

ORDER OF THE COURT (Fifth Chamber)
10 July 2001 *

In Case C-497/99 P,

Irish Sugar plc, established in Carlow (Ireland), represented by A. Böhlke,
Rechtsanwalt, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European
Communities (Third Chamber) of 7 October 1999 in Case T-228/97 *Irish Sugar v*
Commission [1999] ECR II-2969, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by K. Wiedner, acting as
Agent, assisted by C. Quigley, Barrister, with an address for service in
Luxembourg,

defendant at first instance,

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, P. Jann, L. Sevón, S. von Bahr (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General,

makes the following

Order

- 1 By application lodged at the Registry of the Court of Justice on 21 December 1999, Irish Sugar plc ('Irish Sugar') brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 7 October 1999 in Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969 ('the contested judgment'), in which the latter dismissed its action for the annulment of Commission Decision 97/624/EC of 14 May 1997 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.621, 35.059/F-3 — Irish Sugar plc) (OJ 1997 L 258, p. 1; 'the contested decision').
- 2 As is shown by the facts set out in the contested judgment, the Commission held in the contested decision that Irish Sugar, the sole processor of sugar beet in Ireland and the principal supplier of sugar in that Member State, had infringed Article 86 of the EC Treaty (now Article 82 EC). By the contested decision, the Commission determined the existence of infringements of Article 86 of the

Treaty, during the period from 1985 to 1995, consisting in seven individual abuses by Irish Sugar and/or, for the period before February 1990, its distributor, Sugar Distributors Limited ('SDL') on the market in granulated sugar intended for retail and for industry in Ireland. The Commission imposed a fine of ECU 8 800 000 on Irish Sugar for those abuses.

- 3 On 4 August 1997, Irish Sugar brought an action before the Court of First Instance, primarily seeking the annulment of the contested decision and an order for costs against the Commission.
- 4 The Court of First Instance found that there was insufficient evidence in relation to one of the alleged abuses, namely the granting of selectively low prices to customers of a French importer between 1986 and 1988, and reduced the fine to EUR 7 883 326. The Court of First Instance dismissed the remainder of the action and ordered Irish Sugar to bear its own costs and to pay two thirds of the costs incurred by the Commission.
- 5 Irish Sugar has brought the present action, in which it claims, first, that the contested judgment should be annulled in so far as it dismisses its action and orders Irish Sugar to pay part of the costs of the case; second, that the contested decision with the content resulting from the contested judgment should be annulled; and, finally, that the Commission should be ordered to pay the costs of the proceedings before the Court of First Instance and of the present appeal.
- 6 In support of its appeal, Irish Sugar makes three pleas in law calling into question the assessment by the Court of First Instance in relation to the existence of a dominant position or of a collective dominant position occupied by itself and SDL.

- 7 The first plea alleges infringement of Article 86 of the Treaty and of the principle of legal certainty inasmuch as the Court of First Instance wrongly held that the operative part of the contested decision contained a formal finding of the existence of a dominant position. The second plea alleges infringement of the rights of the defence. The Court of First Instance infringed Community law by not recognising that the definition of the market finally adopted in the contested decision had not been notified in the statement of objections and that the rights of the defence had therefore been infringed. The third plea alleges, first, infringement of Article 86 of the Treaty inasmuch as the Court of First Instance wrongly held that Irish Sugar and SDL occupied a collective dominant position on the market, and, second, that insufficient reasons were stated for the contested judgment.
- 8 The Commission contends that the appeal should be dismissed as clearly inadmissible and/or clearly unfounded. It also seeks an order that Irish Sugar pay the costs of the present proceedings.
- 9 In support of its contentions, the Commission argues, in particular, that Irish Sugar does not demonstrate in what way the Court of First Instance committed an error of law in reaching the conclusions it did, and that Irish Sugar raises questions of fact already determined by the Court of First Instance.
- 10 Under Article 119 of its Rules of Procedure, where an appeal is clearly inadmissible or clearly unfounded, the Court may at any time dismiss it by reasoned order.

The first plea in law

- 11 Irish Sugar maintains that the Court of First Instance infringed Article 86 of the Treaty and the principle of legal certainty by holding, in paragraph 18 of the

contested judgment, that a formal finding of the existence of a dominant position and a collective dominant position was 'implied but clear' in the operative part of the contested decision. It claims that the Court of First Instance should have recognised, on the contrary, that the operative part of the contested decision did not contain such a finding, and was thus incomplete on an essential point.

- 12 In support of that plea, Irish Sugar argues, first, that the Court of First Instance could not regard the finding of the existence of a dominant position as being 'clear' in the operative part, since the contested decision was ambiguous on the question of the existence of an individual or collective dominant position. It considers that its analysis of the ambiguity of the decision on that subject is supported by paragraph 25 of the contested judgment. In that paragraph, the Court of First Instance had acknowledged that Irish Sugar had, rightly, challenged the interpretation which the Commission had given of its own decision on the question of an individual or collective dominant position. According to that interpretation, the Commission had formally found that Irish Sugar occupied a sole dominant position throughout the period in question and, in the alternative, that Irish Sugar and SDL occupied a joint dominant position prior to February 1990. Irish Sugar adds that the Court of First Instance was able to remove the ambiguity only by having recourse to a document separate from the contested decision, namely the statement of objections.
- 13 Secondly, Irish Sugar argues that the Court of First Instance could not regard that finding as being 'implied' in the operative part. It rejects the reasoning of the Court in coming to that conclusion, namely that, to infringe the provisions of Article 86 of the Treaty, an undertaking must be in a dominant position.
- 14 In that respect, it should be noted that, in accordance with the powers conferred upon it by Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), it is for the Court of First Instance to assess the legality of a Commission decision which is the subject-matter of an action

brought by a legal person on the basis of the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC). As the Commission has rightly observed, the mere fact that the interpretation of the decision made on that occasion by the Court of First Instance diverges from that defended by the Commission during the proceedings before the latter does not have the effect of invalidating such a decision.

- 15 It should also be noted that the operative part of a Commission decision must be read in the light of its reasoning (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraph 122). In this case, the Court of First Instance stated, in paragraph 17 of the contested judgment, that Irish Sugar did not deny that the grounds for the contested decision included a finding of a dominant position on its part and a joint dominant position with SDL. The Court adds that points 99 to 113 of the contested decision concluded, in point 113, with wording that is quite unequivocal in that respect.
- 16 In those circumstances, this Court finds that the Court of First Instance correctly interpreted Article 1 of the contested decision, in which the Commission concludes that Irish Sugar infringed Article 86 of the Treaty and states the nature of the abuse of a dominant position complained of, by holding that that provision implies that Irish Sugar was in a dominant position or a collective dominant position, in accordance with the reasoning of the contested decision.
- 17 The Court of First Instance was therefore right to hold, in paragraph 18 of the contested judgment, that to infringe Article 86 of the Treaty an undertaking must be in a dominant position. It was also right to hold, in the same paragraph, that the formal finding of the existence of a dominant position and a collective dominant position was implied but clear in the operative part of the contested decision, inasmuch as it was found that Article 86 was infringed.

- 18 It should be added that, contrary to what Irish Sugar claims, the analysis of the Court of First Instance, in paragraphs 16 to 18 of the contested judgment, makes no reference whatever to the statement of objections. The Court of First Instance did not therefore have recourse to a document separate from the contested decision in order to reach the conclusion formulated in paragraph 18 and to dismiss, in paragraph 19 of the contested judgment, the argument of Irish Sugar attempting to prove that the operative part of that decision was incomplete.
- 19 The first plea in law raised by Irish Sugar must therefore be dismissed as clearly unfounded.

The second plea in law

- 20 Irish Sugar argues that the Court of First Instance erred in law by holding, in paragraph 36 of the contested judgment, that the distinction made in the contested decision between the retail and industrial sugar markets did not alter the complaints made against Irish Sugar, and that no infringement of its defence rights can be found, whereas, in the statement of objections, the Commission referred to only one relevant market, namely that for sugar in general.
- 21 Irish Sugar argues that the definition of the market finally adopted modified the intrinsic nature of the infringements imputed to it and notified in the statement of objections. It considers that it was thus deprived of its right to submit observations on an essential point in the course of the administrative procedure. It adds that it invited the Court of First Instance to consider the various abuses allegedly committed in their respective context, namely on the retail and industrial sugar markets, which the Commission did not do in the contested decision.

- 22 In that respect, it should be noted that, in paragraph 35 of the contested judgment, the Court of First Instance rightly refers to the consistent case-law of the Court of Justice whereby the statement of objections must supply the undertaking with all the information necessary to enable it properly to defend itself before the Commission adopts a final decision (see, in particular, Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraph 42).
- 23 In paragraph 33 of the contested judgment, the Court of First Instance points out that, in this case, the definition of the market adopted in the contested decision was that proposed by Irish Sugar itself and that the Commission thus took account of the argument put forward by that undertaking during the administrative procedure.
- 24 The Court of First Instance rightly held, in paragraph 34 of the contested judgment, that the taking into account of an argument put forward by an undertaking during the administrative procedure, without it having been given the opportunity to express an opinion in that respect before the adoption of the final decision, cannot as such constitute an infringement of defence rights. Irish Sugar had had the opportunity to express its view on the definition of the product market used by the Commission in the statement of objections. Citing paragraph 438 of the judgment in *Suiker Unie*, the Court of First Instance correctly inferred that Irish Sugar might expect that its own explanations would lead the Commission to alter its opinion.
- 25 In those circumstances, it was for Irish Sugar to supply the Court of First Instance with evidence to demonstrate that the market definition adopted in the contested decision had altered the complaints made against it and prevented it from defending itself effectively.
- 26 In that latter respect, in paragraph 33 of the contested judgment, the Court of First Instance held that Irish Sugar had failed to show how its defence rights had

been affected, adding that it was not enough to allege that the nature of the objections has been altered as a result of the distinction drawn between the retail and the industrial sugar markets without submitting the least detail in that regard.

- 27 In its appeal, Irish Sugar once again contents itself with maintaining in the abstract that the alteration of the market definition adversely affected its defence rights. It does not explain how the Court of First Instance erred in law by holding that Irish Sugar had not adduced any precise evidence to show that the nature of the complaints made against it had been altered and that its defence rights had been affected.
- 28 Thus Irish Sugar does no more than repeat at the appeal stage arguments which were previously put forward before the Court of First Instance.
- 29 The requirements as to reasoning pursuant to Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice are not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the contested judgment, confines itself to reproducing the pleas in law and arguments previously submitted to the Court of First Instance. Such an appeal amounts in reality to nothing more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake (Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraph 35).
- 30 The second plea in law must therefore be dismissed as clearly inadmissible.

The third plea in law

- 31 Irish Sugar argues that the Court of First Instance infringed Article 86 of the Treaty by holding, incorrectly, that it occupied a collective dominant position on the market together with SDL. It also accuses the Court of First Instance of stating insufficient reasons for the contested judgment in that respect.
- 32 Irish Sugar begins by stating that, before February 1990, it was 100% State-owned, and that the Court of First Instance wrongly failed to take account of that in its analysis of the links between Irish Sugar and SDL.
- 33 Since Irish Sugar does not state in what way the Court of First Instance erred in law by not taking account of that fact in its analysis, that preliminary remark may be dismissed at the outset.
- 34 Irish Sugar sets out the remainder of its plea in three parts: first, contrary to what the Court of First Instance held, it was not present on the same market as SDL; second, the Court of First Instance did not apply the proper test for the purposes of determining the existence of a collective dominant position; third, the Court of First Instance did not state sufficient reasons for the contested judgment.

The first part of the plea, alleging an error of assessment

- 35 Irish Sugar argues, first, that, contrary to what the Court of First Instance held in paragraph 62 of the contested judgment, it was not active in the same market as

SDL during the period from 1985 to 1990. The two companies maintained a vertical commercial relationship, and, during that period, Irish Sugar did not intervene either in the retail sugar market, contrary to what the Court of First Instance held in paragraph 44 of the contested judgment, or in the industrial sugar market. Moreover, Irish Sugar and SDL did not present themselves as a collective entity on the market. All the unlawful practices prior to 1990 were imputable solely to SDL.

- 36 Irish Sugar maintains that its point of view is supported by the evidence contained in various documents, including a table taken from a document dated 2 December 1974 and sent to the Court of First Instance in answer to a written question and the agreement concluded in 1975 whereby it acquired 51% of the shares of SDL. It considers that the Court of First Instance misinterpreted that evidence.
- 37 Irish Sugar then criticises the interpretation by the Court of First Instance of certain facts supposed to demonstrate an alleged strategy of common action on the market. Thus it challenges the finding in paragraph 56 of the contested judgment that Irish Sugar's presentation of the financing characteristics of the rebates granted by SDL to its customers was full of contradictions. Irish Sugar maintains, on the contrary, that it has not ceased to insist on the fact that it did not intervene in the market by financing those rebates and that the Court of First Instance misinterprets the facts by arguing the opposite.
- 38 Finally, Irish Sugar challenges the assessment by the Court of First Instance in paragraphs 198 and 199 of the contested judgment, to the effect that the evidence assembled by the Commission and set out in the contested decision shows that SDL's approach to one of its customers took place in the context of a strategy devised jointly with Irish Sugar to prevent the expansion of a rival brand.
- 39 In that respect, it should be noted that, pursuant to Article 225(1) EC and Article 51 of the EC Statute of the Court of Justice, an appeal may rely only on

grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The appraisal by the Court of First Instance of the evidence put before it does not constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice (Case C-53/92 P *Hilti v Commission* [1994] ECR I-667, paragraphs 10 and 42; Case C-362/95 P *Blackspur DIY and Others v Council and Commission* [1997] ECR I-4775, paragraph 29).

- 40 With regard to the above, this Court finds that, in the first part of its plea, Irish Sugar is in reality seeking to have re-examined by the Court of Justice questions of fact which were determined by the Court of First Instance, and that it has not in any way demonstrated how the Court of First Instance has supposedly distorted the evidence put before it.
- 41 The arguments of Irish Sugar in this first part of the third plea must therefore be dismissed as clearly inadmissible.

The second part of the third plea, alleging that an incorrect test was applied

- 42 Irish Sugar argues that the finding of the presence of certain connecting factors is not sufficient to demonstrate the existence of a collective dominant position. The undertakings concerned also had to have a joint action strategy on the market. Irish Sugar refers in that respect to Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 42; Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others v Commission* [2000] ECR I-1365, paragraph 36; and Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others v Commission* [1996] ECR II-1201, paragraphs 62 to 68.

- 43 Irish Sugar submits that the Court of First Instance erred in law in paragraphs 47 to 59 of the contested judgment by examining whether the connecting factors showed that Irish Sugar and SDL 'had the power to adopt a common market policy'. Irish Sugar argues that such an examination constitutes a structural analysis applicable in the context of the merger regulation. Since, however, this was not a merger regulation case, the Court of First Instance was incorrect in its analysis. Irish Sugar maintains that the Court of First Instance thus wrongly carried out a prospective examination of its conduct, whereas it ought, on the contrary, to have carried out a retrospective analysis.
- 44 It should be noted that Irish Sugar does not demonstrate how the Court of First Instance erred in law in its analysis of the factors connecting Irish Sugar with SDL, having regard to the case-law cited in paragraph 42 of this order.
- 45 As for the reproach addressed to the Court of First Instance for having used the test applicable in merger matters, it should be noted that this is in reality aimed at the approach followed by the Commission in the contested decision and must therefore be dismissed as inadmissible, being a new plea in law submitted for the first time at the appeal stage. To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would mean allowing that party to bring before the Court, whose jurisdiction in appeals is limited, a wider case than that heard by the Court of First Instance. In an appeal, the Court's jurisdiction is thus confined to examining the assessment by the Court of First Instance of the pleas argued before it (Case C-7/95 P *Deere v Commission* [1998] ECR I-3111, paragraph 62).
- 46 As for the allegedly prospective nature of the analysis of the links between Irish Sugar and SDL carried out by the Court of First Instance, it should be noted that, in order to establish whether the undertakings concerned together constitute a collective entity on a given market, it is necessary to examine the economic links or factors which give rise to a connection between them, and, in particular, whether economic links exist between them which enable them to act together

independently of their competitors, their customers and consumers (Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports*, paragraphs 41 and 42).

- 47 The Court of First Instance was therefore right to examine the links between Irish Sugar and SDL and to verify, in paragraphs 47 to 59 of the contested judgment, whether, by reason of the connecting factors which existed between those two undertakings from 1985 until February 1990, they had the power to adopt a common market policy.
- 48 This second part of the third plea must therefore be dismissed as being in part clearly inadmissible and in part clearly unfounded.

The third part of the plea, alleging an insufficient statement of reasons

- 49 Irish Sugar maintains that the Court of First Instance did not state sufficient reasons for the contested judgment. It argues that the Court erred in law by substituting its own findings for those in the contested decision and by not replying to the arguments submitted to it by Irish Sugar.
- 50 In support of this part of the plea, Irish Sugar argues that, although the Court of First Instance correctly sets out its criticisms in paragraph 41 of the contested judgment, it does not answer them. Irish Sugar refers in that respect to paragraphs 45 and 64 of the contested judgment, which it maintains show defects in reasoning.

- 51 Concerning, first, paragraph 45 of the contested judgment, Irish Sugar claims that the Court of First Instance mentioned a criticism of the contested decision by Irish Sugar but then moved on to arguments exchanged in court on that point, without indicating that the Commission argued differently in court from the position taken in point 112 of the contested decision.
- 52 In that respect, this Court finds that Irish Sugar does not demonstrate in what way the reasoning of the Court of First Instance is insufficient. Its remark concerning the Court's not mentioning an alleged difference between the arguments put forward by the Commission in the contested decision and those relied on before the Court of First Instance does not in any way help to demonstrate an insufficient statement of reasons.
- 53 Concerning, second, paragraph 64 of the contested judgment, Irish Sugar considers that the Court of First Instance does not respond to its criticism that, in the statement of objections, the Commission did not address the issue of whether the relationship between the two undertakings led them to adopt the same conduct on the market, but contented itself with finding the existence of structural ties between Irish Sugar and SDL.
- 54 Irish Sugar adds that the Court of First Instance wrongly relies on material not set out in the contested decision and not discussed during the administrative procedure. It claims in particular that the fallacy of the Court's approach is illustrated by its reference to a document which the Commission did not rely upon in the contested decision.
- 55 Irish Sugar further argues that the Court of First Instance misinterprets that document in paragraph 64 of the contested judgment. According to Irish Sugar, the Court of First Instance should have taken account of other evidence, especially of a report, annexed to its application, prepared by experts appointed by the High Court (Ireland) in national competition proceedings. Irish Sugar

maintains that the Court of First Instance arbitrarily selected evidence from amongst that mentioned in paragraph 39 of the contested judgment. It adds in its reply that, by not adopting measures of organisation of procedure in accordance with Article 64(2) of its Rules of Procedure and ignoring pieces of the documentary evidence on file, the Court was in breach of a duty of investigation incumbent on it.

- 56 In that respect, this Court finds that, under the guise of an accusation based on an alleged lack of reasoning, Irish Sugar makes disparate criticisms without in any way showing an insufficiency of reasoning by the Court of First Instance in support of one of its conclusions.
- 57 First, although Irish Sugar accuses the Court of First Instance of allegedly failing to reply to one of its observations, it does not adduce any evidence capable of proving an error of law and does not explain how the alleged omission had any influence on the outcome of the proceedings.
- 58 Next, as for the complaint that, in paragraph 64 of the contested judgment, the Court of First Instance based part of its findings on a document contained in the statement of objections and not in the contested decision, this Court finds it devoid of all clarity. In so far as the Court of First Instance was analysing in that paragraph the exhaustive nature of the statement of objections, it was logical for it to refer to the content of the latter.
- 59 Finally, Irish Sugar challenges the interpretation of the facts by the Court of First Instance and the evidence on which it relied in paragraph 64 of the contested judgment. As has been pointed out in paragraph 39 of this order, however, the Court of Justice does not have jurisdiction to make factual findings. Nor, in principle, does it have the jurisdiction to examine the evidence which the Court of First Instance adopted in support of those facts. It is for the Court of First Instance alone to assess the value that should be given to the pieces of evidence

produced before it. That assessment does not therefore constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice. In this case, it has not been established that the Court of First Instance distorted evidence. Moreover, contrary to what Irish Sugar claims, the Court of First Instance did not breach any duty of investigation by not adopting measures of organisation of procedure.

60 The arguments of Irish Sugar in this third part of the third plea must therefore be dismissed as being in part clearly inadmissible and in part clearly unfounded.

61 It follows that the third plea in law is in part clearly inadmissible and in part clearly unfounded.

62 It follows from the whole of the above considerations that the pleas in law submitted by Irish Sugar in support of its appeal are in part clearly inadmissible and in part clearly unfounded. The appeal must therefore be dismissed pursuant to Article 119 of the Rules of Procedure.

Costs

63 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for Irish Sugar to be ordered to pay the costs, and the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the appeal;
2. Orders Irish Sugar plc to pay the costs.

Luxembourg, 10 July 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber