressed to the Netherlands dealer Jacobson (Annex I 88 to the statements of defence), first stated that RT 'has given the exclusive right, for the 1970/71 marketing year,

to sell its granulated sugar for export from Belgium to the long established Belgian sugar traders' — namely Export and Hottlet — then emphasized 'the essential requirements of RT's general commercial policy which have been defined for us, namely that it does not intend to undertake any business for the Netherlands which is not approved by ... SU and CSM' went on as follows: 'We consider ... that we must draw your attention expressly to this commercial policy of our principal suppliers, the Tirlemont group, since it cannot approve any transaction in Belgian sugar falling outside this policy and the consequence of any such transaction is that we lose the exclusive rights in question ... above'.

B — The evaluation of the evidence

396 It appears to be quite clear from the documents mentioned, if they are evaluated together with the factors set out in Chapters 2 and 3, that RT either expressly or impliedly told the dealers, or deliberately created in their minds the impression, that it would not supply them with sugar or would not supply them with all the quantities for which they applied, unless they complied with its restrictive export policy as applied to the Netherlands or west German markets or deliveries to third countries.

397 The words used in some of its statements are indeed so peremptory that they call to mind instructions to a trade representative rather than negotiations on a footing of equality between a producer and an independent dealer.

398 By compelling dealers to channel their exports to specific consignees or destinations and to impose these restrictions on their own customers RT has restricted the outlets of the dealers and indirectly of their purchasers, which is a practice expressly mentioned by Article 86 (b).

399 Although the incorporation of a denaturing clause in a contract for the sale of sugar does not necessarily amount to an abuse, the extremely hard hearted way in which RT refused to make allowance for the unforeseeable difficulties encountered by Hottlet and the latter's German customer at a later date in despatching sugar to the destination laid down by RT proves in the context of this case to be an integral part of the policy carried out by RT of bringing economic pressure to bear on dealers.

400 There are therefore grounds for finding that RT abused its dominant position on the Belgo-Luxembourg market.

401 This abuse was capable of affecting trade between Member States to the extent to which it had an effect on the pattern of the deliveries which RT allowed dealers to undertake or prohibited them from undertaking in the Netherlands and in the western part of the Federal Republic of Germany.

402 In these circumstances RT's application must be dismissed to the extent to which it asks for the annulment of subparagraph 1 of Article 1 (2) of the contested decision.

Chapter 6

The complaint that SU and CSM brought economic pressure to bear on Netherlands importers

403 Subparagraph 2 of Article 1 (2) of the contested decision blames SU and CSM for having 'during the 1969/70 marketing year committed infringements of Article 86 by bringing economic pressure to bear on Netherlands importers with the object of compelling them to restrict their imports'.

404 SU and CSM jointly threatened the Netherlands dealers Jacobson, Dudok de Wit and Internatio that they would prevent them from continuing to import sugar for the purpose of supplying the Netherlands milk processing industry unless they gave three undertakings:

- not to apply too competitive a price when reselling French sugar to Netherlands third parties;
- to resell, under specific conditions, part of this sugar to two Netherlands producers;
- not to effect 'such imports' — which expression must be understood as meaning imports intended for supplying long established Netherlands customers of SU and CSM — without the latters' consent.

405 It is appropriate to consider first of all whether the Commission has proved the statement in its decision that SU and CSM threatened 'to make it impossible for the dealers to carry on their traditional business of importing sugar under temporary import arrangements for the milk processing industry by themselves supplying this industry on the terms prevailing on the world market'.

406 In fact, in the absence of such evidence, this complaint would be unfounded so that there would be no need to ascertain whether in fact the Netherlands producers, using methods which do not fall within Article 86, induced the dealers to adopt the course of conduct alleged by the Commission.

407 The Commission's main evidence for this statement is an internal memorandum of 8 June 1970 drawn up by Mr Lemaire, a director of Export, reporting a conversation which the latter had with Mr Dudok de Wit, at that time director of the firm having the same name (Annex I 133 to the statements of defence), which included the following passages: 'The Netherlands sugar industry (Suiker Unie & CSM) through Mr Lindeboom, sales manager of Suiker Unie, approached the long established Netherlands sugar trade (Dudok de Wit & Internatio & Jacobson) with the object of making representations in connexion with transactions for importing French granulated sugar concluded by these business houses with Sucre-Union Paris (the trading company of the French sugar beet cooperatives) for the 1969/70 marketing year ... In view of the importance of these transactions a specific agreement was entered into between the Netherlands trade and the sugar manufacturers of this country under which ... This agreement also provides that ... When Mr Lindeboom of Suiker Unie had this discussion with the Netherlands import trade he requested that in future, for the 1970/71 marketing year, it should refrain from effecting similar import transactions: if it did not do so, he would make it impossible for them to carry on their traditional business of importing sugar under temporary arrangements by himself meeting the requirements of the processing industry (milk, etc.) on the terms prevailing on the world market.'

408 With a view to checking, *inter alia,* whether this threat was in fact uttered the Court heard the evidence of Messrs. Lemaire, Dudok de Wit, Sanders (at that time the authorized representative and now deputy director of Jacobson) and Lindeboom.

409 The witness, Mr Lemaire, confirmed that the memorandum recorded accurately and in full the tenor of his discussions with Mr Dudok de Wit.

410 When he was asked whether the 'agreement' entered into between Netherlands producers and the dealers 'had been concluded under some pressure or ... in complete freedom' the witness replied 'that the agreement related to commercial relations, which were unconnected with our direct contacts' and that it was 'impossible for him to give a definite reply'.

411 With regard to the events leading up to the resale of part of the French sugar to Netherlands producers the witnesses Mr Dudok de Wit and Mr Sanders stated that the dealers agreed to buy a large amount of sugar from their French suppliers and that to begin with, because of the fall of the French franc, the dealers viewed this operation in a favourable light.

412 However, after the official devaluation of the French franc, the dealers had to pay an import levy which was a heavy addition to the cost price of a large amount of the sugar in question and made it difficult for them to sell this amount in the Netherlands without incurring a loss.

413 As time pressed the dealers applied to the Netherlands producers which were alone able to purchase relatively large amounts at short notice and — according to the evidence of Mr Sanders — 'were successful', a result with which they were 'very pleased'.

414 Their resale did not bring the producers or the dealers any financial advantage.

415 With regard to the question whether SU and CSM uttered the threat in relation to the dealers which is mentioned in the decision the witness Mr Dudok de Wit replied:

— 'the way in which Mr Lemaire describes the matter is incorrect. The alleged intention of the Netherlands sugar industry to import itself was also not new and, particularly in this case, was implemented by progressive stages ... That constituted in itself a threat but it was not uttered only at that time. This threat was in existence before ... The basis of Mr Lemaire's and my own reasoning is approximately the same; the only difference is that Mr Lemaire's memorandum gives the facts as he saw and interpreted them. Basically it is his interpretation which is faulty ... In fact there was talk of industry increasing its imports ... it is the word "threat" to which I take exception. The situation was a threat to trade but Mr Lindeboom did not specifically describe it in terms of a threat by saying for example: if you continue to import I will make importing impossible.'

— if Mr Lemaire had the mistaken impression that there was coercion by the producers, it would be 'very possible' that this misunderstanding was due to the fact that the witness Mr Dudok de Wit, with the aim of not

offending Mr Lemaire by telling him openly that it was not in the interest of the dealers to buy Belgian sugar, deliberately expressed himself in rather vague terms.

416 On this point the witness Mr Sanders said:

— 'much more is required to make us feel that we are threatened'.

— he finds the statement in Mr Lemaire's memorandum 'very surprising', because, 'if Mr Lindeboom made such a remark, he would obviously have intended to make the sugar coming from third countries compete with the sugar he produces himself. Such an intention seems to me hardly acceptable in the case of a cooperative in which the farmers are owners of sugar factories. In the second place I believe such a declaration of intent to be highly unlikely. If the sugar industry began to import from third countries, it would begin to compete with Netherlands dealers and we claim to be better placed than the Netherlands industrialists to do business on the world markets and we therefore believe that, if we are confronted with this kind of competition, we should be more successful than our competitors in selling more cheaply. And I believe that Mr Lindeboom is also aware of this'.

— 'In the heat of a conversation concerning the conclusion of an agreement allowing us to sell part of our French sugar ... it may have been said: 'if you do not discontinue these imports then we shall take this or that step'. Whether such steps can have any effect is another matter. We can say: If you do not stop this practice we will take such and such a step, but obviously it must be possible to do so. The following year we imported Belgian sugar. It is rather difficult to say 'we shall import sugar from third countries' when the following year new regulations are adopted which make it impossible to import sugar from third countries.'

— 'There may have been such a statement. I must say to you that I am not certain. In any case such a statement carries little weight, because, if it is said that the requirements of the processing industry will be met on the terms prevailing on the world market, that means that both parties will make purchases on world markets and, as the dealers can buy on these markets, the latter in any case claim, perhaps wrongly, that they can do this better than the industry which is more geared to marketing its sugar.'

417 In connexion with the same point the witness Mr Lindeboom stated that:

— during a period which began before 1961 and ended in 1967 he was employed by Internatio and became friendly with Mr Kopmels who was attached to the Jacobson firm and died some years ago.

— Following the import of French sugar which is the subject-matter of these proceedings he had one discussion, which moreover was friendly, with Mr Kopmels on the impact which such imports would have on the Netherlands market but he never had any discussion with Mr Dudok de Wit and Mr Sanders;

— during the said discussion he said to Mr Kopmels that, owing in particular to the currency situation which has led to distortion of competition, 'the situation in the sugar sector is becoming so difficult that it could very well one day bring about a collapse of domestic prices', which would call for 'self discipline' on the part of both producers and dealers of the Netherlands;

— these preoccupations did not have a commercial origin but were due to the fact that SU, as a cooperative for beet growers, considered that it was under a duty to ensure that the minimum price to be paid to them, laid down by Community rules, was not endangered;

— the Belgian trade and a German undertaking laid Netherlands operators open to harsh competition by selling at very low prices to large Netherlands undertakings;

— 'we have not impeded trade' which the witness could prove with the help of contracts which were entered into after 1970.

418 Although it cannot be ruled out that the threat alleged by the Commission was in fact uttered, it does not however appear, according to the witnesses' statements, to have been adequately proved.

419 The statement made by the Commission at the hearing has not provided any facts or considerations which alter this evaluation.

420 Since therefore the facts alleged by the Commission upon which it based this complaint have not been sufficiently proved, subparagraph 2 of Article 2 (2) of the contested decision must be annulled.

Chapter 7

Complaint that SZV prevented its agents from reselling sugar from other sources and tied its customers by the grant of loyalty rebates

421 Subparagraph 3 of Article 1 (2) of the contested decision blames SZV for having 'from the beginning of the 1968/69 marketing year onwards

committed infringements of Article 86 by preventing its agents from reselling sugar from other sources and by tying its customers by granting loyalty rebates'.

Section 1: Procedural and formal submissions

I — Submissions already dealt with in Chapter 2

422 The submissions put forward by SZV that premature publication is a breach of the principle that everyone is entitled to a fair trial and that there were unduly short time-limits for submission of observations on the notification of objections are in substance similar to the corresponding submissions made by SU, CSM and Pfeifer & Langen in connexion with the second complaint and must be rejected for the reasons given in connexion therewith.

II — Submissions based on defects in the notification of objections

423 1. SZV takes the view that the notification of objections which was sent in identical wording to forty-eight undertakings, although each of the latter was only affected by some of the facts alleged, did not set out with sufficient accuracy the complaints specifically made against the applicant or the evidence used against it.

424 None of the documents mentioned in the notification of objections to justify the complaint that it engaged in a general concerted action based on the principle 'chacun chez soi' ('each in his own home') which was also made against the applicant, emanated from SZV or was sent to it.

425 Since it consequently feared that the replies given by the other undertakings would be construed against it, SZV requested the Commission to send it copies of them, which the Commission refused to do on the ground that it was under a duty to respect the principle of professional secrecy.

426 This complaint, which is the only one made against the applicant by the contested decision, is not that SZV engaged in a concerted practice but that it abused a dominant position.

427 This complaint has been clearly and accurately formulated on pages 91 to 93, 107 to 108 and 121 to 123 of the notification of objections and supported by documents emanating from SZV or which explicitly mention SZV.

428 The submission must therefore be rejected.

429 2. SZV submits that, contrary to Article 3 of Regulation No 1 of the Council, the wording of the notification of objections which was sent to it was not entirely written in German but included copies of a large number of documents in other languages, of which the Commission did not at the same time produce a German translation.

430 This submission cannot be upheld because the copies of the only documents relating to this case, namely those referred to at pages 91 to 93 of the German version of the notification of objections, are in German.

431 3. Finally SZV blames the Commission for having quoted in the notification of objections as evidence of the alleged infringement extracts of letters of which neither the name of the sender nor of the addressee was indicated.

432 In the originals of these letters which SZV's authorized representative was able to examine the names had also been effaced.

433 This submission relating to the evaluation of the evidence forms part of the substance of the case.

III — Submission that Article 4 of Regulation No 99/63 has been infringed

434 SZV submits that the decision is defective because there has been an infringement of Article 4 of Regulation No 99/63 under which the Commission 'shall in its decisions deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views', since the notification of objections only attributed a dominant position to SZAG, whereas the decision found that SZV occupied such a position.

435 It emerges from pages 122 and 123 of the notification of objections that the Commission blamed SZV for having abused the dominant position of SZAG, whereas according to the decision SZV abused its own dominant position.

436 However SZV has not denied that it defined its position during the administrative proceedings on the complaint made against it under Article 86.

437 The Commission stated, without the applicant raising any objection, that it changed its mind simply because it learnt from the observations of the undertakings concerned that SZAG only has limited voting rights in SZV.

438 Since the applicant therefore had the opportunity of making known its point of view on the question whether it occupies a dominant position and could expect that its own and SZAG's explanations would lead the Commission to modify its opinion, this submission is unfounded.

IV — Submission based on defects in the taking of evidence by the Commission and on the inadequacy of the statement of the reasons upon which the decision is based

439 SZV submits that some of the statements in the decision are not supported by evidence or that the reasons upon which they are based are not such as to enable their accuracy to be verified.

440 The examination of the question whether the Commission has or has not produced evidence of the alleged infringement forms part of the substance of the case.

Section 2: Substantive submission based on infringement of Article 86 of the Treaty

I — The question whether the 'southern part of Germany' is a substantial part of the common market

441 1. It is clear from the statement of the reasons upon which the decision is based (p. 20 to 21, paragraph 9, p. 28 under paragraph 16) that when the Commission refers to 'the southern part of Germany' it means the area which

it regards as SZV's sales territory as opposed, on the one hand, to the sales territories which it considers belong to NZV and WZV, two companies, of which the sugar producers of the southern and western regions of the Federal Republic of Germany are members and, on the other hand, to the Länder of Berlin and the Saar, which it states are for the most part supplied by sugar coming respectively from the Federal Republic of Germany and the French Republic.

442 The Commission produced for the Court's file a map (Annex II 10 to the statements of defence in Cases 54 to 56/73) 'based on' the maps annexed to the contracts of WZV's commission agents, which marks the boundaries of the latter's sales territory and bears the letters 'NZV' (in the north) and 'SZV' (in the south), but does not however indicate with any accuracy the boundary between the respective sales territories of these two marketing organizations.

443 If this map is examined in the light of the parties' statements, to the extent to which they agree, it shows clearly that the territory within which SZV carries on business, that is the 'southern part of Germany', within the meaning this expression is given in the decision, includes the whole of Bavaria and Baden-Württemberg, part of the Land Hessen bordering on these two Länder, which takes in more than half of Hesse as well as certain parts adjoining the Rhine-Palatinate, the Saar, North Rhine-Westphalia and Lower Saxony which are regions of insignificant size compared with the other sectors of SZV's sales territory.

444 2. In order to ascertain the criteria which determine whether a specific territory is 'a substantial part of the common market' reference must be made to Chapter 5.

445 The aggregate annual production of the companies which were members of SZV was at that time on average about 800 00 metric tons, a figure which must be evaluated bearing in mind that, on the one hand, SZAG, the principal member of SZV having its place of business in Baden-Württemberg itself supplied about 70 % of this production and, on the other hand, that Franken, having its place of business in Bavaria, is after SZAG the largest producer member of SZV (cf. decision p. 20, paragraph 9).

446 According to the Commission's statistics (cf. Annex I to the rejoinder in Case 55/73, table V, column 29) consumption 'in SZAG's sales territory less the

Saar' increased during each of the four marketing years under consideration to 790 000, 792 000, 872 000 and 826 000 metric tons respectively, and these figures could even increase to the extent to which it would have to be conceded that SZV's sales territory exceeds that of SZAG.

447 According to the available statistics the average number of consumers in the region in question for the years which have to be taken into account can be estimated at 22 million at least.

448 If these figures are compared with the corresponding figures relating to the whole of the Community set out in Chapter 5, the 'southern part of Germany', within the meaning which this expression is given in the decision, is found to be sufficiently large, so far as sugar is concerned, to be considered having regard to the other criteria mentioned in Chapter 5 as a substantial part of the common market in this product.

449 3. SZV submits that for the purpose of determining whether the area in question is a substantial part of the common market the statistical data relating to this area should not only be compared with the corresponding data relating to the common market as it was when the facts giving rise to these proceedings existed but also with the data relating to the Community of 'Nine' in its present form.

450 Article 86 of the EEC Treaty clearly refers in each case to the position occupied by the undertaking concerned on the common market at the time when the latter acted in a way which is alleged to amount to an abuse.

451 For this reason alone SZV's argument cannot be upheld.

II — The question whether SZV occupies a dominant position on the sugar market of the southern part of Germany

452 SZV does not deny that in the two principal regions of the area in question, namely the Länder of Bavaria and of Baden-Württemberg, its share of the market is approximately the 90 % to 95 % share mentioned in the contested decision (p. 39, paragraph No 3) for the whole of its sales territory.

453 Similarly it concedes that in the Land Hesse its share of the market exceeds 50 % and, having regard to the fact that part of this Land does not form part of the applicant's sales territory, this statement raises the presumption that, to the extent to which the Land Hesse is co-extensive with this territory, SZV's share of the market is appreciably higher than 50 %.

454 These figures are confirmed by the Commission's statistics (Annex I to the rejoinder in Case 55/73, table V, columns 28 to 30) according to which imports, other than deliveries from producer to producer, effected during the four marketing years in question in the sales territory of SZAG, the largest member of SZV, only amounted to 0·19 %; 0·73 %; 1·62 % and 2·93 % respectively of the total consumption in SZAG's sales territory.

455 With regard to the deliveries effected in the sales territory of SZV or its members by NZV and WZV or by the members of these marketing organizations there is no evidence at all on the Court's file that the volume of these deliveries was very large.

456 Therefore SZV solely or jointly with its members had the opportunity of preventing effective competition on the market in question.

457 Consequently it had during the period to be taken into consideration a dominant position on this market.

III — The existence of an abuse

458 The complaint made by the Commission against SZV consists of two distinct parts. The first relates to the applicant's sales organization and in particular to the obligation imposed on agents not to resell sugar from other sources without its consent and the second to the fact that the applicant tied its customers by loyalty rebates.

1. The obligation imposed on agents

A — The Commission's view

(a) In its decision the Commission states that, in order to distribute within its sales territory the sugar produced by its members, SZV used primarily

seventeen regional representatives who, in addition to their operations in the sugar sector, sold other products for their own account.

460 These representatives under the trade representatives contracts entered into by SZV with them were subject to the obligation, *inter alia,* only to sell in the name and for the account of SZV and, except with the latter's prior consent, not to act as agent for other producers of or dealers in sugar or competing products and not to engage in the sugar trade on their own account.

461 However the said consent was presumed to be granted if SZV's members wished to market the sugar they themselves produced direct by using the applicant's representatives.

462 To the extent to which the representatives wished to sell sugar from either German or foreign sources, they were granted consent if the sugar was to be processed or was a special kind intended for other undertakings.

463 By these arrangements SZV made it virtually impossible for foreign producers to sell sugar through dealers who obtained their supplies from it.

464 If it is true that there are other dealers in south Germany who can import freely and that a number of processing undertakings also obtain their supplies from abroad, it would be no less true that the arrangements at issue appreciably reduced foreign producers' opportunities of selling at a time when the high price level in south Germany made importing into this territory an attractive proposition.

465 The fact that an undertaking occupying a dominant position imposes on its agents an obligation such as the one in question amounts to an abuse of this position within the meaning of Article 86 of the Treaty.

466 (b) During the proceedings the Commission made the following complaint.

467 The system, which it criticizes, implies that the 1 270 wholesalers, who have their places of business in SZV's sales territory and supplied small industrial

consumers and retailers, do not have the opportunity of obtaining sugar direct from the applicant but must apply to one of SZV's seventeen regional representatives.

468 Such a system does not guarantee the development of competition at the commercial level so that SZV must either replace its regional representatives by independent wholesalers or at least give not only the said representatives but also independent dealers direct access to the production which it sells.

469 Further the Commission blames SZV for supplying itself, through its regional representatives, about 730 large industrial consumers, thereby preventing the 1 270 beforementioned wholesalers from supplying a sector having approximately a 55 % share of sugar sales in the territory in question.

470 Therefore, since these dealers were not in commercial contact with the large processing industry in south Germany, they had little opportunity of selling foreign sugar to this industry which, to the extent to which it bought French sugar, applied direct to French producers.

471 This situation, together with the consequences of the prohibition of competition imposed on regional representatives and of denying wholesalers direct access to SZV, reduces to a considerable extent the opportunities of selling in south Germany sugar coming from other Member States.

472 An undertaking having a dominant position is not allowed to organize the sale of its production in such a way as to eliminate competition.

B — The evaluation of the Commission's view

473 SZV submits that, since the relationship to itself of the intermediaries with whom it entered into the disputed agreements was that of commercial representatives, Article 86 does not apply to these contracts.

474 (a) 1. With regard to the prohibition of competition stipulated in these contracts it must be noted that an undertaking or association, in order to ensure that the goods which it or its members manufacture are distributed, can choose either to use commercial employees — that is to say persons

bound to it by a contract of employment — or traders with whom it enters into contracts of a different kind.

475 So far as the legal position of these traders and the terms of these contracts are concerned, the laws of the Member States and economic practice have developed a great variety of forms of agreement which distinguish in particular between those where the intermediate trader negotiates with customers or comes to an agreement with them in his own name and for his own account, or in his own name but for the account of the principal, or again in the name and for the account of the latter.

476 If the contracts on the Court's file, which are at issue, are examined they are found to be in law trade representatives contracts, in particular because they expressly confer upon the intermediaries the attributes of a trade representative within the meaning of German law and because under their terms the representative is under a duty to negotiate or conclude sales of sugar in the name and for the account of the principal, to carry out the latter's instructions and look after his interests and finally because they allot them specific territories where they are to act as representatives.

477 It is agreed that, without prejudice to certain small differences, German law, which governs the contracts in dispute, proceeds on the basis of the principle that such trade representatives are prohibited, even if there is no stipulation in the contract to that effect, from competing with their principal without the latter's consent and that any infringement of this prohibition of competition may even render the representative liable to an action against him for damages.

478 However for the purpose of applying Articles 85 and 86 of the Treaty the relationship between an economic operator and his intermediaries must only be determined in the light of Community law, so that the fact that a trade representatives contract, which imposes upon the representative a prohibition of competition, complies with the national law governing this contract or that this law even imposes a similar prohibition is not determinative when considering whether such a contract is not caught by Article 86.

479 However it must be admitted, independently of the content of the applicable laws of the Member States, that, in general, the fact that a producer or an association of producers forbids its agents, who sell in its name and for its

account, to act at the same time for competing producers without its consent, corresponds to the nature and spirit of a legal and economic relationship of the kind in question.

480 In fact, if such an agent works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter's undertaking, who must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking.

481 In these circumstances the abuse is not due to the fact that the principal forbids such an auxiliary organ, without his consent, to trade in products which could compete with his own.

482 The position is different if the agreements entered into between the principal and his agents, whom the contracting parties call 'trade representatives', confer upon these agents or allow them to perform duties which from an economic point of view are approximately the same as those carried out by an independent dealer, because they provide for the said agents accepting the financial risks of the sales or of the performance of contracts entered into with third parties.

483 In fact in such a case the agents cannot be regarded as auxiliary organs forming an integral part of the principal's undertaking with the result that, if a clause prohibiting competition is agreed between principal and agent and the principal is an undertaking occupying a dominant position, that clause may constitute an abuse within the meaning of Article 86 as it is likely to consolidate that dominant position.

484 However the Commission has not alleged and the agreements produced for the Court's file do not disclose that the relations between SZV and its agents included the conditions which have just been mentioned, that is to say stipulations which enable the conclusion to be drawn that the agents have in relation to the applicant a position very similar to that of an independant dealer.

485 In particular the Commission has not denied that the trade representatives in question were mainly concerned with distribution for the account of the applicant without acting at the same time as independent dealers to any great extent.

486 2. However even clauses prohibiting competition imposed by an undertaking occupying a dominant position on trade representatives may constitute an abuse, if foreign competitors find that there are no independent operators who can market the product in question on a sufficiently large scale, and are in practice forced to apply to the said undertaking's trade representatives if they wish to sell this product in the latter's sales territory, or if the said undertaking enlarges the scope of the prohibition of competition to such an extent that it no longer corresponds to the nature of the legal and economic relationship in question.

487 With regard to the first of these exceptions the Commission has not denied that there are two groups of economic operators in south Germany trading in sugar, which, since they are under no obligation to SZV, are not bound by the prohibition of competition imposed by the latter on its trade representatives. They are the 1 270 wholesalers referred to above, and, in particular a not inconsiderable number of dealers, whose business consists mainly or to a great extent of importing and exporting sugar.

488 It does not appear that this case is concerned with dealers in the second group.

489 The result of all these considerations is that the clauses prohibiting competition in the disputed contracts are not in themselves an abuse within the meaning of Article 86.

490 (b) The Commission then blamed SZV, on the one hand, for having forced the wholesalers whose places of business were in its sales territory to apply to its trade representatives and not to itself, and, on the other hand, for having supplied about 730 large industrial consumers of this territory instead of arranging for the said wholesalers to play their part in delivering sugar to them.

491 These aspects of SZV's sales organization have nothing to do with the obligations imposed on trade representatives but stem from decisions taken unilaterally by SZV, namely to enable them to play their part in delivering sugar to the trade and to prevent dealers from delivering sugar to large consumers.

492 If the producer avails himself of an agent who is an auxiliary organ forming an integral part of his undertaking, purchases from this 'representative' are in fact direct purchases from his principal.

493 Therefore such conduct can neither be an abuse nor evidence thereof.

494 With regard to the fact that SZV supplied certain large consumers direct through its trade representatives without making use of dealers there was nothing to prevent these consumers from buying from independent dealers instead of applying to the applicant's representatives or these dealers from selling to the said industrial consumers.

495 The view can therefore be taken that sugar was not supplied in this way because of any pressure brought to bear by SZV but as a result of decisions taken freely by the consumers in question who could see that this system of supplying direct offered advantages.

496 Moreover the Commission has not blamed SZV for having acted in a discriminatory manner in choosing which large industrial consumers to supply direct.

497 All these considerations show that an abuse within the meaning of Article 86 of the Treaty has not been proved.

498 Subparagraph 3 of Article 1 (2) of the decision must therefore be annulled to the extent to which it blames SZV for having prevented its agents from reselling sugar from other sources.

2. The loyalty rebate

A — The Commission's view

499 (a) The decision states that since SZV was formed it has applied a system of so-called annual 'quantity' rebates which are in fact loyalty rebates and were granted at a rate of DM 0·30 per 100 kg to customers who met their annual requirements exclusively from members of SZV.

500 In the case of some of the customers the rebate was deducted immediately on the invoice.

501 In some cases at least the rebate was discontinued or its discontinuance notified if the buyer went on importing sugar and these steps induced the buyers in question to stop importing, even though offers from abroad were DM 10 to 20 per metric ton below SZV's offers.

502 The grant of such a rebate placed customers who also buy sugar from other sources at an unjustifiable disadvantage and enabled SZV to 'control' the volume of supplies to its customers by foreign producers.

503 As SZV's purchasers depend at least in part on SZV's deliveries because their storage facilities were inadequate and they needed regular supplies, the disadvantage of losing the rebate, although it appears to be relatively small, would very soon outweigh the advantage of buying sugar from third parties, even if the latter were to make offers at more favourable prices.

504 The fact that in certain cases the rebate was granted even though sugar was purchased from foreign producers does not alter the fact that the notification alone of its discontinuance or the mere risk of it being discontinued prevented customers from importing sugar in large quantities systematically.

505 If such a rebate is granted by an undertaking occupying a dominant position with a view to restricting further opportunities for importing and to consolidating this position, this rebate amounts to an abuse of this position within the meaning of Article 86 of the Treaty.

506 (b) During the proceedings the Commission produced eight sales contracts entered into by SZV (Annex I 145 to 148, 150, 151, 153, 154 to the statements of defence), four of which include the disputed clause, whereas a fifth contract makes the grant of a rebate subject to the condition that the annual purchases made during the last year and in the preceding year are approximately the same, and lastly in the three remaining contracts the rebate has already been deducted from the sale price without having been expressly connected with a clause that supplies must be obtained exclusively from SZV.

507 The parties disagree over the construction of the four contracts mentioned in the previous paragraph. The Commission is of the opinion that in these contracts as well the rebate at issue was granted, whereas the applicant takes the opposite view and goes on to say that, on the one hand, the said contracts show that the clause, which makes the grant of the rebate dependant upon the agent obtaining his supplies exclusively from SZV, was not systematically incorporated in all the sales contracts concluded by the company and, on the other hand, that it deducted the rebate immediately each time a customer wished this to be done.

508 Further the Commission produced for the Court's file certain documents intended to show that, at least in certain cases, the rebate at issue was discontinued or its discontinuance notified if the purchaser in question continued to import sugar (Annex I 155 to 158 to the statements of defence).

509 The applicant, without seriously calling in question the truth of the statements in these documents, objects however to their use as evidence on the ground that they have been made partly anonymous, and claims that they are not a suitable basis for any generalisation, since the company's customers numbered approximately 2 000.

B – The evaluation of the facts

510 (a) It is agreed that the clause in issue as described in the contested decision was incorporated in a large number of sales contracts concluded by SZV without however having been inserted in all of them.

511 There is no need to ascertain the number of contracts which have this clause and the number which do not.

512 In fact the Court's file shows that in any case the effect of the clause was in practice by no means negligible since it was incorporated in contracts for large quantities (cf. the contract of 9 December 1970 being Annex I 146 of the statements of defence and having as its object the sale of 30 000 metric tons).

513 Moreover, as the Commission has argued, when examining this complaint the cases where the rebate was immediately deducted from the invoice price must

be taken into account as well, since this method of granting a rebate also dissuades the customers concerned from obtaining their supplies from other producers, as they had to fear that, if they did so, they would either be required to repay the amount originally deducted or that the rebate would be discontinued in future.

514 (b) The system applied by SZV was likely to affect trade between Member States, since the dissuasive effect mentioned above related not only to the sugar which the company's customers could purchase from other German producers but also to the sugar which these customers might have been prepared to import from other Member States.

515 In the case of the latter imports the dissuasive effect was very marked, since the foreign sugar imported into south Germany, even if it is offered at an ex-works price below that of German sugar, is burdened with heavy freight rates.

516 Therefore the loss of the rebate was likely either to make it more expensive to import than to obtain supplies from SZV or at least to cancel the financial advantage which importing could have offered compared with this method of obtaining supplies.

517 (c) 1. With regard to the question whether the system at issue amounts to an abuse of its dominant position SZV submits that a rebate such as the one in question is a normal price reduction, which is lawful having regard to the importance of rationalizing sales in a competitive economy.

518 This way of conceiving a rebate disregards the fact that the rebate at issue is not to be treated as a quantity rebate exclusively linked with the volume of purchases from the producer concerned but has rightly been classified by the Commission as a 'loyalty' rebate designed, through the grant of a financial advantage, to prevent customers obtaining their supplies from competing producers.

519 2. The parties cannot agree whether the Commission is correct when it states that the system to which exception is taken enabled SZV to 'control' the volume of sugar supplied to its customers by foreign producers.

520 In particular SZV denies that it was able to find out the entire requirements of all its customers.

521 This argument is not relevant, since it is unnecessary to know to what extent the application of the said system was capable of providing SZV with complete particulars of the volume of imports in its sales territory but necessary to find out whether this system was likely to dissuade the company's customers from obtaining their supplies also from producers established in the other Member States and this question has already been answered in the affirmative.

522 3. As the Commission has emphasized the effect of the system complained of was that different net prices were charged to two economic operators who bought the same amount of sugar from SZV if one of them purchased from another producer as well.

523 By acting in this way SZV 'applied dissimilar conditions to equivalent transactions with other trading parties' within the meaning of Article 86 (c) of the Treaty.

524 SZV however, calls attention to the fact that the Commission has not proved that the application of the system complained of placed the various buyers from the company 'at a competitive disadvantage'.

525 Purchasers from SZV, and in particular large industrial consumers, compete with other buyers from the company.

526 Further the system complained of was likely to limit markets to the prejudice of consumers within the meaning of Article 86 (b), because it gave other producers and especially those having their places of business in other Member States no chance or restricted their opportunities of competing with sugar sold by SZV.

527 The loyalty rebate in question which may further consolidate SZV's dominant position is incompatible with this provision.

528 Having regard to all these circumstances this submission must be rejected to the extent to which it is designed to annul the finding that SZV has abused its dominant position by tying its customers by granting loyalty rebates.

Chapter 8

The complaint directed against Pfeifer & Langen, that it entered into agreements with its agents which restrict their opportunities for importing and exporting within the Community

529 Subparagraph 4 of Article 1 (2) of the contested decision blames Pfeifer & Langen for having 'from the 1968/69 marketing year onwards committed infringements of Article 85 (1) by entering into agreements with their agents which restrict their opportunities for importing and exporting within the Community'.

I — Summary of the relevant statements in the decision and of certain additional information supplied by the applicant

530 The Commission submits that the sales territory of WZV, of which Pfeifer & Langen is the principal member, is subdivided into several areas and in some of them WZV only sells through regional commission agents with whom Pfeifer & Langen entered into 'trade representatives agreements' which included, on the one hand, a prohibition on the sale of sugar from other sources without Pfeifer & Langen's consent which was only granted for the sale of special qualities of sugar or of sugar for denaturing and, on the other hand, the obligation only to resell the sugar supplied by Pfeifer & Langen in a specific territory and to specific customers.

531 Pfeifer & Langen only supplied other dealers direct if the latter signed such agreements or stated that they accepted the principles governing them.

532 The effect of this system of selling was to make the sale of sugar coming from other Member States in the western part of the Federal Republic of Germany very much more difficult, to prevent any increase in the number of sugar suppliers in that area, to enable Pfeifer & Langen to control the operations for which it granted its consent and to stop the company's agents exporting the sugar produced by the latter to other Member States.

533 At the request of the Court Pfeifer & Langen produced for the Court's file a copy of two standard form contracts which in turn governed its relations with its agents, the first — hereinafter called 'the 1948 contract' — from 1948 to 30 June 1970 and the second — hereinafter called 'the 1970 contract' — from 1 July 1970 to 31 December 1972.

534 The 1948 contract and the 1970 contract both

— stipulate that the agent shall sell 'in the name and for the account of Pfeifer & Langen', the 1970 contract also stating that the agent has the attributes of a trade representative within the meaning given to such a representative under German law, and 'shall promote in all respects and to the maximum possible extent the interests of Pfeifer & Langen' and 'shall devote the whole of his time and attention to the sale of sugar in accordance with Pfeifer & Langen's instructions'.

— assign each agent a specific territory in which he is to act as representative and grant him, as the 1970 contract expressly states, 'the exclusive right to sell in the territory assigned to him and, consequently, territorial protection for its entire range of sugar for consumption' and it is not denied that these clauses imply a prohibition on sales outside this area.

535 These contracts contain clauses which prohibit any trading in sugar from other sources without the consent of Pfeifer & Langen. They are expressed in the following terms in the 1948 contract and 1970 contract respectively.

The 1948 Contract

'The representative shall not represent other sugar factories except with the express written consent of Pfeifer & Langen, nor deal in sugar from the Pfeifer & Langen undertaking or elsewhere for his own account'.

The 1970 Contract

'The representative undertakes . . . not to sell in the specific territory in which Pfeifer & Langen is interested any other sugar for consumption coming from a domestic or foreign source. Every derogation from this undertaking must be limited in time and confirmed in writing by Pfeifer & Langen. This exclusivity agreement does not apply, unless and until this clause shall be cancelled, to the transactions carried out by the representative for the benefit of the "Nordwestdeutsche Markenzucker-Vertriebs-GmbH & Co. KG", at Bielefeld/Cologne and [WZV] at Cologne'.

536 In reply to a question put to it by the Court the applicant stated that it cooperated with other agents on the basis of oral agreements which in the main correspond to the beforementioned contracts.

II — The substance (of the complaint)

537 Pfeifer & Langen submits that, since the relationship to it of the agents with whom it entered into the agreements, which are the subject-matter of this complaint, was that of trade representatives, Article 85 does not apply to these agreements.

538 An analysis of the agreements on the Court's file shows that in law they are trade representatives contracts, especially as they expressly grant the agents the attributes of a trade representative within the meaning given to such a representative under German law, impose on them the obligation to sell the sugar in the name and for the account of the principal, to carry out the latter's instructions, to promote his interests and, finally, because they assign them specific territories where they are to act as representatives.

539 If such an agent works for his principal he can in principle be regarded as an auxiliary organ forming an integral part of the latter's undertaking bound to carry out the principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking.

540 In these circumstances incompatibility with Article 85 is not simply due to the fact that the principal forbids such an auxiliary to trade without his consent in products which might compete with his own products.

541 The position is different if the agreements entered into between the principal and his agents, whom the contracting parties call 'trade representatives', confer upon these agents or allow them to perform duties which from an economic point of view are approximately the same as those carried out by an independent dealer, because they provide for the said agents accepting the financial risks of the sales or of the performance of contracts entered into with third parties.

542 For in such cases the agents cannot be regarded as auxiliary organs forming an integral part of the principal's undertaking, so that a clause prohibiting

competition which they entered into may be an agreement between undertakings which is prohibited under Article 85.

543 The Commission submits that in this case the assumption that the agents were merely auxiliaries, forming an integral part of the undertaking cannot be made good.

544 In fact it is not disputed that the agents in question are large business houses, which at the same time as they distribute sugar for the account of the applicant, WZV and others, undertake a very considerable amount of business for their own account on the sugar market, in particular in the field of exports to third countries or of supplies for denaturing.

545 Thus these representatives are authorized to act as independent dealers in those transactions where there is no risk of competition in the common market but they are, on the other hand, effectively fettered by their trade representatives contracts in those transactions where such competition may be generated at the commercial level.

546 That these commercial undertakings sometimes formed an integral part of the applicant undertaking and sometimes acted as independent traders, is moreover confirmed by the applicant's own observation (reply page 44) that the integration of representatives in its sales organization 'did not rule out the possibility that agents may also compete with independent dealers, in particular when they sell for their own account', and that 'when they do so they do not act as members of the applicant's sales organization'.

547 In fact the creation of such an ambivalent relationship, which in respect of the same commodity only gives the trader the opportunity of continuing to operate independently to the extent to which it is in the interest of his supplier for him to do so, cannot escape the prohibitions of Article 85 no matter how such a relationship is regarded under national law.

548 When Article 85 (1) not only prohibits agreements, decisions or practices having regard to their object but also to their actual effects in the field of competition, it implies that these effects must be considered in the context in which they take place, that is to say in their surrounding economic and legal

circumstances within which they may, together with other factors, have a cumulative effect on competition.

549 In order to determine whether an agreement is caught by Article 85 (1) it cannot therefore be severed from this context and, in particular, the existence of similar contracts may be taken into consideration to the extent to which these kinds of contracts are in general likely to restrict free trade.

550 When the applicant adopted the policy only to sell the sugar it produces for human consumption in a particular sector of the common market through undertakings such as those appearing in this case, which had entered into trade representatives contracts granting them the exclusive right to sell in a specific territory in consideration of the obligation not to sell in this territory any other domestic or foreign sugar for consumption, it in fact restricted competition, particularly in the field of prices.

551 By setting up this marketing network which moreover overlapped in some places that of other producers, to whom the prohibition on sales by the representative of sugar coming from other sources did not apply, the applicant has in fact, so far as the sugar which it produced in accordance with the quota it was awarded by the common organization of the market in sugar is concerned, restricted free trade.

552 By doing so it made the interpenetration of markets much more difficult.

553 In this connexion its objection that this system under which the marketing is carried out exclusively by representatives had been adopted ever since 1948 and cannot therefore be regarded as being designed to maintain a partitioning of the markets, which were not made free markets until 1968, is irrelevant, since a legal instrument adopted under a national system governed by a large number or regulations which were in force before 1968 is perfectly adapted to maintain the framework of the sugar markets.

554 Therefore this submission must be rejected.

555 So far as the fine is concerned this applicant reaffirms that the infringement of Article 85 cannot justify the imposition of a fine, since the Commission's

communication of 1962 misled it by giving the impression that the trade representatives contracts were in any case compatible with the provisions of this Article.

556 Although the applicant must have known that the organization of its marketing network on the basis of agency agreements entered into by it with commercial undertakings which were not simply ordinary auxiliaries was likely to restrict competition, the possibility that the wording of the said communication could induce the belief that such a practice was accepted as being compatible with the Treaty cannot nevertheless be ruled out.

557 Therefore this infringement cannot be taken into consideration for the purpose of fixing the amount of the fine.

Chapter 9

The complaint of a concerted action in connexion with the invitations to tender for refunds on exports to third countries

558 Article 1 (3) of the contested decision blames RT, Say, Béghin, Générale sucrière et Sucres et Denrées — as well as Lebaudy-SUC and Sucre-Union which have not lodged any application with the Court — for having 'committed in 1970 infringements of Article 85 (1) by engaging in concerted actions, at the time of the invitations to tender for refunds on exports to third countries, in connexion with the amount of the refunds for which applications were made and also the quantities which were offered'.

559 The Commission's main submission is that a system of invitations to tender must be regarded as an ideal way of generating competition and that competition within the common market is impeded if the tenders submitted by the participants at an invitation to tender are the result of prior knowledge of the tenders of the other participants and of concerted action between them.

Section 1: Formal submission based on infringement of Article 190 of the Treaty

560 Sucres et Denrées regards as inadequate the statement of the reasons given by the Commission in support of its assertion that 'although these invitations to

tender deal with the export of sugar to third countries, account must be taken of the fact that they permit the export of sugar produced within the Community'.

561 Further, Générale sucrière and Sucres et Denrées consider that the statement that 'this concerted action has also supplemented the other measures taken by the persons concerned to achieve protection of certain national markets' lacks precision.

562 The decision (page 30, the first paragraph of Section II) includes a general outline of the practices for which it blames the undertakings concerned. This outline also mentions the practices alleged in this complaint and states that it was the general aim of these undertakings 'to ensure the protection of their respective markets'.

563 The decision (page 42, third paragraph under Letter F) goes on to state 'that according to the results of the invitations to tender some producers rather than others would have to sell surplus quantities in the other Member States of the Community' and 'that the concerted action was likely to bring about a change in the quantities marketed within the Community by the principal producers in France and Belgium'.

564 All these factors show that in the Commission's view, on the one hand, all the measures to which exception is taken were designed to achieve the common purpose of protecting the respective markets of the producers concerned and, on the other hand, the concerted action relating to the invitations to tender in question affected trade — and consequently competition — within the common market.

565 As the statement of the reasons upon which the decision was based is adequate this submission is unfounded.

Section 2: Substantive submissions

I — Infringement of Article 85 of the Treaty

566 The applicants take the view that the Commission has infringed Article 85 of the Treaty either because it based its decision on statements of facts which are

incorrect or, in particular, because it wrongly thought that the applicants' conduct might affect trade between Member States and that its object and effect was to impede competition not only in the case of exports to third countries but also within the common market.

1. The truth of the facts alleged

567 A — A memorandum drawn up by employees of Export for Baron Kronacker, the Chairman of this company, and recording a telephone conversation with Mr Maisin (of RT) of 17 February 1970 (Annex I 78 to the statements of defence) states:

'Mr Maisin telephoned us because we asked him last week to supply us with raw sugar for the purpose of the invitation to tender for refunds on the export of raw sugar on 18 February.

He confirmed that on 16 February he was in Paris for a meeting of refiners at which Tate & Lyle were represented.

During this meeting the amounts of the refunds for which tenders will be submitted was the subject of an agreement. Tate will be the principal ultimate purchaser of these lots.

Raffinerie Tirlemontoise plans to export about 9 000 metric tons of raw sugar which will be delivered to Tate. RT suggests that Export acts in this operation as broker. If Export does so it should abide by the common policy laid down for invitations to tender.

When invited to clarify this last point Mr Maisin admits that this commitment also covers invitations to tender for the export of white sugar...

During the exchange of views which followed we asked Mr Maisin how this concerted action worked in practice. We learnt that:

— the participators were Say, Béghin, Lebaudy, Commerciale Sucrière (Bouchon-St-Louis) [an expression referring to Générale sucrière], Sucre-Union, Raffinerie tirlemontoise and Sucres et Denrées.

It must be noted that Sucres et Denrées attends the meetings. Because it is so far away Raffinerie tirlemontoise rarely attends but keeps in touch by telephone... These meetings are held on Tuesday evenings at about 17.00 hrs. The discussions at these meetings are about

(1) the general level of refunds

(2) the amount for which each of the members will tender, any necessary reconciliation of the tenders taking place during multilateral discussions.

Conclusion

Raffinerie tirlemontoise proposes that we should act as brokers in its intended (or agreed) sale of 9 000 metric tons to Tate & Lyle.

As consideration it requests us to give up our freedom to attend the invitations to tender for exports of raw as well as white sugar.

It is implied that Raffinerie tirlemontoise refuses to offer us raw sugar which we are free to sell wherever we like'.

568 Another of Export's internal memoranda (Annex II 17 to the statement of defence in Case 47/73) shows that this firm's Managing Board on 17 February took the following decisions, 'after considering the proposal (Mr Maisin of RT] on the question of Export sharing in the profits arising out of the sale of Tirlemont raw sugar, [proposal] subject to communication by Export of its tenders in answer to the EEC invitations to tender for white sugar':

'A — We agree ... not to tender for a refund on raw sugar at the standing EEC invitations to tender which will take place once a week on and after Wednesday 18 February, so that such applications for refunds do not compete with the applications of Franco-Belgian refiners and in particular of Raffinerie tirlemontoise. (It must be noted that this was a purely formal gesture, because, unless Export's supplies of raw sugar were guaranteed by Tirlemont, the only possible Belgian supplier, it could not reasonably be expected to tender at the invitation to tender for raw sugar: the risk being that if it was a successful tenderer it would be unable in practice to cover its position).

B — .....

C — So far as the tenders for refunds at the invitation to tender for white sugar are concerned the basic ideas of a general proposal made by Export to Raffinerie tirlemontoise are as follows. They were communicated ... by Mr Kronacker to Mr Rolin and then to Mr Maisin.

(1) .....

(2) Export wishes to attend the meeting in Paris on Tuesday evenings and even to represent Tirlemont (since the latter cannot attend) when decisions will be taken as to the refunds for which application is to be made at the invitation to tender to be held on the following day, Wednesday morning. These meetings ... are attended by Franco-Belgian refiners, Sucre-Union [Sucres et Denrées] and Bauche.

(3) Export will notify the amounts in respect of which it will attend the invitation to tender for white sugar for itself and for the account of third parties (principals) and indicate the level of its tenders: not their amount but whether they are higher or lower than those decided upon at the meeting in Paris or by RT ...

(4) .....

(5) Concurrently with the meetings in Paris relating to the concerted action at which the French discuss their applications for refunds Mr Kronacker asks that a small joint RT — Export committee be set up to determine the position in Belgium

.....

569 Baron Kronacker states in an internal memorandum 'on the question of RT's negotiations on 26 March 1970' (Annex II 18 to the statement of defence in Case 47/73)

'It is my wish that we keep in step with Tirlemont. If we do so we sacrifice our principals, we agree to reduce the amounts in respect of which we attend the invitation to tender for Export and, although we have no say in the matter, we agree to adopt the prices of the Paris consortium. This of necessity implies that Tirlemont only takes part in the invitations to tender through us. This should also imply that we attend the Monday meetings in Paris ...'

570 Export states in an internal memorandum headed 'Observations on the oral answer by Mr Rolin on 20 May to Baron Kronacker's written proposal of 20 May relating to relations between Export and RT for the 1970/71 marketing year' (Annex I 131 to the statement of defence)'. In addition Mr Rolin of RT still restricts our freedom of action and our opportunities for applying for refunds.

Such applications according to him should be made after their amount and level have been coordinated with Mr Bernard, Chairman and Managing Director of Say within the framework of the concerted action agreed in Paris, (Say, Béghin, Varsano [de Sucres et Denrées], Sucre-Union etc ...)';

571 The minutes of a meeting held on 17 July 1970 by RT's Board of Directors (Annex II 19 to the statement of defence in case 47/73 state: 'For next year we would like to try to avoid cut price refunds. For this purpose the managing director has submitted a preliminary draft of a plan for pooling exports.

Moreover one advantage of this plan is that it will also reduce the tendency in France to apply cut price internal prices. Finally it would enable large reductions of transport costs to be effected'.

572 RT states in a telex message to Export of 23 July 1970 (Annex I 77 to the statements of defence)

1. I have not laid the blame on Export for any break-down in the negotiations for forming a Franco-Belgian pool. I have explained the efforts which we have made and the reasons for them which I will summarize in a few words:

(A) Elimination of competition for refunds so that each producer is at least guaranteed the intervention price.

(B) Consequently ending of the struggle to sell amounts on the domestic market where the price is more certain rather than having to export (this applies primarily to France).

.....

2. To come to the crux of the problem I want to sell through Export but I would like to arrange for applications for refunds to be harmonized. Having regard to the importance of our French interests it seems to me to be necessary to prevent Tirlemont from appearing to support an agreement between the French when it works at rue Veneau and to undermine the same agreement when it supplies Export. The observations which I made on your observations of 20 May are based on this wish to find a formula for the concerted action in connexion with applications for refunds. As soon as a solution has been found we can complete the terms of the option which I mentioned to you'.

.....

573 Export in a telex message to RT of 19 August 1970 (Annex I 81 to the statements of defence), having recorded its acceptance of the 'plan' proposed by RT for arranging deliveries to the Netherlands and suggested that a 'similar plan' be worked out for deliveries to Italy, deals with the question of refunds as follows:

'Taking into account our participation in the points above, and in principle, whatever formula is adopted in Paris, we advocate that Export and RT actually work together in third countries and this cooperation must normally result in a concerted action on the level of refunds, account being taken of the manufacturers' policy'.

574 B — It has already been stated that the evidential value of these documents, to the extent to which they emanate from Export or are addressed to this firm by RT, cannot be called in question and that these documents may also be used as evidence against applicants other than RT.

575 These documents, read together, prove that the applicants in fact implemented a concerted action relating to the quantities to be offered and the amounts to be applied for at invitations to tender for refunds on exports to third countries.

576 Moreover, although some of the applicants assert that the undertakings concerned confined their joint activities to an exchange of information, none of them however seriously calls in question the facts alleged, and Générale sucrière and Sucres et Denrées even expressly acknowledge the existence of a concerted action adding however that the applicants did not confer together once and for all but on the occasion of each invitation to tender.

577 These facts and considerations show that the applicants as well as Lebaudy-SUC and Sucre-Union have knowingly substituted for the risks of competition practical cooperation between them leading in the end to conditions of competition which did not correspond to normal market conditions. In this case those market conditions were the results which the invitations to tender in question could have produced, if each of the undertakings concerned had determined independently the quantities to be offered and the amounts for which application was to be made.

578 Therefore the only possible finding is that the applicants and the other undertakings concerned in fact engaged in the concerted practices disclosed in the decision.

2. The question whether these practices fulfil the conditions laid down in Article 85 of the Treaty

A — The question whether these practices might affect trade between Member States and whether their object or effect was to impede competition within the common market

579 (a) The telex message of 23 July 1970 quoted by RT stating *inter alia* that 'elimination of competition for refunds' could and was intended to 'result' in

'ending the struggle to sell amounts on the domestic market' proves that the undertakings concerned have themselves established a link between the practices in question, on the one hand, and the competitive situation of these undertakings on the common market, on the other hand.

580 Further, as the undertakings concerned had their place of business in France and Belgium, which are countries having a large sugar surplus, there is no doubt that, had it not been for the concerted action at issue, some at least of these undertakings would have been awarded smaller quantities than they were in fact awarded and would thus have been induced to sell more sugar in the other Member States, and these sales could not only modify the pattern of intra-Community trade but also intensify competition within the common market, the very result which the undertakings wished to prevent as is shown by the telex message which has been quoted.

581 (b) The applicants submit that Community regulations relating to the invitations to tender for refunds on exports to third countries gave the Commission such wide powers that it could prevent the conduct complained of from producing the effects referred to in Article 85.

582 It is true that these regulations gave the Commission considerable powers and in particular the power to decide how frequently the invitations to tender should be held, to determine the maximum amount of sugar to be exported at each invitation to tender and to discontinue a specific invitation to tender.

583 However these powers were limited by the fact that each tenderer whose offer did not exceed the maximum amount of the refund could require as a rule that the award be made to him and that he be issued with an export licence.

584 So far as the possibility of discontinuing an invitation to tender is concerned it is appropriate to point out that such a drastic step would have stopped the flow of exports if it had been taken regularly.

585 Furthermore the applicants fail to appreciate that, in order to be able to uncover a concerted action such as the one in question, the Commission had in the first place to examine and compare the results of a relatively large number of invitations to tender so that, from this point of view as well, it was unable to put a stop to every concerted action.

586 The applicants' argument cannot therefore be accepted.

587 (c) RT submits that with reference to Article 184 of the Treaty, the Community regulations which established the system of invitations to tender are inapplicable, since they are contrary to one of the fundamental objectives of Regulation No 1009/67, namely to ensure that when sugar producers sell they will at least obtain the intervention price.

588 In fact the effect of this system was to force producers to be satisfied with a return less than the said price.

589 Although under Article 9 of Regulation No 1009/67 the intervention agencies of Member States shall buy in the sugar offered to them at the intervention price, there is nothing in this regulation to justify the assertion that this price is also 'guaranteed' to producers for sugar which they supply to other producers.

590 So far in particular as exports to third countries are concerned Article 17 (1) of the regulation provides that the difference between the quotations and prices on the world market and prices within the Community 'may' be covered by an export refund 'to the extent necessary to enable the products to be exported'.

591 This wording shows that Community institutions were not required to introduce a system of export refunds and still less to fix the amount thereof in such a way that if sugar producers export they obtain the intervention price.

592 RT's submission cannot therefore be upheld.

593 (d) RT takes the view that Article 85 does not apply to the practices complained of, since the latter did not relate to the market for a product but the 'market' for export licences.

594 This argument is irrelevant, since the only question which has to be answered is whether the said practices, whatever their immediate purpose may have

been, aimed at and led to competition being impeded within the common market and this question must be answered in the affirmative.

595 These considerations lead to the conclusion that the object and effect of the disputed practices were, *inter alia,* to impede competition within the common market and, for this reason, might affect trade between Member States.

B — The question whether the concerted practices had an appreciable effect on intra-Community trade and competition within the common market

596 In reply to the questions put by the Court the applicants calculated that the sugar which they exported in 1970 as a result of the invitations to tender amounted altogether to 89 821 metric tons of raw sugar and 248 833 metric tons of white sugar, whereas the Commission estimated these amounts to be 60 627 and 207 239 metric tons respectively and went on to say that Sucre-Union and Lebaudy-SUC had exported 28 332 and 17 125 metric tons of white sugar respectively.

597 According to the Commission's statistics (tables III and IV of Annex I to the rejoinder in Case 47/73), to the extent to which they are based on the data supplied by France and Belgium, the following amounts were exported by these two Member States within the common market:

	1969/70		1970/71	
	Raw sugar	White sugar	Raw sugar	White sugar
France	1 800	298 600	74 700	524 300
Belgium	13 900	87 100	21 100	91 100
Total	15 700	385 700	95 800	615 400

598 All this statistical information shows that the undertakings concerned were able to export large quantities to third countries as a result of the concerted action to which exception is taken, not only in absolute terms, but also in comparison with French and Belgian exports within the common market.

599 The only inference to draw from this is that, had it not been for the concerted action, some of the undertakings concerned would have been forced to sell more sugar within the common market and that consequently the pattern of intra-Community trade and the degree of competition within the common market would have been modified.

600 Furthermore the undertakings concerned were from the economic point of view very important, as the French producers affected by this complaint accounted at the time for 75 % of French production, which increased from 2 620 000 metric tons in 1968/69 to 3 230 000 metric tons in 1971/72, whereas RT accounted for 65 % of Belgian production which went up from 530 000 metric tons in 1968/69 to 770 000 metric tons in 1971/72.

601 In these circumstances it is appropriate to find that the concerted practices in question might affect trade between Member States and impede competition within the common market to an appreciable extent.

602 All these considerations lead to the conclusion that the submission based on infringement of Article 85 of the Treaty must be rejected.

II — Infringement of Regulation No 26

603 If the Court finds that the disputed practices 'helps to bring about the protection, *inter alia,* of the Italian market' Générale sucrière and Say submit that they ought to benefit from the exceptions specified in Article 2 of Regulation No 26.

604 This submission is without purpose, since the Court does not take the view that the immediate result of these practices was the protection of the Italian market.

605 RT's submission based on the fact that the Commission was wrong not to apply the second exception specified in Article 2 of Regulation No 26 to the applicants' case, which is also put forward in connexion with the second complaint, must be rejected for the reasons given when the complaint was examined.

Chapter 10

The requirement that the applicants put an end immediately to the infringements found to have been committed (Article 2 of the decision). The fines (Article 3)

I — Article 2 of the decision

606 Article 2 of the decision requires the undertakings referred to in this decision 'to put an end immediately to the infringements found to have been committed' by Article 1 of the decision.

607 Article 2 must be annulled to the extent to which it refers to infringements which have not been upheld in whole or in part by the Court.

II — The fines imposed by Article 3 of the decision

608 Article 3 of the decision must be annulled to the extent to which it imposes fines on Volano, Emiliana, SADAM, SZAG, Cavarzere, Industria degli Zuccheri and Eridania (Cases 45/73, 46/73, 50/73, 54/73, 111/73, 113/73 and 114/73), since the Court has not found that these applicants committed any infringement.

609 With regard to the fines imposed on the applicants SU, Générale sucrière, CSM, Say, Béghin, RT, Sucres et Denrées, SZV and Pfeifer & Langen (Cases 40 to 44/73, 47/73, 48/73, 55/73 and 56/73), against which the Court has only upheld part of the infringements alleged by the Commission, it must first of all be noted that the Commission has stated that it did not punish the infringements set out in Article 1 (2) and (3) of the decision directly with a fine but took these infringements and the infringements set out in paragraph 1 of the said article into account when fixing the amount of the fines which it imposed.

610 This method leads to the conclusion that in appropriate cases the fines must be considered as having also been imposed by reason of the infringements found in Article 1 (2) and (3) of the decision.

611 It appears from the considerations set out in the preceding chapters that all the infringements upheld by the Court have been committed intentionally or

at least negligently, so that the undertakings concerned are liable to pay a fine as provided for in Article 15 (2) of Regulation No 17 in respect thereof except in the case of the infringement referred to in Chapter 8.

612 In fixing the amount of the fines under Article 15 (2) regard shall be had both to the gravity and to the duration of the infringement so that the Court has to take particular account of the legislative background and economic context of the conduct to which exception is taken, the nature of the restrictions of competition as well as the number and size of the undertakings concerned.

613 So far more particularly as the legislative background and economic context of the conduct complained of is concerned, no decision as to the amount of the fines can be made without taking account of the fact that the sugar market is not organized on the basis of the Community treated as a geographical unit but as a system designed to maintain any partitioning of national markets, in particular by means of national quotas within the limits of which manufacturers producing sugar and at the same time farmers growing beet are in general protected.

614 The Commission has failed to take sufficient account of the extent to which this system was capable of affecting conditions on the sugar market.

615 Indeed the fact that, on the one hand, the sugar produced in the Community which can be sold on the domestic market was limited to a fixed amount and, on the other hand, that the principal producers know the amounts to which the production of each of their competitors is restricted, meant that the value of the market in question was unusually easy to calculate and the market itself abnormally stable.

616 In these circumstances each producer was of necessity inclined to seek a profit not by increasing his production and, therefore, his share of the market, but by selling his production at the highest possible prices.

617 However, there were limits to the higher prices which producers could hope to get caused by the surplus production of sugar in the Community and in some Member States by maximum consumer prices which were fixed or at least strongly recommended by the national authorities.

618 It was therefore in the interest of producers not to disturb existing price levels in the various Member States and they must have known that by intervening in any way on their competitors' traditional markets they ran the risk of bringing down the price level on these markets and therefore of reducing the profit on their own production.

619 The common organization of the market in sugar, which moreover is tending to emerge from its initial transitional phase and for the reasons which have just been given only left a residual field available for competition, has therefore helped to ensure that sugar producers continue to behave in an uncompetitive manner.

620 Although this situation cannot lead to acceptance of practices which are likely to make still worse what are, from the point of view of the Treaty, the disadvantages of such a system, it nevertheless means that the behaviour of the parties concerned cannot be regarded with the usual severity.

621 Furthermore the damage which the users and consumers suffered as a result of the conduct to which exception is taken was limited, because the Commission itself has not blamed the parties concerned for any concerted or improper increase in the prices applied and because, even though the restrictions on the freedom to choose suppliers caused by the partitioning of the market deserve censure, they are not so oppressive in the case of a product like sugar which is mainly homogenous.

622 Finally in the case of each of the undertakings in question the importance of the infringement or infringements upheld by the Court must be compared with the importance of all the infringements for which the Commission has blamed the applicants.

623 In addition, in so far as an infringement upheld by the Court has been committed by several applicants, it is appropriate to consider how seriously each of them participated in it.

624 Having regard to these factors the fines imposed on SU, Générale sucrière, CSM, Say, Béghin, RT, Sucres et Denrées, SZV and Pfeifer & Langen (Cases 40 to 44/73, 47/73, 48/73, 55/73 and 56/73) must be reduced as set out in the operative part of this judgment.

Costs

625 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading, whereas, where there are several unsuccessful parties the Court shall decide how the costs are to be shared.

626 Under paragraph 3 of this Article, where each party succeeds on some and fails on other heads or where the circumstances are exceptional, the Court may order that the parties bear their own costs in whole or in part.

(a) The costs in the main action

627 In these proceedings, as the Commission was unsuccessful in Cases 45/73, 46/73, 50/73, 54/73, 111/73, 113/73 and 114/73 (Volano, Emiliana, SADAM, SZAG, Cavarzere, Industria degli Zuccheri and Eridania) it must be ordered to pay the whole of the costs in these cases account being taken of the fact that these applicants have either expressly or by implication asked for them in their pleadings.

628 As the applicants and the Commission have succeeded on some and failed on other heads in Cases 40 to 44/73, 47/73, 48/73, 55/73 and 56/73 (SU, Générale sucrière, CSM, Say, Béghin, RT, Sucres et Denrées, SZV and Pfeifer & Langen), in these cases the parties shall bear their own costs.

(b) The costs of the intervention

629 The intervener's intervention in Cases 41/73, 43 to 48/73, 50/73, 111/73, 113/73 and 114/73 (Générale sucrière, Say, Béghin, Volano, Emiliana, RT, Sucres et Denrées, SADAM, Cavarzere, Industria degli Zuccheri and Eridania) has been unsuccessful, as it was only intended to support the conclusions of the Commission in connexion with the complaint relating to the protection of the Italian market (subparagraph 1 of Article 1 (1) of the decision) which the Court has not upheld.

630 So far as the costs of the intervention are concerned it nevertheless appears fair and reasonable to order the Commission and the intervener to bear their own costs, since, on the one hand, the intervener is an association having as its object the protection of consumers' interests and, on the other hand,

neither the costs incurred by the applicants nor by the Commission in connexion with the intervention were very large.

(c) The costs incurred in connexion with the examination of the witnesses

631 The witnesses were examined by the Court in Cases 40/73 (SU) and 42/73 (CSM) and also in connexion with the complaint that economic pressure was brought to bear on Netherlands importers (subparagraph 2 of Article 1 (2) of the decision).

632 Since the Commission failed on this head it must be ordered to pay the costs of examining these witnesses.

On those grounds,

THE COURT

hereby:

(1) Annuls the following parts of Article 1 of Commission Decision No COM(72) 1600 of 2 January 1973:

- **subparagraphs 1 and 4 of Article 1 (1);**
- **subparagraph 2 of Article 1 (1) to the extent to which the said subparagraph finds that Pfeifer & Langen, SU and CSM have engaged in a concerted practice;**
- **subparagraph 2 of Article 1 (2);**
- **subparagraph 3 of Article 1 (2) to the extent to which it finds that SZV committed an infringement by preventing its agents from reselling sugar from other sources;**

(2) Annuls Article 2 of the decision to the extent to which it refers to infringements which it has not upheld in whole or in part;

(3) (a) Annuls Article 3 of the decision to the extent to which it imposes fines on Emiliana, Volano, SADAM, Süddeutsche Zucker AG, Cavarzere, Industria degli Zuccheri and Eridania (Cases 45/73, 46/73, 50/73, 54/73, 111/73, 113/73 and 114/73).

(b) Reduces the fines imposed by Article 3 on the other applicants.

— in the case of Suiker Unie (Case 40/73) to 200 000 u.a. (FL 724 000);

— in the case of Générale Sucrière (Case 41/73) to 80 000 u.a. (FF 444 335·20);

— in the case of Centrale Suiker Maatschappij (Case 42/73) to 150 000 u.a. (FL 543 000);

— in the case of Say (Case 43/73) to 80 000 u.a. (FF 444 335·20);

— in the case of Béghin (Case 44/73) to 100 000 u.a. (FF 555 419);

— in the case of Raffinerie tirlemontoise (Case 47/73) to 600 000 u.a. (BFrs. 30 000 000);

— in the case of Sucres et Denrées (Case 48/73) to 100 000 u.a. (FF 555 419);

— in the case of Südzucker-Verkauf GmbH (Case 55/73) to 40 000 u.a. (DM 146 400);

— in the case of Pfeifer & Langen (Case 56/73) to 240 000 u.a. (DM 878 400)

(4) Rejects the remainder of the applicants' conclusions.

(5) (a) In Cases 45/73, 46/73, 50/73, 54/73, 111/73, 113/73 and 114/73 (Volano, Emiliana, SADAM, Süddeutsche Zucker AG, Cavarzere, Industria degli Zuccheri and Eridania) orders the Commission to pay the whole of the costs of the main proceedings.

(b) In Cases 40 to 44/73, 47/73, 48/73, 55/73 and 56/73 (Suiker Unie, Générale sucrière, Centrale Suiker Maatschappij, Béghin, Say, Raffinerie tirlemontoise, Sucres et Denrées, Südzucker-Verkauf GmbH and Pfeifer & Langen) orders each of the parties to bear the costs which it incurred in the main proceedings.

(c) So far as the costs of intervention are concerned orders the applicants concerned, the Commission and the intervener to bear their own costs.

(d) Orders the Commission to bear the costs of examining the witnesses.

Lecourt Monaco Kutscher Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 16 December 1975.

A. Van Houtte
Registrar

R. Lecourt
President

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ABBREVIATIONS

General expressions

Ccz	= Cassa conguaglio zucchero (The sugar equalization fund, an Italian organization)
CIP	= Comitato interministeriale dei prezzi (The inter-departmental committee on prices)
Communication	= the notification of objections of 24 July 1972 sent in accordance with Article 19 (1) Regulation No 17 to the undertakings to which the contested decision was sent.

Names of the undertakings referred to in the contested decision [1]

Béghin	= Société F. Béghin (44/73)
Cavarzere	= Cavarzere Produzioni Industriali (111/73)
CSM	= Centrale Suiker Maatschappij (42/73)
Dudok de Wit	= Handelsmaatschappij Dudok de Wit en Co. (a Netherlands importer)
Emiliana	= Società Agricola Industriale Emiliana (46/73)
Eridania	= 'Eridania' Zuccherifici Nazionali (114/73)
Export	= Société pour l'exportation de sucre SA, Antwerp
Franken	= Zuckerfabrik (sugar factory) Franken, Ochsenfurt (Germany)*
Générale sucrière	= Société anonyme Générale sucrière (41/73)
Hottlet	= SA Hottlet & Cie., Edegem (Belgium) (exporter)
Industria degli zuccheri	= Società Italiana per l'Industria degli Zuccheri (113/73)
Internatio	= NV Internatio Produkten (Netherlands importer)
Jacobson	= Leonard Jacobson en Zonen (Netherlands importer)
Lebaudy-Sommier	= Société Nouvelle de Raffinerie Lebaudy-Sommier SA Neuilly-sur-Seine*
Lebaudy-SUC	= Groupement d'intérêt Economique Lebaudy-SUC, Paris*
NZV	= Norddeutsche Zucker GmbH, Uelzen
Pfeifer & Langen	= Firma Pfeifer & Langen (56/73)
Romana	= Romana Zucchero S.p.A., Genoa*

1 — When undertakings are applicants the number of the case is shown in brackets. The undertakings which received a copy of the decision but did not lodge an application with the Court, because they were not fined, are marked with an asterisk.

RT	= Raffinerie tirlemontoise (47/73)
SADAM	= Società SADAM (50/73)
Say	= Société des Raffineries et Sucreries Say (43/73)
Sermide	= Zuccherificio di Sermide S.p.A., Genoa*
Société générale de sucreries	= Società Generale di Zuccherifici (Société Générale de Sucreries), Brussels*
SU	= Coöperatieve Vereniging Suiker Unie UA (40/73)
Sucres et Denrées	= Société Anonyme Sucres et Denrées (48/73)
Sucre-Union	= Sucre-Union SA, Paris (Marketing organization)*
SZAG	= Süddeutsche Zucker-Aktiengesellschaft (54/73)
SZV	= Südzucker-Verkauf GmbH (55/73)
Unione	= Unione Nazionale Consumatori (intervener)
Volano	= Zuccherificio del Volano S.p.A. (45/73)
WZV	= Westdeutsche Zuckervertriebsgesellschaft mbH & Co. KG. Cologne (marketing organization)*

Community texts quoted

Regulation No 1	= EEC Council: Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, 1958 p. 385; OJ (English Special Edition) 1952–1958 p. 59)
Regulation No 17	= EEC Council Regulation No 17 of 6 February 1962; First Regulation implementing Articles 85 and 86 of the Treaty (OJ, 1962, p. 204; OJ (English Special Edition) 1959–1962 p. 87)
Regulation No 26	= EEC Council: Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, 1962 p. 933; OJ (English Special Edition) 1959–1962 p. 129)
Regulation No 99/63	= Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (OJ, 1963 p. 2268; OJ (English Special Edition) 1963–1964 p. 47)
Regulation No 1009/67	= Regulation (EEC) No 1009/67/EEC of the Council of 18 December 1967 on the common organization of the markets in sugar (OJ, 1967, p. 308/1; OJ (English Special Edition) 1967 p. 304)
Regulation No 430/68	= Regulation (EEC) No 430/68 of the Council fixing prices in the sugar sector for the sugar marketing year 1968/69 (OJ, 1968 L 89 p. 2)
Regulation No 431/68	= Regulation (EEC) No 431/68 of the Council of 9 April 1968 determining the standard quality for raw sugar and fixing the Community frontier crossing point for calculating cif prices for sugar (OJ 1968 L 89 p. 3; OJ (English Special Edition) 1968 (I) p. 71)

Regulation No 432/68	=	Regulation (EEC) 432/68 of the Council of 9 April 1968 fixing for the sugar marketing year 1968/1969 the derived intervention prices, the minimum price of beet; the threshold price and the amount guaranteed as well as the production levy (OJ L 89 p. 4)
Regulation No 765/68	=	Regulation (EEC) No 765/68 of the Council of 18 June 1968 laying down general rules for the production refund on sugar used in the chemical industry (OJ, 1968 L 143, p. 1; OJ (English Special Edition) 1968 (I) p. 150)
Regulation No 766/68	=	Regulation (EEC) No 766/68 of the Council of 18 June 1968 laying down general rules for granting export refunds on sugar (OJ, 1968 L 143 p. 6; OJ (English Special Edition) 1968 (I) p. 155)
Regulation No 839/68	=	Regulation (EEC) No 839/68 of the Commission of 28 June 1968 on detailed rules concerning export refunds on sugar (OJ 1968 L 151, p. 4)
Regulation No 1965/69	=	Regulation (EEC) No 1965/69 of the Commission of 3 October 1969 on a standing invitation to tender to determine the export refund on white sugar (OJ, 1969 L 250 p. 24)
Regulation No 2049/69	=	Regulation (EEC) No 2049/69 of the Commission of 3 October 1969 laying down general rules on the denaturing of sugar for animal feed (OJ 1969 L 263 p. 1; OJ (English Special Edition) 1969 (II) p. 441)
Regulation No 224/70	=	Regulation (EEC) No 224/70 of the Commission of 5 February 1970 on a standing invitation to tender to determine the export refund on raw beet sugar (OJ, 1970, L 29 p. 27)
Regulation No 394/70	=	Regulation (EEC) No 394/70 of the Commission of 2 March 1970 on detailed rules for granting export refunds on sugar (OJ 1970 L 50 p. 1; OJ (English Special Edition) 1970 (I) p. 132)
Regulation No 100/72	=	Regulation (EEC) No 100/72 of the Commission of 14 January 1972 laying down detailed rules on the denaturing of sugar for animal feed (OJ 1972 L 12, p. 15; OJ (English Special Edition) 1972 (I) p. 21)
Communication of the Commission of 24 December 1962	=	Communication of the Commission of 24 December 1962 relating to exclusive representation agreements entered into with trade representatives (OJ 1962 No 139 p. 2921)
Communication of the Commission of 29 July 1968	=	Communication of the Commission of 29 July 1968 concerning agreements, decisions and concerted practices in the field of cooperation between undertakings (OJ, 1968 C 75, p. 3)
Communication of the Commission of 27 May 1970	=	Communication of the Commission of 27 May 1970 concerning minor agreements which are not covered by Article 85 of the Treaty (OJ, 1970 C 64, p. 1)