Competition and Consumers

As befits a former professor, the Commissioner for Competition Policy, Mr Mario Monti, gives thoughtful and interesting speeches on the work of his Commission services; and in Lisbon recently he tackled the question of the consumers' interest in the enforcement of the competition rules. He is on good ground. References in the Treaties to the interests of consumers are relatively sparse. But the competition rules do refer to the consumer; and it is to the Commission's credit that it (generally) attaches importance to this aspect of competition policy.

"We need to do more," Mr Monti said, "to explain what our fight against cartels, our scrutiny of mergers and acquisitions and the control of state subsidies means to the man in the street: greater choice of products and services, better quality, better prices. We can be proud of the story we have to tell. It is thanks to the opening up of markets such as telecommunications and air transport to increased competition, that phone tariffs and air fares have dropped significantly all over Europe. Once EU citizens understand these facts, they will become our best supporters in the Member States, for example on the liberalisation of postal services - the Commission's latest challenge - or our challenging of unjustified subsidies to white elephants or inefficient firms which could see their money go wasted! We are all consumers, and we are all taxpayers."

As examples of individual cases in which the Commission's anti-trust decisions have directly benefitted the consumer, Mr Monti quoted the Volkswagen and British Airways cases. In 1998 Volkswagen incurred a record fine for agreeing with its Italian dealers not to sell cars to consumers living in Austria and Germany who had tried to take advantage of Volkswagen's lower prices in Italy: a clear violation of the special car distribution rules and a flagrant negation of a European single market for consumers, not just for companies. In 1999, British Airways was also fined for offering loyalty discounts to travel agents which had the effect of shutting out competing carriers and resulted in less choice for travellers.

In the field of mergers, the same concern for consumers led the Commission (according to Mr Monti) to take action in a number of supermarket mergers in Finland, Austria, France and Spain and in the recent acquisition of the French oil company Elf by its rival TotalFina, where it obtained the sale of 70 petrol stations and could have threatened consumer interests by gaining control of petrol prices on French motorways. Mr Monti was not as specific about state aid cases as he might have been: there are plenty of good examples of the point which he made in general terms about the interests of consumers both as such and as tax-payers. (There is a good example on page 130 of this issue: the CDA case.) But his speech was a great justification of the Commission's competition policy. ■

ABUSE OF DOMINANT POSITION (MAIL): THE DEUTSCHE POST CASE

Subject: Abuse of dominant position
Discrimination
Refusal to supply

Industry: Mail

Parties: Deutsche Post AG
The British Post Office and various other complainants

Source: Commission Statement IP/00/562, dated 31 May 2000

(Note. Considering the discussions carried out in 1998 and 1999 into the activities of the national postal services within the European Union, and particularly the REIMS II agreement – see the Commission's note below – it is surprising that there should be yet another case in which a national post office has apparently made use of its dominant position on the market in a manner which the Commission is rightly challenging. If the practice of the German Post Office is as the Commission describes it, there is not only an abuse of a dominant position but also a serious interference with cross-border trade; and this is ipso facto contrary to the principle of an internal market.)

Commission's Statement of Objections

The Commission has concluded an extensive investigation, prompted by a number of complaints, into the way incoming cross-border mail is handled by Deutsche Post AG (DPAG). The German postal operator has been informed by the Commission that it considers, subject to any arguments DPAG may put forward in its defence, that DPAG abuses its dominant market position and restricts competition. In its Statement of Objections, which is a preliminary procedural document and not a final decision, the Commission considers that DPAG's frequent and systematic interception, surcharging and delay of normal incoming cross-border mail infringes the competition rules of the European Union (EU). If the initial view of the Commission is confirmed, DPAG will be ordered to cease this behaviour.

The original complaint, which was filed by the British Post Office (the BPO) in February 1998, has been followed by five additional complaints including the same allegations, namely, that DPAG infringes EU competition rules by intercepting, surcharging and delaying normal cross-border mail. The BPO has given numerous examples of situations where DPAG has refused to deliver to German addressees bulk mailings coming in from the UK, unless the BPO agrees to pay the full domestic tariff applicable in Germany. DPAG considers mail containing any reference to Germany such as the inclusion of a German reply address in the contents of the mail to have a German sender and charges the full domestic tariff for such mail. (See the note at the end of this report.)

The Commission's investigation indicates that the mailings in question did not have German senders. The mailings were produced and posted in the UK and should be treated as normal cross-border mail. By intercepting, surcharging and delaying normal cross-border mail, the Commission considers that DPAG abuses its dominant position on the German market for the delivery of cross-border mail.

According to the Commission's preliminary assessment, the behaviour of DPAG is abusive in several ways. First, DPAG treats differently incoming cross-border mail which it considers to be "genuine" on the one hand and cross-border letter mail which it considers to be of German origin (that is, mail with a German reply address). DPAG thus discriminates between different customers.

Second, the Commission considers that DPAG's practice of intercepting incoming cross-border mail followed by claims for surcharges of a prohibitive nature, should be regarded as a constructive refusal to supply its delivery service.

Third, the Commission is of the opinion that the price charged by DPAG exceeds the average cost by at least 25%. This price has no reasonable relationship to real costs or to the real value of the service provided. Fourth, DPAG impedes the delivery of mail, thereby damaging the senders' and the sending operator's commercial activities.

Procedure

A Statement of Objections is a legal act which opens formal proceedings under EU procedural rules. It lists in detail the allegations against DPAG and includes the Commission's assessment how DPAG infringes Article 82 of the EC Treaty. The party concerned has full rights of defence, including access to the case files and the possibility to respond to the charges made by the Commission. The defendant may produce evidence of its own may request to present its defence orally at a hearing. Based on these elements, the Commission will finally decide whether a prohibition decision is necessary DPAG may then appeal the decision of the Commission before the European Courts in Luxembourg.

Note on Cross-Border Mail

Normally, the receiving postal operator charges a fee from the sending postal operator for each cross-border mail item delivered. These fees, so-called terminal dues, are calculated as a percentage of the applicable domestic tariff in the receiving country. In 2000 the terminal dues are 65% of the domestic tariff. The applicable terminal dues have been set in the REIMS II agreement, which has been concluded by all public postal operators in the EU except the Dutch Post Office. The agreement has been notified to the Commission. On 15 September 1999, the Commission adopted an Article 81(3) decision, exempting the REIMS II agreement until 31 December 2001. ■

The recently announced investigation, at the European level, of the Time Warner / AOL merger will be covered in our next issue.

PRICE-FIXING (LYSINE): THE ADM CASE

Subject: Price-fixing
Fines
Supply restrictions
Information agreements

Industry: Lysine
(Some implications for most industries)

Parties: Archer Daniels Midland Co (USA) (ADM)
Ajinomoto Co (Japan)
Cheil (Korea)
Kyowa Hakko (Japan)
Sewon (Korea)

Source: Commission Statement IP/00/589, dated 7 June 2000

(Note. What distinguishes this case from many other classic cartel cases is the influence on the parties of the so-called Leniency Notice. By adopting a clear and well-publicised policy of making substantial reductions in the fines imposed on corporations participating in a cartel, the Commission undermines the solidarity of the cartel and tempts individual members of the cartel to provide information about the cartel's activities. The policy certainly paid off in this case.)

On 7 June, the Commission fined Archer Daniels Midland, Ajinomoto and three other companies a total of almost 110m for operating a global price-fixing cartel for lysine. The decision highlights the Commission's determination to fight cartels, the most damaging of all anti-competitive practices.

Lysine is the most important amino acid used in animal foodstuffs for nutritional purposes. Amino acids are building blocks of protein. They can be of vegetal or animal origin (such as soybeanmeal or fishmeal). They can also be manufactured. The five cartel participants manufacture and sell synthetic amino acids. The availability of synthetic amino acids enables nutritionists to compose protein diets which improve animal foodstuff requirements.

The Commission's extensive investigation found that Archer Daniels Midland Co (USA), Ajinomoto Co (Japan), Cheil (Korea), Kyowa Hakko (Japan) and Sewon (Korea) fixed lysine prices worldwide, including in the European Economic Area. They also fixed sales quotas for that market and operated an information exchange in order to underpin these quotas from at least July 1990 to June 1995.

The Commission considers that the cartel represents a serious infringement of the EC competition rules and justifies heavy fines. The leading players in the cartel, Archer Daniels Midland and Ajinomoto have been fined € 47.3m and € 28.3 million respectively. The other three cartel participants, Cheil, Kyowa and Sewon have incurred fines of € 12.2m, € 13.2m and € 8.9m respectively.

This case started in July 1996, shortly before several cartel participants were charged by the US antitrust authorities with engaging in illegal conspiracy. In July 1996, Ajinomoto decided to inform the Commission about the existence of the cartel covering a period from Archer Daniels Midland's entry into the EEA lysine market (June 1992) up to June 1995.

Ajinomoto's decision came immediately after the Commission had adopted its Leniency Notice on the non-imposition or reduction of fines in cartel cases (O.J. C.207 of 18 July 1996). This Notice sets out the conditions under which companies co-operating with the Commission during its investigation into a cartel may be exempted from fines or granted reductions in the fines which would otherwise have been imposed upon them. Three other cartel participants started to cooperate with the Commission at a later stage.

Pursuant to the Leniency Notice, the Commission has granted four co-operating companies significant reductions in the fines. Ajinomoto was the first to come in and give decisive evidence of the cartel. However, it was also a ring-leader in the cartel and failed to inform the Commission of an earlier cartel involving the then three Asian producers Ajinomoto, Kyowa and Sewon (a cartel dating back to July 1990). The Notice provides for a maximum reduction in the fine of 50% in such a case. The Commission took the view that it could grant this maximum reduction to Ajinomoto. The Commission also granted a 50% reduction to Sewon. This company informed the Commission about the earlier cartel while also producing further evidence of the later cartel. Cheil and Kyowa provided the Commission with evidence confirming the existence of the infringements. They receive smaller reductions of 30% each.

Archer Daniels Midland did not co-operate with the Commission during the nvestigation. However, it did not contest the facts set out in the Commission's Statement of Objections. For this, the company received a 10% reduction in the fine. ■

Illegal State aid to German CD producer

The Commission has decided to close with a final negative decision the formal investigation procedure in respect of State aid measures amounting to DM 427m awarded to CDA Compact Disc Albrechts GmbH, Thuringia (Germany) and its predecessor companies. As these measures are incompatible with the Treaty, the aid has to be recovered from the beneficiaries. Following the Commission's request for information, on the basis of press reports in 1994, the German authorities notified aid in favour of a plant for manufacturing CDs in Thuringia. Until today, the German government has failed to submit a clear and precise description of the financial resources provided by the State in connection with the setting up and restructuring of the company. The Commission found that at least DM 260.57m of the aid granted for the purposes of setting up the CD plant and for consolidating the firm's situation was used elsewhere in the Group and was thus misused. (Source: Commission Statement IP/00/645, dated 21 June 2000.)

STATE AIDS (MOTOR VEHICLES): COMMISSION STATEMENT

Subject: State aids

Industry: Motor vehicles; cars

Source: Commission Statement IP/00/604, dated 13 June 2000

(Note. This is a useful re-statement of the criteria applicable to the granting of state aids to the motor vehicle industry. Some of the individual cases reported in previous issues may have left readers wondering how, and in what permissible circumstances, Member States can subsidise or otherwise support the relatively prosperous corporations which manufacture motor vehicles. The short answer is that support which qualifies as "regional aid" tends to receive a fair wind, even though the Commission formally recognises that other factors, such as the effect on the industrial sector, as distinct from the geographical area, have to be taken into account. State aids in the interests of rescuing or restructuring an industry are the subject of separate rules, referred to briefly at then of the present Statement.)

The Commission has decided to extend the period of validity of the existing Community framework for State aid to the motor vehicle industry (the "car framework") by a period of one year until 31 December 2001. The car framework imposes a strict discipline in the granting of aid in order to reduce distortions of competition in the car sector to a minimum. Until 2001, the Commission will assess a possible replacement of the car framework by the rules of the so-called multisectoral framework.

During the period 1970-80, several European governments injected massive amounts of aid into the modernization and development of their domestic car industry. As a result, the Commission introduced a Community framework for State aid to the motor vehicle industry in 1989, (the Car framework) with the twofold aim of increasing the transparency of aid flows and imposing strict discipline in the granting of such aid in order to reduce distortions of competition in the Community industry to a minimum.

The risk of undue distortion of competition is particularly high in the automotive sector because the level of globalization and the structural over-capacity affecting most manufacturers leads to a fierce price competition. This intense competition reduces the profit margins which in turn forces the industry to make permanent cost reductions. Consequently, any over-compensation of regional handicaps may have adverse effects on unaided competitors. The risk of undue distortion of competition is also high because Member States and regions are put into competition by multinational automotive companies for the location of large-scale investment projects. Hence, there is a tendency for disproportionate aid allocation to such projects.

The motor vehicle industry, according to the car framework, may benefit from regional aid to assist new plants and the extension of existing ones in the assisted areas of the Community, thus making a contribution to regional development.

However, the Commission has to compare the advantages from the standpoint of regional development with any unfavourable consequences for the sector as a whole. The purpose of the comparison is to ensure that other factors affecting the Community, such as respect for fair competition and over-capacity, are also taken into consideration. Notification of aid measures is required if aid is to be granted from an approved scheme, involving either: a total investment costs of € 50m or total aid of € 5m. It is also required if aid is granted as an ad hoc measure where all aid is above the de minimis limit of € 100,000 over 3 years.

Before the Commission can authorise regional aid in favour of a car manufacturer, it has to conduct an analysis, which concentrates on the following issues:

- The necessity of the aid: which means that the aid recipient must clearly prove that it has an economically viable alternative location for its project or sub-part(s) of a project (mobility of the project); that, if there were no other industrial site, whether new or in existence, capable of receiving the investment in question within the group, the undertaking would be compelled to carry out its project in the sole plant available, even in the absence of aid; and that, if the project is not mobile, no aid can be authorised by the Commission.

- The eligibility of the costs: which means that only those costs eligible for aid under the Regional Scheme may be eligible for the Commission.

- The proportionality of the aid: to assess whether the aid is proportional, the Commission carries out a cost-benefit analysis, comparing the costs which an investor would bear in order to carry out the project in the region in question with the costs for an identical project in a different location, thus making it possible to determine the specific handicaps of the assisted region concerned and enabling the Commission to authorise regional aid within the limit of the regional handicaps resulting from the investment in the plant with which the comparison has been made.

- An analysis of the effects on the industry and on competition: which means that the Commission studies the effects on competition of every investment project, looking in particular at variations in production capacity at group level on the relevant market (for instance, if capacities are increased, the allowable aid intensity is reduced).

Rescue and restructuring aid to the car sector is assessed in accordance with the guidelines on state aid for rescuing and restructuring firms in difficulty (OJ, C.288, 09.10.1999) which apply to all sectors. The Commission usually requires a reduction in installed capacity (in proportion to the aid intensity). Rescue and restructuring aid which leads to a capacity increase will be prohibited. ■

ACQUISITIONS (MOTOR VEHICLES): THE GM / SAAB CASE

Subject: Acquisitions

Industry: Motor Vehicles

Parties: General Motors Corporation
Saab Automobile AB
Investor AB

Source: Commission Decision, dated 20 June 2000

(Note. In this case, the interest lies mainly in the identification of the product market, discussed in paragraphs 6 to 9, and of the geographical market, discussed in paragraph 14. Ostensibly, the Commission's "segmentation" of the product market is persuasive; but, as the Rover / BMW case showed some years ago, the allocation of specific products to the various segments is more controversial. In the present case, the overall assessment is that competition is lively enough to accommodate the acquisition in question.)

1 On 31.01.2000 the Commission received a notification of the proposed acquisition by the US company, General Motors Corporation ("GM") of the remaining shares of the Swedish company, Saab Automobile AB ("Saab"), a company which it has jointly owned and controlled with Investor AB ("Investor"). The proposed transaction will be carried out through the exercise by GM of the call option, granted to it through a 1996 agreement with Investor, over the 50% shareholding of this latter company.

2 After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Council Regulation No 4064/89 and does not raise serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

I. THE PARTIES AND THE OPERATION

3 GM is a leading global manufacturer of motor vehicles. Apart from its activities in the design, manufacture and marketing of vehicles, it also has interests in telecommunications and space, aerospace and defence, financial and insurance services, locomotives, automotive systems, and heavy-duty automatic transmissions. Saab is a manufacturer and distributor of passenger cars.

II. CONCENTRATION

4 GM acquires control of the whole of Saab; thus Saab passes from joint control by GM and Investor to sole control by GM and therefore the transaction constitutes a concentration within Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

5 GM and Saab have a combined aggregate worldwide turnover of more than 5b. Each of them has a Community-wide turnover in excess of 250m, but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension. It does not constitute a cooperation case under the EEA Agreement, pursuant to Article 57 of that agreement.

IV. COMPETITIVE ASSESSMENT

A. Relevant Product Markets

a) Manufacture and supply of passenger cars

6 In previous decisions concerning the passenger car market, the Commission has held it possible to subdivide this market, on the basis of a number of objective criteria like engine size or length of cars, in several segments which could constitute distinct product markets. However, a final definition was not required, and the exact market definition was left open (for example, in the Ford/Volvo decision of 26.3.1999). The narrowest segmentation previously used by the Commission is the following:

- A: mini cars
- B: small cars
- C: medium cars
- D: large cars
- E: executive cars
- F: luxury cars
- S: sport coupés
- M: multi purpose cars
- J: sport utility cars (including off-road vehicles).

7 The boundaries between segments are blurred by factors other than the size or length of cars. These factors include price, image and the amount of extra accessories. Also, the tendency to offer more options like ABS, airbags, central locking etc. in small cars further dilutes the traditional segmentation. Customers choose their cars using a combination of parameters, such as brand, size, equipment and price. On the other hand, segmentation is generally used by the industry and it still seems to be regarded as an important indicator for the positioning of a car in the market place. In particular, some differences still exist in price, technology and engineering requirements within the market. For the purposes of the competitive analysis of the present case, it is not necessary to delineate further the relevant product market, because in all the alternative market definitions considered, effective competition would not be significantly impeded, as explained below.

b) Wholesale and retail distribution of passenger cars

8 In previous decisions (such as the Inchape/IEP Decision of 26.01.1992, the Commission has distinguished between the wholesale and retail distribution

of motor vehicles. At the wholesale level, distributors or importers distribute vehicles to dealers, which latter retail the vehicles to final customers.

9 The wholesale function is often carried out by subsidiaries of the manufacturers themselves. At the retail level, vehicles are sold to final customers by dealers, who are often independent, although they may be subject to exclusive agreements with manufacturers (under EU Regulation 1475/95).

B. Relevant Geographic Market

a) Manufacture and supply of passenger cars

10 The notifying parties are of the view that the relevant geographic market is at least the EEA.

11 From a supply-side point of view, production in the car industry is international or even global in its outlook (see the Ford/Mazda Decision of 24 May 1996. From a customer point of view, recent years have brought a progressive harmonisation of the competitive environment within the Community with respect to technical barriers, restrictions concerning distribution systems, and the transparency of car pricing. However, differences remain with regard to prices, vehicle taxation, distribution systems and penetration rates of major competitors within the Member States. In the present case, the exact definition of the relevant geographic market can be left open since, in all the alternative geographic market definitions considered, effective competition would not be significantly impeded in the EEA or any substantial part of that area, as explained below.

b) Wholesale and retail distribution of passenger cars

12 In previous cases (Inchape, Toyota), the Commission has left open the question, whether the geographical market for these activities is European or national. In the present case it is not necessary to determine the exact geographic market since even in the narrowest geographical market the operation would not raise any serious doubts as to its compatibility with the Common market (see assessment below).

C. Competitive Assessment

13 Since the concentration involves a change from joint control of Saab by GM and Investor to sole control of Saab by GM, there is no new combination or additional overlap in the relevant markets, that is, the manufacture and distribution of passenger cars. However, since it is GM's stated intention to expand Saab's operations, an examination of combined market shares is provided below.

a) Manufacture and supply of passenger cars

14. Unlike GM, which is active in all of the above-mentioned passenger car segments except mini-cars, Saab is active in only three segments, namely large

cars ('D'), sport coupés ('S') and executive cars ('E'). In the overall market for passenger cars at the EEA level, the combined share of GM/Saab will be about [10-15%] (GM [10-15%], Saab [0-5%]; in only one segment, medium cars, will GM/Saab account for more than [10-15%] but, as stated above, Saab is not active in this segment. In only five Member States will GM/Saab's combined marked share reach 15% in any of the individual segments mentioned above:
UK: Large cars [15-20%] (GM [15-20%], Saab [0-5%])
Executive cars [20-25%] (GM [15-20%], Saab [5-10%])
Sweden: Executive cars [20-25%] (GM [0-5%], Saab [20-25%])
Sports coupés [25-30%] (GM [0-5%], Saab [25-30%])
Finland: Sports coupés [15-20%] (GM [5-10%], Saab [10-15%])
Italy: Sports coupés [15-20%] (GM [10-15%], Saab [0-5%])
Netherlands: Executive cars [15-20%] (GM [10-15%], Saab [0-5%]).
In any event GM/Saab will continue to face significant competition in the EEA post-transaction in all segments identified above. The EEA passenger car market is extremely competitive and fragmented, with no single competitor accounting for more than 25% of sales. The Parties estimate competitors' EEA market shares as follows:
Volkswagen/Audi/Seat/Skoda [20-25%], Ford/Volvo/Jaguar [10-15%], Peugeot/Citroen [10-15%], Renault [10-15%], the Fiat group [10-15%], Daimler/Chrysler [5-10%] and BMW/Rover [5-10%]. Each of these competitors continues to invest heavily in research and development, and possess the resources and product offering to continue to constrain GM/Saab competitive freedom post-transaction.

b) Wholesale and retail distribution of passenger cars

15. The proposed transaction will not materially impact on the wholesale and retail distribution of passenger cars. First, GM/Saab's share at wholesale level does not exceed [10-15%] in the EEA or in any Member State thereof, while their estimated EEA share at retail level is less than [0-5%]. Second, neither GM nor Saab are party to any agreements or other arrangements providing for the wholesale or retail distribution of competitive products. Accordingly, since they both distribute at wholesale level overwhelmingly through subsidiaries, their position at wholesale level is primarily a function of their position in the production and supply of passenger cars, which, as indicated above, is not such as to give rise to concerns.

V. CONCLUSION

16 The overlap between the product ranges of GM and Saab is limited. The merger will have no immediate effect on the industry's level of concentration. In particular, there are no indications that the merger will raise entry barriers in the passenger car market or any distinct part of it. Therefore, the proposed concentration will not create or strengthen a dominant position.

17 For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market ... ■

RELEVANT MARKET (FLOAT GLASS): THE KISH GLASS CASE

Subject: Relevant market
Product market
Geographic market
Procedure
Complaints
Right to be heard
Legal certainty
Misuse of powers

Industry: Float glass
(Some implications for most industries)

Parties: Kish Glass & Co. Ltd
Commission of the European Communities
Pilkington United Kingdom Ltd (intervener)
Flabeg GmbH (subsidiary of Pilkington)

Source: Judgment of the Court of First Instance in Case T-65/96 (*Kish Glass & Co. Ltd v Commission of the European Communities*), dated 30 March 2000

(Note. There are two aspects of this case which are of interest to other corporations and industries. The first concerns the procedures adopted following a complaint addressed to the Commission. The judgment in this case usefully rehearses the case-law bearing on the subject, with particular reference to the right to be heard, the principle of legal certainty and the allegation of a misuse of powers. The Court points out that third parties cannot claim to have a right of access to the file held by the Commission on the same basis as the undertakings under investigation

The second aspect of the case concerns the identification of the product and geographical markets. One interesting feature of the identification of the geographical market in this case is the extent to which transport costs and distances have a bearing on the area of the market in question. Another was whether the manufacture of a product in metric sizes represented a different product market from manufacture in imperial sizes; and, if so, whether there was "interchangeability" between the two. The applicant lost on all points but raised many problems calling for the Court's opinion.)

Background to the dispute

1 On 17 January 1992 Kish Glass & Co Ltd, a company incorporated under Irish law which supplies glass, lodged a complaint with the Commission pursuant to Article 3(2) of Council Regulation 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, alleging that Pilkington United Kingdom Ltd and its German subsidiary, Flabeg GmbH, abused their dominant position on the Irish market in 4mm float glass, in applying different conditions from those offered to other purchasers for equivalent transactions and in refusing

to supply it with this type of glass beyond a certain limit, thereby placing the applicant at a competitive disadvantage.

2 On 14 February 1992 the Commission sent a request for information, pursuant to Article 11 of Regulation No 17, to the applicant, to which the applicant replied on 10 March 1992.

3 When requested to comment on that complaint by the Commission, Pilkington stated that it did not hold a dominant position on the market in float glass and that it applied a system of discounts based on the size of the customer, the time allowed for payment and the quantity purchased.

4 The applicant submitted its comments on Pilkington's observations to the Commission on 1 July 1992. It maintained that the system of customer classification used by Pilkington was discriminatory, and that that company, with a market share of more than 80%, was the major supplier of 4 mm float glass in Ireland, which was the relevant geographical market for assessing whether it held a dominant position.

5 The Commission replied to the applicant on 9 July 1992, stating that a system of discounts based on a classification of customers by category and on quantity was not discriminatory. The applicant submitted its observations on that statement on 10 August 1992.

6 On 18 November 1992 the Commission sent a letter to the applicant pursuant to Article 6 of Commission Regulation 99/63/EEC on the hearings provided for in Article 19(1) and (2) of Council Regulation 17, informing it that it considered that there were not sufficient grounds for upholding its complaint and requesting it to submit any further observations it might have so that it could formulate its definitive position. Kish Glass complied with that request.

7 Following an informal meeting of 27 April 1993, the Commission informed the applicant, by letter of 24 June 1993, that its observations disclosed no matters of fact or of law liable to affect the conclusions in the letter of 18 November 1992. However, the Commission stated that it intended to send to Pilkington a request for information under Article 11 of Regulation 17 and that the applicant would be kept informed of the procedure.

8 On 3 December 1993 the Commission sent to the applicant a non-confidential version of Pilkington's response to that request for information.

9 By letters to the Commission of 16 February 1994 and 1 March 1994 Pilkington clarified its position with regard to the definition of the relevant geographical market and its alleged dominant position on that market.

10 In two letters to the Commission dated 8 March 1994, Kish Glass reaffirmed its position regarding the definition of the relevant geographical market, which it argued to be the Irish market, and Pilkington's alleged abuse of its dominant position on the specific market for 4 mm float glass. It also provided

the Commission with information on the prices charged by Pilkington on the Irish market.

11 On 24 and 27 May 1994, the applicant submitted to the Commission further evidence to show that the transport costs from continental Europe to Ireland were far higher than those from the United Kingdom to Ireland and that there was a local geographical market.

12 By letter of 10 June 1994 Pilkington informed the Commission that it disputed the transport-cost data provided by the applicant.

13 Having obtained information from other manufacturers of glass in the Community, on 19 July 1995 the Commission sent a second letter to the applicant pursuant to Article 6 of Regulation No 99/63 confirming that the relevant product market was the sale of float glass of all thicknesses to dealers, that the geographical market was the whole of the Community and that Pilkington did not hold a dominant position on that market.

14 On 31 August 1995 the applicant submitted its observations regarding that second letter pursuant to Article 6 of Regulation 99/63, again disputing both the definition of the geographical and product market adopted by the Commission and its appraisal of the dominant position held by Pilkington.

15 Between 31 October and 3 November 1995, the Commission obtained information by telephone and by fax from eight importers of glass established in Ireland on methods of purchasing 4 mm float glass.

16 On 14 November 1995 the Commission sent a request for information pursuant to Article 11 of Regulation No 17 to certain companies operating on the Irish market, including the applicant and Pilkington, to obtain data on the quantity of 4mm float glass sold in Ireland, on the dimensions of the glass sold and on the transport costs to the Dublin area.

17 On 18 December 1995 the Commission sent to the applicant five replies from glass companies, which were received on 22 December 1995. On 7 February 1996 the Commission sent to the applicant five further replies from glass companies, which reached it on 12 February 1996.

18 By decision of 21 February 1996, received by the applicant on 1 March 1996, the Commission definitively rejected the complaint lodged by Kish and maintained its previous position that the relevant product market was the sale of float glass of all thicknesses to dealers, that the relevant geographical market was the Community as a whole, or at least the northern part of the Community, and that Pilkington did not hold a dominant position on that market.

Procedure

19 By application lodged at the Registry of the Court of First Instance on 11 May 1996, Kish Glass brought this action.

20 By application lodged at the Registry of the Court of First Instance on 30 September 1996, Pilkington United Kingdom Limited applied for leave to intervene in support of the form of order sought by the defendant. By order of 30 June 1997 the President of the Third Chamber of the Court of First Instance granted it leave to intervene.

21 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry. It requested the Commission, however, to answer a number of written questions, to which the Commission replied on 22 March 1999.

22 The parties presented oral argument and answered the questions put by the Court at the hearing on 28 April 1999.

Forms of order sought

23 The applicant claims that the Court should:
annul the Decision adopted by the Commission on 21 February 1996;
order the Commission to pay the costs.

24 The defendant, supported by the intervener, contends that the Court should:
dismiss the application;
order the applicant to pay the costs.

Law

25 The applicant raises five pleas in law in support of its application. In the first plea, which is in two parts, it alleges both that the Commission infringed its right to be heard and that it breached the principle of legal certainty and misused its powers. In its second plea it claims that the defendant disregarded procedural rules. Its third plea alleges breach of essential procedural requirements and of the principle of legal certainty. In its fourth and fifth pleas it alleges that the Commission committed a manifest error of assessment in its definition, on the one hand, of the relevant product market and, on the other, the geographical market.

The first plea, alleging infringement of the applicant's right to be heard and of the principle of legal certainty and misuse of powers

[Arguments of the parties (paragraphs 26 to 31)]

Findings of the Court

Infringement of the applicant's right to be heard

32 According to settled case-law, respect for the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules. That principle requires

that the undertaking concerned be afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission (see, in particular, Case C-301/87, *France v Commission*, paragraph 29; Joined Cases C-48/90 and C-66/90, *Netherlands and Others v Commission*, paragraph 37; Case C-135/92, *Fiskano v Commission*, paragraphs 39 and 40; and Case C-48/96 P, *Windpark Groothusen v Commission*, paragraph 47).

33 However, it must be observed that this principle concerns the rights to be heard of those in respect of whom the Commission carries out its investigation. As the Court of Justice has already observed, such an investigation does not constitute an adversary procedure as between the undertakings concerned but a procedure commenced by the Commission, upon its own initiative or upon application, in fulfilment of its duty to ensure that the rules on competition are observed. It follows that the companies which are the object of the investigation and those which have submitted an application under Article 3 of Regulation 17, having shown that they have a legitimate interest in seeking an end to the alleged infringement, are not in the same procedural situation and that the latter cannot invoke the right to be heard as defined in the cases relied on (see, to that effect, judgment of the Court of Justice in Joined Cases 142/84 and 156/84, *BAT and Reynolds v Commission*, paragraph 19, and judgment of the Court of First Instance in Case T-17/93, *Matra Hachette v Commission*, paragraph 34).

34 Since the right of access to the file is also one of the procedural guarantees intended to safeguard the right to be heard, the Court of First Instance has held, similarly, that the principle that there must be full disclosure in the administrative procedure before the Commission in matters concerning the competition rules applicable to undertakings applies only to undertakings which may be penalised by a Commission decision finding an infringement of Articles 85 or 86 of the EC Treaty (now Articles 81 EC and 82 EC), since the rights of third parties, as laid down by Article 19 of Regulation 17, are limited to the right to participate in the administrative procedure. In particular, third parties cannot claim to have a right of access to the file held by the Commission on the same basis as the undertakings under investigation (judgment in *Matra Hachette v Commission*, cited above, paragraph 34).

35 As regards the rights of the applicant as a complainant, the Court of First Instance points out that, in the present case, the investigation of the complaint lasted more than four years and that the applicant had the opportunity to put its point of view on several occasions. In particular, the last five replies of the Irish companies of which the applicant was notified did not alter the essential points with which the procedure was concerned so that the fact that the Commission only allowed the applicant nine days to comment on the replies before adopting the contested decision did not prevent it from making its views known.

36 In the circumstances the applicant's rights cannot be said to have been infringed.

Misuse of powers and breach of the principle of legal certainty

37 As regards the argument that the Commission misused its powers in seeking information from Irish glass companies by telephone or fax even though Article 11 of Regulation 17 provides that such requests must be made in writing, it must be borne in mind to begin with that, according to consistent case-law, the adoption by a Community institution of a measure with the exclusive or main purpose of achieving an end other than that stated constitutes a misuse of powers (see Case C-84/94, *United Kingdom v Council*, paragraph 69, and Case T-77/95, *SFEI and Others v Commission*, paragraph 116).

38 In the present case, it must be observed both that Article 11 of Regulation 17 does not prevent the Commission from obtaining information by means of oral requests followed by requests in the proper form and that the applicant has not furnished evidence that the collection of information orally had any purpose other than that envisaged by that article.

39 It follows that the first plea must be rejected as unfounded in its entirety.

The second plea, alleging breach of procedural rules

[Arguments of the parties (paragraphs 40 to 43)]

Findings of the Court

44 First, it must be borne in mind that, under Article 11(3) of Regulation 17, when the Commission sends a request for information to an undertaking or an association of undertakings, it is to state the legal bases and the purpose of the request and also the penalties laid down for supplying incorrect information. Consequently, the Commission was required to inform Pilkington, in its letter of 14 November 1995, of the reasons which led it to request further information.

45 Second, according to settled case-law, once the Commission decides to proceed with an investigation, it must, in the absence of a duly substantiated statement of reasons, conduct it with the requisite care, seriousness and diligence so as to be able to assess with full knowledge of the case the factual and legal particulars submitted for its appraisal by the complainants (Case T-7/92, *Asia Motor France and Others v Commission*, paragraph 36).

46 In the present case, it is clear from the documents before the Court that the Commission's investigation was carried out over a period of more than four years, during which the Commission collected comments from a significant number of undertakings in the sector, analysed them and gave the complainant an opportunity to put forward, on several occasions, all such information as could be taken into account. In so doing, the Commission carried out all its activities with the requisite care, seriousness and diligence. In confining itself to observing that, in its letter of 14 November 1995, the Commission had expressed the view that its complaint was poorly founded and asked for further information from Pilkington in order to reject it, the applicant has not proved the contrary.

47 Accordingly, the second plea must be rejected as unfounded.

The third plea, alleging breach of essential procedural requirements and of the principle of legal certainty

[Arguments of the parties (paragraphs 48 to 50)]

Findings of the Court

51 It should be borne in mind that, according to case-law, a reference in a document to a separate document must be considered in the light of Article 190 of the EC Treaty (now Article 253 EC) and does not breach the obligation to state reasons incumbent on the Community institutions. Thus, in its judgment in Case T-504/93, Tiercé Ladbroke v Commission, paragraph 55, the Court of First Instance held that a Commission decision sent to the author of a complaint that gave rise to an investigation, which referred to a letter sent pursuant to Article 6 of Regulation 99/63, disclosed with sufficient clarity the reasons for which the complaint was rejected, and thus fulfilled the obligation to state reasons under Article 190 of the Treaty. Regardless of whether such a reference is described as a matter of reasoning or of form, that finding applies a fortiori where reference is made to a document annexed to a decision and, therefore, contained in it. Moreover, the applicant has in no way substantiated its suspicions that the Commissioner responsible was unaware of the reasoning for the contested measure.

52 The reference in question is sufficient to meet the requirements of legal certainty under Community law.

53 It follows that the third plea must also be rejected as unfounded.

The fourth plea, alleging a manifest error of assessment in the definition of the relevant product market

[Arguments of the parties (paragraphs 54 to 61)]

Findings of the Court

62 According to settled case-law, for the purposes of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products (see, in particular, the judgment in Case 31/80, *L'Oréal*, paragraph 25, and in *Michelin v Commission*, cited above, paragraph 37). Moreover, according to the same case-law *(Michelin v Commission*, cited above, paragraph 44), the absence of interchangeability between different types and dimensions of a product from the point of view of the specific needs of the user does not imply that, for each of those types and dimensions, there is a distinct market for the purposes of determining whether there is a dominant position. Furthermore, since the determination of the relevant market is useful in assessing whether the

undertaking concerned is in a position to prevent effective competition from being maintained and behave to an appreciable extent independently of its competitors and customers and consumers, an examination to that end cannot be limited to the objective characteristics only of the relevant products but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration (*Michelin v Commission*, cited above, paragraph 37).

63 In the present case, the Court of First Instance must consider whether the conditions of competition and the structure of supply on the market in float glass precluded the Commission from finding, on the basis of *Michelin v Commission*, cited above, that even if glass of different thicknesses is not interchangeable for final users, the relevant product market must be considered to be that for raw float glass of all thicknesses, as distributors must meet demand for the whole range of products.

64 As a preliminary point, the Court of First Instance observes that, according to consistent case-law, although as a general rule the Community judicature undertakes a comprehensive review of the question whether or not the conditions for the application of the competition rules are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.

65 The applicant contends that the fact that continental producers do not produce glass in imperial dimensions prevents them from competing effectively with Pilkington. On that point, it must be observed that, at point 15 of the contested decision, the Commission considered that question and arrived at the opposite conclusion to that reached by the applicant. On the basis of information provided by nine Irish importers it found that wholesalers did not have a clear preference for imperial sizes in so far as they were able to cut without too much wastage glass in metric sizes down to imperial sizes. During the proceedings before the Court of First Instance, the applicant confined itself, with regard to that point, to stating that, so far as it was aware, Pilkington was the only manufacturer of 4mm float glass able to adapt the glass to imperial sizes without wastage, that it believed that the other manufacturers used ends allowing them to manufacture only sheets of different sizes and that it was unlikely that wholesalers would be able to cut metric sizes without wastage. Not only does the applicant furnish no evidence in support of its argument, but it puts forward nothing to invalidate the Commission's assessment of the matter, which was based on information obtained directly from operators on the market.

66 The applicant also maintains, essentially, that, in view of the near monopoly enjoyed by Pilkington in the market for 4mm glass in imperial sizes, that company enjoys a privileged position in commercial relations with glass importers. Moreover, it submits that 4mm glass cannot be replaced by float glass of other thicknesses.

67 In that regard, it must be observed that the applicant has not established that any preference importers have for Pilkington's products is not the result of

their pursuing their own economic interest or exercising their freedom of contract. Accordingly such preferences cannot be interpreted as being indicative of a deterioration in the structure of supply on the market. It must be observed, next, that it is clear from the data given in the replies of the Irish companies, which are not contested by the applicant, that sales in Ireland of 4 mm float glass in imperial sizes account for 27% of the market. Even if it is accepted that Pilkington holds a near monopoly in the sector of 4mm glass in imperial sizes, that percentage is clearly not in itself a sufficient ground for claiming, as the applicant has done, that the majority of purchases of 4mm float glass in Ireland are processed by Pilkington. About 73% of demand for the product is made up of purchases of glass in metric sizes which cannot be affected by Pilkington.

68 Finally, in point 18 of the contested decision, the Commission explained that production of 4mm glass is technically almost identical to production of glass of other thicknesses and that glass manufacturers can convert production rapidly without excessive cost. In that connection, it must be observed that the fact that one of Pilkington's four production sites specialises in the manufacture of a certain type of glass does not mean that the technical processes for manufacture of the glass are different and does not demonstrate that an economic operator with only one production site cannot convert his production rapidly, so that the applicant's argument on the basis of the lack of cross-elasticity between supply of 4 mm glass and glass of other thicknesses cannot be upheld either.

69 The Court of First Instance finds, therefore, that the applicant has not established that the position of the Commission, set out in point 19 of the contested decision, that the relevant product market is the sale of glass of all thicknesses, was vitiated by a manifest error of assessment. It follows that that argument cannot be upheld by the Court.

70 The fourth plea must, therefore, be rejected as unfounded.

The fifth plea, alleging a manifest error of assessment of the geographical market

[Arguments of the applicant (paragraphs 71 to 80)]

Findings of the Court

The first objection

81 In its judgment in *United Brands v Commission*, cited above, the Court of Justice stated that the opportunities for competition must be considered, in regard to Article 86 of the Treaty, having regard to the particular features of the product in question and with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated (paragraph 11). Furthermore, in the same judgment, in order to ascertain whether the conditions of competition were sufficiently homogeneous in that case the Court of Justice referred primarily to transport costs, taking the view that, where such costs do not in fact stand in the way of the distribution of the

products, they are factors which go to make the relevant market a single market (*United Brands v Commission*, paragraphs 55 and 56).

82 It follows that, in the present case, the definition of the relevant geographical market, in the light, in particular, of the costs of transporting glass borne by continental producers, is justified. It must be observed, moreover, that in order to determine the conditions of competition on European markets, the Commission did not, in the contested decision, only consider the costs mentioned above but also verified that the volume exported to Ireland between 1988 and 1994 by continental producers was about one-third of the volume of the demand for float glass in that country, that the differences between prices charged in Ireland and in five other European countries by the five main continental producers did not indicate the existence of separate markets and that the existence of obstacles of a technical or regulatory nature to entry to the Irish market could be ruled out. Finally, it must be observed that, although the applicant disputes that the criteria laid down by the judgment in United Brands v Commission, cited above, were applied correctly, it does not indicate how they should be applied in order to define the geographical market in the light of the impact of transport costs on the conditions of competition.

83 It follows from the foregoing that the first objection must be dismissed.

The second objection

84 As regards the objection concerning the accuracy of the analysis of transport costs carried out by the Commission, it must be observed that that analysis takes account of the information supplied by the operators in the sector at the time of the investigation of the Pilkington-Techint/SIV merger and of the decision made following that investigation. In that decision the Commission observed that: (1) 80-90% of a plant's production is sold within a radius of 500 km; that distance is sometimes exceeded and can reach 1,000 km, beyond which the cost of transport becomes prohibitive, that is to say uncompetitive; (2) in its natural supply area with a 500 km radius a glass-producing undertaking is in competition with other undertakings whose supply areas overlap with its own; (3) since each of those undertakings has its own radius of supply, competition by an undertaking with those within its radius tends to extend to their natural supply area; (4) consequently, it is appropriate to consider the Community as a whole to be the geographical reference market.

85 It must first be determined whether the argument set out by the Commission in the contested decision for the purpose of defining the geographical market is contradictory. In the course of the hearing it became apparent that at several points in the contested decision the Commission was making reference to its decision in Pilkington-Techint/SIV, point 16 of which appears to be inconsistent with point 33 of the contested decision. In that connection, it should be borne in mind that a contradiction in the statement of the reasons on which a decision is based constitutes a breach of the obligation laid down in Article 190 of the Treaty such as to affect the validity of the measure in question if it is established that, as a result of that contradiction, the addressee of the measure is not in a position to ascertain, wholly or in part, the real reasons for

the decision and, as a result, the operative part of the decision is, wholly or in part, devoid of any legal justification (see in particular the judgment of the Court of Justice in Case T-5/93, *Tremblay and Others v Commission*, paragraph 42).

86 In point 16 of the preamble to the decision in Pilkington-Techint/SIV, the Commission states that raw float glass is a bulky, heavy product, expensive to transport over great distances; for example, the cost of transportation by lorry amounts to between 7.5 and 10% of the selling price at a distance of 500 km. In point 33 of the contested decision the Commission states that transport costs towards the edge of a plant's natural supply area (domestic market) exceed those within its near vicinity by up to 10% of the value of the product.

87 Following careful examination of those two decisions, the Court must observe, first, that the contested decision refers to the Pilkington-Techint/SIV decision without referring specifically to the percentages given in brackets in point 16 of the preamble to that decision, second, that the percentages given in point 16 are given by way of illustration and their significance is weakened by the conclusions the Commission reaches in that decision, which are the same as those it reached in the contested decision, in finding that it seems appropriate to consider the Community as a whole to be the geographical reference market and, third, that the true reason for the definition of the geographical reference market contained in the Pilkington-Techint/SIV decision is to be found in the second paragraph of point 16 of its preamble where it is stated that, given the dispersion of the individual float plants and the varying degrees of overlap for the natural supply areas, so that effects can be transmitted from one circle to another, it seems appropriate to consider that the geographical reference market is the Community as a whole.

88 It must be observed that the Commission in no way contradicts itself in that, first, in its decision in Pilkington-Techint/SIV, it defined the geographical reference market essentially on the basis of the concept of the natural geographical area of supply from a given float-glass production plant, represented by concentric circles with a radius determined by the relative transport cost and, second, it arrived at the same definition in the contested decision, having found that the transport costs which are tolerated by a producer in the natural supply area of its plant exceed those within the near vicinity of that plant by up to 10% of the value of the product. The concepts of natural supply area and near vicinity of the plant, on the basis of which the Commission concluded that transport costs did not exceed 10%, are compatible. Both concepts enable the relevant geographical market to be determined for an undertaking on the basis of the cost of transport by measuring that market not from the factory but from a number of points on the edge of a circle or series of circles surrounding it which constitute its natural supply area or the area in its near vicinity.

89 It follows that, contrary to what appeared to emerge from the hearing, the contested decision is not vitiated by contradiction in referring in point 33 to the Pilkington-Techint/SIV decision.

90 The applicant, for its part, does not contest, in themselves, the criteria which were used by the Commission to define the natural supply area (domestic

market) and on which the contested decision was based. In claiming that the Commission made a manifest error of assessment in its determination of the relevant geographical market, it is merely disputing the reliability of the replies of the glass producers on which that determination was based.

91 The Court observes, in that regard, that the third-party undertakings requested to supply information pursuant to Article 11 of Regulation 17 may have penalties imposed on them if they supply incorrect information, with the result that they cannot as a general rule be considered not to have supplied accurate and reliable information in the absence of evidence to the contrary. The applicant cannot purport to deny that the data supplied in those replies are of any value simply by referring to the analysis of transport costs which it put forward during the administrative procedure in its letter of 24 May 1994 and which was not accepted by the Commission in the contested decision.

92 In its letter of 24 May 1994, the applicant refers to the report commissioned by the Dublin Port and Docks Board from Dublin City University Business School (hereinafter the Dublin Port Report) on transport costs in the port of Dublin. On the question of the advantages said to be enjoyed by Pilkington in terms of transport costs, the applicant bases its argument on data which do not specifically refer to Pilkington but are merely inferred from its presumed commercial activity. For example, on page 4 of its letter, it states: "[Pilkington] is not constrained by any particular sailing and will therefore ship by the most cost effective sailing". The Dublin Port Report (pages 172-173) indicates that discounts of 15% to 18% are available for volume or guaranteed units. As Pilkington imports considerable amounts of glass to the Irish market (and maintains an office in Dublin), it would be guaranteed the highest discount. In addition, the 18% discount is granted for transport by day, whereas 15% is the maximum discount for night transport. Due to the proximity of Liverpool, Pilkington can benefit from the higher 18% discount. Finally, Kish estimates that Pilkington may have as many as 40 units per week and would benefit from favoured customer status and be at the low end of the price range, particularly if space is block-booked. Moreover, in that letter the applicant does not give precise figures for continental transport costs and, again on page 4 of the letter, states: "The Dublin Port Report does not indicate the percentage of the available 20 containers which are open-top, but it is certainly very small as only two shipping lines provide such specialised form of transport".

93 The applicant's argument based on the significance of transport costs as it emerges from the replies of the Irish glass companies is not sufficient to establish that the relevant geographical market is Ireland alone. The fact that the glass companies established in the Dublin and Galway areas obtain almost all their supplies from Pilkington merely indicates that, in view of the cost of transport, the latter has a competitive advantage in the geographical area close to its factory, but an advantage of that kind must be considered to be normal on most markets. Moreover, as the applicant itself points out, many other Irish companies buy significant quantities of glass from continental producers. In that regard, it must be observed that the company based in Limerick, which is as far away from Dublin as that based in Galway is, purchases only 62% of its supplies from Pilkington. It is thus clear that the data concerning glass imports derived from the

replies of the Irish companies do not support the inference drawn by the applicant that the Irish market is separate from the Northern European market.

94 Finally, the Court observes that the applicant's argument finds no support in the decisions it cites. For instance, while it is clear from point 77 in the preamble to the Flat Glass Decision that the cost of transport is a very significant factor in marketing flat glass beyond national frontiers and that the proportion of production intended for export is limited compared with the quantities sold on the home market, that does not mean that the analysis of costs that is made in the contested decision is erroneous. Second, the situation on the plasterboard market in the case which gave rise to the BPB decision was quite different from that on the float glass market. In that decision, unlike the situation in the present case, BPB Industries, which was charged with an abuse of a dominant position, had a factory in Ireland which supplied the national market and a factory in Great Britain which did not export to Ireland. In that connection, the Commission made the point that the prices of the factory located in Great Britain were not competitive with those in Ireland (see point 21 of the preamble to the BPB decision). The Commission concluded that Great Britain and Ireland were the relevant geographical market since those countries were the only areas in the Community where BPB is both the sole producer and has a near monopoly position in the supply of plasterboard (point 24 of the preamble to the BPB decision). It therefore determined the geographical market on the basis of factors quite different from those relied on by the applicant in the present case.

95 It follows from the foregoing that the second objection must be dismissed.

The third objection

96 The Court finds that the analysis of the differences in the FOB and CIF prices for 4mm float glass from the United Kingdom sold in other countries of the Community is not such as to invalidate the conclusions which the Commission drew from it in the contested decision.

97 As regards the FOB prices, it must be observed that, as the Commission pointed out, they refer to the price of the product as loaded on board and do not include the costs of subsequent transport, which on this type of market are normally borne by the producers. Consequently, such prices cannot be considered to give appropriate information on the real market prices.

98 On the other hand, the CIF price, which includes production and insurance costs, and every type of transport costs, can be taken into account for determining the real market prices. However, it must be observed that the data furnished by the applicant do not support its submission that the relevant geographical market is Ireland. Those data show that the discrepancy between the average prices charged in Ireland and the average prices charged in the Netherlands (470/500; ECU 30 per tonne) is less than that between the average prices charged in the Netherlands and the average prices charged in Germany, Belgium or Luxembourg (500/540; ECU 40 per tonne). On the basis of that consideration alone, it should be concluded that Ireland forms part of the same

geographical market as the Netherlands and not, as the applicant argues, that Ireland constitutes a separate market from the rest of Northern Europe.

99 It follows from the foregoing that the third objection must be dismissed.

100 It also follows that the fifth plea must be dismissed as unfounded.

101 The application must, therefore be dismissed in its entirety.

Costs

102 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

Court's Ruling

The Court of First Instance (Fourth Chamber) hereby:

1 Dismisses the application;

2 Orders the applicant to pay the costs. ■

New Hearing Officer

The Commission has appointed Mr John Temple Lang as Hearing Officer in the Directorate General for Competition. Mr Temple Lang, an official of Irish nationality, is the longest serving Director in the Directorate General and for the last few years has been in charge of the Directorate dealing with telecommunications and media. Before joining the Directorate General, he had worked for a number of years in the Commission's Legal Service.

The position of Hearing Officer was created in 1982 to reinforce the rights of defence of parties in competition proceedings. The Hearing Officer organises hearings of all parties involved in a competition case and is responsible for certain procedural decisions related to the confidentiality of documents and the admission of third parties to a hearing. He reports on the outcome of the hearings to the Commissioner and the Director General for Competition.

Source: Commission Statement IP/00/544, dated 24 May 2000

The full text of the Kish case reported above is freely available on the Court's web-site; the text is not, however, definitive.