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COMMISSION OF THE EUROPEAN COMMUNITIES

C(97) 1315 final

Brussels, 14 May 1997

COMMISSION DECISION

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)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty¹, as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 3, Article 15(2) and Article 16(1) thereof,

Having regard to the decision taken by the Commission on 22 April 1993 to initiate proceedings in this case,

Having given the undertaking concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19(1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17²,

After having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

THE FACTS

A. The subject of the proceeding

1. This proceeding is concerned with certain practices of Irish Sugar plc (hereinafter referred to as "Irish Sugar") in relation to the commercialisation of sugar in Ireland in the period from 1985 onwards.
2. The proceeding was initiated by the issuance of a statement of objections against Irish Sugar and certain other parties in April 1993. On the basis of the arguments put forward by the parties and new complaints by competitors of Irish Sugar within Ireland, the Commission undertook further fact-finding and issued a revised statement of objections against Irish Sugar in March 1996.

¹ OJ No 13, 21.2.1962, p. 204/62.

² OJ No 127, 20.8.1963, p. 2268/63.

B. The product concerned

3. The product concerned by this case is sugar. Sugar is produced from sugar beet or cane. With the exception of part of the South of Spain and the French DOM, sugar cane is mainly grown in tropical and sub-tropical areas outside the Community. The ACP countries have the right to export to the Community a certain quota of cane sugar, free of import levy.
4. For the purposes of the present decision, three different types of sugar can be distinguished: white granulated, liquid and speciality sugars.
5. White granulated sugar is the final product after processing beet and refining cane. Different qualities are identified in the relevant Community Regulations³. The standard quality is EC II sugar. White granulated sugar represents the major part of Community production and consumption. It is sold to industry and the retail trade. Industry uses white granulated sugar as an ingredient. Industrial users are supplied mainly with sugar in bulk or bags. The retail trade resells white granulated sugar to the final consumer. The main form in which this is done is one kilo packets.
6. Liquid sugars are mainly used in the food-processing industry. The highest quality is made by dissolving white granulated sugar. Lower grades are made only from cane by blending liquors produced at various stages of the cane-sugar refining process.
7. Speciality sugars are all dry sugars other than white granulated. This category includes ACP direct consumption raws, brown sugars, caster sugars, icing sugars and other milled sugars, and also syrups and treacles⁴.
8. Sugar is a sweetener. Other groups of sweeteners are starch and artificial sweeteners. They contain a wide range of products from isoglucose to sorbitol, saccharin, cyclamates or aspartame. Each of these products has its own specific properties and can be substituted for sugar in different industrial processes. For a number of reasons varying from product to product, i.e. Community quota, lack of bulking quality or higher prices, they have had only limited impact on the total sales of the natural sugars derived from cane and beet.

³ Council Regulation (EEC) No 793/72, OJ No L 94, 21.4.1972, p. 1 and Commission Regulation (EEC) No 2103/77, OJ No L 246, 27.9.1972, p. 12.

⁴ For fuller details of the three different types of sugar see paragraphs 2.62-2.73 of the UK Monopolies and Mergers Commission ("MMC") report "on the existing and proposed mergers between Tate & Lyle Plc or Ferruzzi Finanziaria SPA and S&W Berisford" (HMSO Cmd 89 of February 1987) and paragraphs 4.30-4.32 of the MMC report "Tate & Lyle Plc and British Sugar Plc" (HMSO Cm 1435 of February 1991).

C. The Common Agricultural Policy Sugar Regime

9. The sugar regime of the CAP⁵ is designed to support the production of sugar within the Community. The last revision of the sugar regime took place in May 1995, when the Council decided⁶ to extend the regime for a further period of six years (i.e. to the 2000/2001 marketing year inclusive). Each Member State is allocated two quotas; an "A" quota, and a "B" quota. The total A quota is in principle intended to equal the Community's annual consumption. The B quota is intended to provide a surplus, so that demand can be met even in the event of crop failure in certain geographic areas.
10. A system of price support exists, but only for A/B quota sugar. Any sugar produced by Community undertakings in addition to their A/B quota is referred to as "C" sugar, and must be either sold on the world market without support or stored and used as part of the following year's A/B sugar.
11. The proportion of the total A/B quota assigned to each Member State is decided upon by the Council. The quota allocated to each country is then divided amongst the national sugar producers by the government in question.
12. Each year the Council fixes a number of institutional prices in relation to the purchase of sugar beet and its processing and sale, the most important of which is the intervention price, that is the price at which any manufacturer may sell A/B sugar to national intervention boards. Companies selling into intervention receive the intervention price for their processed sugar. As part of the measures to ensure that the sugar regime is self-financing, a charge - the production levy - is applied to all A/B sugar. Intervention price plus the storage levy represents the guaranteed minimum price for A/B sugar. This is known as the effective support price. The storage regime is also self-financing.
13. In the context of the Uruguay Round the previous import regime with a threshold price and variable levies has been replaced by fixed tariffs, which will be reduced by 20% over six years.
14. The Council also fixes minimum prices that the processors must pay to beet growers for the sugar beet.
15. Processors of beet sugar may sell A/B sugar freely throughout the Community. If they are unable to sell all their sugar in this way, they may either sell into intervention, or export it onto the world market. If they choose the latter option they receive an export refund which is calculated on the basis of a tendering system.
16. In addition to A/B sugar, the Community provides price support for a limited amount of sugar imported pursuant to the Lomé Convention⁷.

⁵ Council Regulation (EEC) No 1785/81 and subsequent legislation based thereupon.
OJ No L 177, 1.7.1981, p. 4.

⁶ Council Regulation (EC) No 1101/95, OJ No L 110, 17.5.1995, p. 1..

⁷ See Note 4 above.

D. The sugar market in Ireland

17. Irish Sugar is the sole processor of sugar beet in Ireland and Northern Ireland.
18. Irish Sugar was set up in 1933 by the Irish Government under the name Comhlucht Siuicre Eireann, Teo. In the first half of the 1980s it made heavy losses and required substantial Government funding. In the second half of the 1980s a group rationalisation programme was implemented, as a result of which Irish Sugar gradually moved into profitability. In April 1991 Irish Sugar was privatized. The mechanism for reducing the State's holding in Irish Sugar included the incorporation of a new holding company, Greencore Plc (hereinafter referred to as "Greencore"), which acquired Irish Sugar. In the year ending 27 September 1996, Irish Sugar had a turnover of IEP 134.7 million and an operating profit of IEP 27.2 million, out of a Greencore aggregate turnover of IEP 459 million and operating profit of IEP 49.1 million.
19. Upon Ireland's accession to the Community, Irish Sugar was allocated the entire A/B sugar quota for Ireland, which it continues to hold and which amounts to 200 200 tonnes a year. This quota exceeds domestic consumption.

Table 1: Production, trade and consumption of sugar in its natural state in Ireland

	1986/87	1987/88	1988/89	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95*
Quota (A + B) (000 tonnes)	200	200	200	200	200	200	200	200	200
Carry forward of sugar (outside the quota) from preceding marketing year	+10	+11	+34	+29	+16	+16	+10	+ 10	0
Production	186	223	195	214	225	213	223	177	213
Carry forward of sugar (outside the quota) to the following marketing year	-11	-34	-29	-16	-16	-10	-10	-	-13
"C" sugar for export	-	-	-	27	25	19	23	-	-
National production available	185	200	200	211	210	208	200	187	200
Stock movements**	-	-	-	-	-	-	-	-	7
Import from A/C/B/D/E/F/G/H/I/J/K/L/M/N/O/P/Q/R/S/T/U/V/W/X/Y/Z	13	14	7	6	6	7	6	7	
Total sugar available	201	195	208	217	207	215	204	205	207
Export to third countries	-	-	13	-	-	6	-	-	6
Export to Member States	39	42	41	46	39	39	44	32	44
National consumption	162	153	154	171	168	170	160	173	157

** For stocks and figures the figures are positive. If stocks are increased the figures are negative.

Source: Statistics of the Directorate-General for Agriculture of the Commission.

20. Sugar consumption per capita in Ireland is higher than the average for the Community⁸, reflecting its role as an ingredient within the relatively important food and drink manufacturing industry of the country (which, together with other agricultural related industries, accounted for 16% of overall employment in 1995⁹) as well as on the retail market.
21. Irish Sugar is the main supplier of sugar in Ireland, with an overall market share of above 90 % in the period 1985-95. Imports of sugar into Ireland have come from France, the United Kingdom (mainly Northern Ireland) and to a limited extent from Germany and Belgium. Imports from the UK are mainly imports of sugar produced by Irish Sugar. In 1993/94, imports of sugar other than that produced by Irish Sugar accounted for around [.....] ¹⁰of the market.
22. On the industrial side, most imports since 1985 have been of French sugar and have been made through ASI International Trading Ltd and its successor ASI International Foods ("ASI"). These industrial sales are in 50 kg bags. The importation of bulk sugar from France to Ireland is more costly than the transport of bagged sugar, particularly if the tanker has to make the return journey with an empty container¹¹. The Greencore Group Corporate Plan of June 1994 notes that "*The vast majority of imports is in 50kg bags, with bulk sugar transport being relatively expensive because of the need for dedicated containers*". Over the years, industrial users have been moving to silos for stocking their sugar, resulting in an ever declining market for bagged sugar¹².
23. On the retail sugar market, which accounts for around 25% of the total sugar market, Irish Sugar's share has been above 85% since 1985, and its main "Siucra" brand enjoys significant consumer recognition¹³. Most of its competition comes from small domestic companies. Depending on relative price differentials, there have at times been imports of retail sugar from Northern Ireland, although a significant proportion of such imports are manufactured by Irish Sugar. Irish Sugar internal documents note that its customers for retail sugar have traditionally been split 50/50 between wholesalers and retail groups ("multiples"), but that recently multiples have been growing in importance. A few of these

⁸ On the basis of purchases of sugar in its natural state (whether for direct consumption or processing by industry), as in Table 1, Irish consumption per head 1994/5 was 0.044 tonnes compared to an EU12 average of 0.035 tonnes. If imports and exports of transformed sugar are taken into account, Irish total domestic consumption per head 1994/5 was 0.039 tonnes compared to an EU12 average of 0.034 tonnes. (Source: 1994/5 provisional marketing-year statistics).

⁹ Source: Facts about Ireland, Irish Government publication 1995.

¹⁰ [...] In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21(2) of Regulation No 17 concerning non-disclosure of business secrets.

¹¹ The cost of transport from France for sugar in bags rose from around IEP 30 to IEP 45 per tonne between 1985 and 1994. Transport costs for importing sugar in bulk would have been on average IEP 40 to 50 per tonne higher over this period. Up to 1990 the average difference between the effective support price in France and the market price in Ireland was around IEP 50, thus making it commercially viable to import bagged sugar, but not bulk sugar.

¹² As a result of industrial users moving to silos, the bagged market has been shrinking from 30 000 tonnes at the beginning of the 1980s to less than 7 000 tonnes today.

¹³ For example, see the reference to "*the recognized branding advantage of Siucra products*" in paragraph 57 below.

mutiples sell "own-brand" retail sugar. However *"to-date, all sugar for own brands is sourced from Irish Sugar as the Irish source is seen as important to the customer"*¹⁴.

24. During the 1980s Irish Sugar's main domestic competitors for retail sugar were Round Tower Foods Ltd ("Round Tower"), and ASI, which imported the "Eurolux" brand of Compagnie Française de Sucrierie ("CFS") until late 1988. In the period 1984/85 up to 1986/87 the majority of Round Tower's sugar supplies consisted of imported sugar. During that period it was active as a parallel importer of Irish Sugar sugar from Northern Ireland into Ireland. It also imported sugar direct from certain destinations and purchased from ASI sugar imported from France. Since 1987/88 it has bought most of its sugar from Irish Sugar.
25. By the early 1990s Round Tower was Irish Sugar's only domestic competitor on the retail market for white granulated sugar, with a retail market share of [.....]
26. In 1993 four Irish food packers, namely Gem Pack Ltd ("Gem Pack"), Burcom Ltd ("Burcom"), Tara Foods Ltd and P.J. Lumley Ltd, launched 1 kg white granulated sugar brands,. These companies achieved a total retail market share of around 7.5% by mid-1994, with Gem Pack being the most successful (around 5% of the total market). Burcom ceased trading in mid-December 1994. ASI also launched its own retail pack in 1993, using imported French sugar, but withdrew from the retail market for the second time in mid-1994.
27. Burcom initially packed both Irish Sugar sugar and imported sugar sourced from ASI, whilst the other packers sourced their industrial sugar from Irish Sugar. Since the demise of Burcom and ASI's withdrawal from the market, Irish Sugar has supplied *"almost all"*¹⁵ of the bulk white granulated sugar packed by its domestic competitors for the retail market.
28. In September 1994 Irish Sugar launched the "Castle" brand of 1 kg retail sugar, at a lower wholesale price than Siucra.
29. Distribution of Irish Sugar sugar in Ireland is carried out by Sugar Distributors Limited (hereinafter referred to as "SDL"). Until February 1990, Irish Sugar held 51% of the equity (in the form of "B shares") of SDL's parent company, Sugar Distributors (Holdings) Ltd ("SDH"). The remaining 49% (in the form of "A shares") was held until 1988 by the companies Musgraves and Punch, and Messrs Garavan and Keleghan, and from 1988 on by four executives of SDH, namely Messrs Lyons, Keleghan, Tully and Garavan. At that time there was an equal number of directors for the A and B shareholders and an independent chairman. The Managing Director of Irish Sugar and a number of other Irish Sugar Directors were on the Boards of SDH and SDL. Another company, J C Cole Ltd ("JCC"), was responsible for distribution of sugar in the Western District of Ireland until it was wound up in March 1988 and its business integrated in SDL.

¹⁴ Source: Greencore Group Corporate plan 1993/94-1997/98 of June 1994. In Annex 4 of the Statement of Objections of 25 March 1996.

¹⁵ Source: Greencore Group Corporate Plan of June 1994. In Annex 4 to the Statement of Objections of 25 March 1996.

30. Irish Sugar has stressed that, in the period prior to February 1990, it had legal control over SDH but not management control¹⁶. From July 1982 onwards¹⁷ the responsibility for technical services and marketing including, but without being limited to, marketing strategy, consumer promotions and rebating, was allocated to Irish Sugar, whilst SDL was made responsible for the funding of sales, trade promotions, merchandising and distribution of Irish Sugar products in the South and Northern markets. These responsibilities were divided into the designated areas between SDL, JCC and William McKinney (1975) Ltd ("McKinney"), with SDL responsible for sales decisions including pricing decisions for all three companies. However, these decisions were *"to be taken in accordance with policy as laid down by the Chief Executive of the Sugar Division"* of Irish Sugar which, as noted, funded any rebates to customers. SDL was, subject to availability of supplies, committed to purchasing its sugar requirements only from Irish Sugar and was prohibited from the sale, resale or promotion of any products *"which are of a like or similar kind"* to Irish Sugar products. SDL's and Irish Sugar's co-responsibilities included *"advising and reviewing of pricing and promotion policies"* and *"communicating information as necessary to each other on all aspects of sugar marketing, sales, trading, advertising, consumer promotions and financial"*. To ensure that *"all aspects of sugar trading"* were *"effectively communicated"* between Irish Sugar and SDL, and that the areas of co-responsibility were properly covered, a monthly meeting was instituted between the Sugar Division of Irish Sugar and SDL. These meetings were chaired by the Chief Executive of the Sugar Division of Irish Sugar.
31. In February 1990 Irish Sugar acquired all of the remaining shares in SDH, and thus became the sole owner of SDL.
32. In addition to being the main supplier of sugar in Ireland, Irish Sugar continues to be an important supplier of sugar in Northern Ireland through McKinney. At the time that this company was set up in 1976, it was 51% owned by SDL. In 1980 SDL increased its shareholding to 60%. SDL and its parent company SDH had a clear majority on the Board of Directors of McKinney in the period 1985-1989, with seven out of the ten Directors¹⁸. Two of the four remaining minority shareholders in McKinney had a representative each on the Board. However, McKinney Management Committee meetings, at which commercial policy was decided, were usually attended only by Messrs Lyons, Hogan and Keleghan of SDH/SDL and Mr Wood of McKinney¹⁹. In 1989 SDL further increased its shareholding in McKinney to 70%.
33. The consumption of granulated sugar in Northern Ireland has fluctuated between 35 000 and 39 000 tonnes since 1984, with the main suppliers being Irish Sugar, British Sugar PLC and Tate & Lyle PLC. In the period 1984-1994 Irish Sugar held [...] of the sugar market in Northern Ireland, British Sugar accounted for around [...] and Tate & Lyle [...]. In 1994 the Greencore Group Corporate Plan noted: "Currently, we have about [...] of the retail branded market and about [...] of the industrial market" in Northern Ireland.

¹⁶ Irish Sugar response of 1 September 1993 to the initial Statement of Objections at 12.

¹⁷ As recorded in the minutes of the SDL Board Meeting of 1 July 1982. In Annex 3 to the Statement of Objections of 25 March 1996.

¹⁸ Messrs Gray, Comerford, Garavan, Hogan, Keleghan, Lyons and Tully.

¹⁹ See, for example, the minutes of the McKinneys Management Committee meetings of 29 April 1986, 15 January 1987, 16 March 1987 and 14 December 1987.

Industrial Sugar Prices

34. According to Irish Sugar, in the period 1985-1994, prices for industrial sugar in Ireland and Northern Ireland have shown the following pattern.

Table 2: Average net selling prices (IEP per tonne) for industrial sugar in Ireland and Northern Ireland

	1985/8 6	1986/87	1987/88	1988/8 9	1989/90	1990/91	1991/92	1992/93	1993/9 4
Ireland	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Northern Ireland	[...]	[...]	[...]	[...]	[...]	[...]	[...]		

Source: Greencore/Irish Sugar

35. According to Caobisco/Committee of Industrial Sugar Users, the average indicative selling prices in IEP for industrial sugar in bulk ex-factory in Ireland during the following months between 1986 and 1994 were:

Table 3: Average indicative prices for industrial sugar in Ireland

03.86	10.86	10.87	03.89	02.90	02.91	03.92	05.93	02.94
	01.87	07.88	10.89	07.90	04.91	07.92		08.94
						12.92		
480	510	524	536	540	562	560	590	610
		528	538	559	570	560		605
						560		

Source Caobisco/Committee of Industrial Sugar Users

36. It should be noted that the Caobisco figures are for particular months, whereas those of Irish Sugar are annual averages.
37. Irish Sugar also makes regular sales of between [...] and [...] tonnes of industrial sugar in Great Britain. In the period 1985-1994 prices for industrial sugar in the United Kingdom (including Northern Ireland) have shown the following pattern.

Table 4: Average net selling prices (GBP per tonne) for industrial (bulk) sugar in Great Britain and Northern Ireland

	1985/8 6	1986/8 7	1987/88	1988/8 9	1989/90	1990/9 1	1991/9 2	1992/9 3	1993/9 4
UK (incl. N.I.)	385	393	398	411	4 50	480	488	543	580

Source: Caobisco/Committee of Industrial Users of Sugar indicative prices. It should be noted that over this period sterling has declined from a premium of around 18-20% relative to the Irish pound to

41. A handwritten note on a "Sugar Plan" slide copied by the Commission at the premises of Greencore, together with the Greencore Corporate Plan of June 1994 refers to the "home market premium" on the sugar price. A further handwritten note headed "Sugar Plan", also notes that, for various assumptions on sales prices, the "home market premium is retained"²³.

E. Facts underlying the infringement of the competition rules

I. Measures to protect the home market against competition from imports from other Member States

(i) **Imports from France**

42. As noted above, a high proportion of imports of sugar into Ireland since 1985 have come from France.

** Transport restriction*

43. It follows from the documents on the file that in the mid-1980s Irish Sugar took steps to restrict the opportunities for transportation available to its competitors. In this respect reference can be made to the minutes of the Irish Sugar/SDL/JCC Committee meeting of 28 June 1985:

"Present situation in home retail market ... In relation to packet sugar being produced by Round Tower, it was noted that a gap of approximately [...] per tonne existed between their average selling price and the price of "Siucra" [Irish Sugar] product. On this problem it was agreed that CSET [Irish Sugar] should ensure that Round Tower were not enjoying advantageous arrangements with their supplier or shipper..."²⁴

44. In particular, in the middle of 1985 Irish Sugar tried to hamper ASI from bringing in sugar from France by threatening the State-owned British and Irish shipping line company ("B&I") that it would take away all Irish Sugar business if they continued to carry French sugar, supplied by the French processor CFS, for ASI. B&I gave in to Irish Sugar and agreed that it would no longer carry sugar for ASI. This resulted in ASI initiating legal proceedings against B&I and Irish Sugar. Irish Sugar's course of action in this respect is referred to in a series of handwritten entries in the office diary of Mr Keleghan:

"17 July 1985 - Chris Comerford [Managing Director of Irish Sugar] - Brendan Byrd [representing B&I] - B&I will not be handling any French sugar from Monday 22 July. Last years tonnage 228 x 20 = 4560 - Year to date 91 x 20 = 1820 - 1420 to April ... Charles Lyons gave promise to Brendan Byrd that Tanktrans [a subsidiary of Irish Sugar] would put extra business in B&I..."

"1 August 1985 - B&I advised P.C. [Peter Cunningham of ASI] that CSET [Irish Sugar] applied pressure to them not to deliver to PC - Crude and Deceitful

²³ In Annex 4 to the Statement of Objections of 25 March 1996.

²⁴ In English in the original text.

attempt to put pressure on PC prior to discussions. PC had meeting with Alex Spain [director of B&I].²⁵"

The B&I claim was settled out of Court. It was agreed that Irish Sugar would pay CFS a certain amount of indemnity. Irish Sugar has admitted that it advanced "the proposition" to B&I to withdraw its custom if B&I continued to ship CFS sugar from France to Ireland.

*** *Selective pricing***

45. In a note dated 8 March 1988 to the members of the CSET (Irish Sugar)/SDL/JCC Executive regarding French sugar imports Mr Keleghan (then Sales Director of SDL) noted the following:

"...We have established that it would cost approx. [...] to bring all customers to a maximum of [...] per tonne. (...) I do not envisage dropping prices to all customers, thereby involving the heavy cost referred to above, however, where we meet up with new low prices we must respond carefully and ensure that we hold customers at all levels no matter how small. This I am aware is a slightly risky step, as we may have some very small users enjoying terms equal to or better than some bigger ones. I feel this is a risk we must take however. In the meantime we have initiated increased vigilance at Industrial Customers level with a view to establishing the extent of any increased activity by ASI.²⁶ "

*** *Product swap and fidelity rebate***

46. It has been shown above that traditionally ASI's retail sales of white sugar were made through Round Tower²⁷. However, from 1987/88 onwards Round Tower was receiving nearly all of its sugar from SDL. As the existing business of ASI came under severe pressure in the industrial sector, ASI decided in 1988 to launch a 1 kg sugar packet of CFS under the brand name "Eurolux" to the market in Ireland.

At the Board meeting of SDH of 28 June 1988 this issue was discussed and the minutes record that:

"... With regard to the retail market, Mr Keleghan advised the board that as he had forecast at the March meeting, ASI did launch a retail pack on the market. While they had so far been unsuccessful in their launch, it was his belief that they would succeed in getting some small quantities of sugar into some independent retail shops..."

Mr Comerford (Managing Director of Irish Sugar) stated that the sugar industry has never before faced a challenge such as we were now facing. If we did not succeed in meeting this challenge, then the future of the sugar industry in Ireland would be very bleak indeed. He was quite pleased with the response so far to the challenge but was

²⁵ In English in the original text

²⁶ In English in the original text.

²⁷ ASI also supplied Shamrock Foods Limited with golden granulated, a speciality sugar.

concerned about the cost to both (Irish Sugar) and (SDL) which would be very high...²⁸

²⁸ In English in the original text.

48. Upon presentation and introduction by ASI of "Eurolux", SDL took certain actions which upon complaint by ASI have been challenged in court under Irish law by the Director of Consumer Affairs and Fair Trade. These actions are described in the affidavit of Mr Anthony Brennan, Authorized Officer acting on behalf of the Director before the Irish High Court on the following lines.
49. ASI concluded a deal with the Irish wholesale group Allied Distribution Merchants ("ADM") for the supply of 1 kilogram packs of granulated sugar in or about February 1988. ADM agreed to purchase 1 500 tonnes of 1 kg packs of Eurolux sugar and the first consignment of 24 tonnes thereof was delivered in mid-April to the ADM warehouse for distribution to retail outlets of the Londis chain of stores. ADM issued on 15 April 1988 a bulletin to all its members, that is to say the retail outlets of the Londis chain, advising them of the availability of the sugar. According to the affidavit of Mr Brennan, following the issue of the said bulletin, Mr Keleghan of SDL had a meeting with Mr Lane (Chief Executive of ADM). The affidavit indicates the following:

"At the said meeting Mr Keleghan informed Mr Lane that if the quantity of sugar purchased from the defendant (about [...] tonnes per annum) was reduced then the defendant [SDL] would "bonus back" their sugar. In effect this meant that ADM could not sell or compete and they lost their bonus from the defendant. Mr Lane informed Mr Keleghan that he had a large quantity of the first delivery of Eurolux Granulated Sugar in his warehouse unsold. Mr Keleghan offered to buy this sugar to sell to manufacturing industry and he agreed to allow the amount he received for it as a credit in ADM's account. (...) The amount of Eurolux sugar purchased by the defendant was 21.01 metric tonnes.²⁹"

Mr Brennan further notes in his affidavit:

"I say that in reply to my question as to why more sugar was not ordered, Mr Lane replied that he considered the market was not ready for Eurolux sugar at present. He added that ADM had an agreement with SDL whereby ADM normally buy [x] tonnes of sugar and get this at the [3x] tonne rate, which is a more advantageous rate. If they were to reduce the amount of sugar purchased this agreement would no longer be of effect and they would not be able to obtain the sugar from the defendant [SDL] at the [3x] tonne rate.³⁰"

It follows from the evidence on the file that the 21 tonnes of Eurolux sugar in question were collected from ADM on 22 April 1988.

50. Similar actions took place with regard to the retailer Kelly's Spar Supermarket. According to Mr Brennan's affidavit, Kelly had bought half a tonne of Eurolux sugar from the agent of ASI around mid May 1988. The Eurolux sugar was placed on the shelf and at first the sugar sold well. It is further reported in the affidavit of Mr Brennan that some four weeks later, SDL called the shop and asked how Eurolux was selling. The affidavit states that Mr Kelly informed SDL that if he could get a better price for sugar from Irish Sugar he would not want to sell the Eurolux sugar. Mr Kelly stated that the man representing the defendant (SDL) informed him that

²⁹ In English in the original text.

³⁰ In English in the original text.

"if he wasn't able to shift it they would swop it for him."³¹

The affidavit continues by stating that about two hours later the Eurolux sugar was collected and exchanged for an equivalent quantity of sugar from Irish Sugar.

51. In his replying affidavit Mr Keleghan of SDL said, in essence, that both ADM and Kelly were concerned as to whether they would be able to sell all of the Eurolux sugar which they had been delivered. Both ADM and Kelly would have been aware that the Irish market was not ready for Eurolux sugar. In the case of Kelly, SDL noted that Mr Kelly himself had asked to arrange to swap Eurolux sugar for the Siucra brand.
52. It follows from the documentary evidence of the file that although the actions relating to the product swap were taken by SDL, Irish Sugar was duly informed by ASI of the difficulties it encountered. In a letter of 18 July 1988 Mr Loane of ASI wrote the following to Mr Comerford, the Chief Executive of Irish Sugar at Irish Sugar's address in Dublin.

"Dear Mr Comerford

I am writing to bring to your attention unfair trade practices being initiated either directly by your company or by Sugar Distributors Limited which is controlled by you in relation to our efforts to market our Eurolux 1 kg Retail Sugar in Ireland. We have requested the Director of Consumer Affairs and Fair Trading to investigate specific difficulties we are experiencing.

Specifically this letter is to advise you that we object very strongly to your companies substitution of our product in the Spar retailer, Kelly's of Boyle. With or without the agreement of the proprietor this action contravenes existing legislation and we respectfully demand that you restore our product here and in other instances where this practice has occurred.

We specifically object to the use of oppressive tactics on other individual retailers who are enjoying the benefits of Eurolux and would continue to so do if left unthreatened.

We seek your assurance that you will desist from restrictive practices and unfair trading and compete with us on equal terms as we are entitled to expect under the rules of the European Community."³²

53. The Director of Consumer Affairs and Fair Trade was seeking an injunction in the High Court to restrain SDL from acquiring 1 kilo Eurolux sugar from wholesale or retail outlets. The injunction was however not granted on the ground that there was no evidence *"that there was a continuing breach of the relevant Orders or that it was likely that there would be further breaches."*

³¹ In English in the original text.

³² In English in the original text.

(ii) Imports from Northern Ireland

54. In the period between 1985 and 1990, and in particular during a price war between the UK sugar producers British Sugar PLC and Tate & Lyle PLC, Irish Sugar was faced with the problem of cross-border imports from Northern Ireland to Ireland. In principle all sugars in Northern Ireland, regardless of their origin, could be used for these imports. They included both sugars from competing producers such as British Sugar's Silver Spoon and Irish Sugar's own sugar which was being re-imported either in bulk or in retail packets (under the McKinney label). At several meetings this matter was discussed, leading to various specific actions which were designed as a defence against these imports.

*** Restriction of supply**

55. At an internal meeting between Irish Sugar and SDL concerning packet sugar of 23 January 1985 it was noted:

"Volume of sugar imported across border in November/December estimated at 700 tonnes with an acceleration in January.

Sales to Wholesalers in border area over the last two months as follows: (...)

Mr A.J. Hogan [General Manager Marketing of Irish Sugar] suggested we remove [...]/tonne rebates currently given in Northern Ireland. This would have a double benefit in increased Northern prices plus reducing rebate required in South. This action to be taken while attempting to get B.S.C. [British Sugar] and Tate & Lyle to follow but our price to be increased in any case.

Mr Keleghan's [Sales Director of SDL] view was that there were only two alternatives.

(a) National rebates in the South. He suggested [...]/tonne on a National basis with [...] in border areas for February/March. Estimated cost £[....].

(b) Remove present [...] border area rebate as this was impossible to maintain on a selective basis and restrict supplies of McKinney sugar to the Northern Ireland wholesalers who are currently supplying the Southern trader.

After discussion it was decided to implement the latter alternative. In the meantime efforts are to be continued to get B.S.C. and Tate & Lyle to increase prices.³³"

56. At the board meeting of McKinney of 6 February 1985 Mr P. Wood (Director of McKinney) recorded that:

"Tate & Lyle were gaining some additional sales because of restriction of supplies of McKinney sugar in the border area."³⁴

³³ In English in the original text.

³⁴ In English in the original text.

*** Selective rebates (discriminatory pricing) including border rebates**

57. In a note titled "SDL review of current (April 1986) competitive problems on domestic sugars and recommendations on pricing/promotional strategy", it is indicated that:

"Since the last packet sugar price increase in October 1984 (...) a substantial differential has existed between home market prices and the price of competitive imported product, the latter including re-imported McKinney packets and bagged sugar. (...) The activities of Round Tower Foods Limited which is currently packing and selling an estimated 40 tonnes of packet sugar per week (...) are a continuing cause of concern and, at this stage, are but one feature of the actual/potential competition picture which threatens the price and market share dominance of "Siucra" packet sugars in the Republic of Ireland market.³⁵"

In the same note some strategic options were set out:

"(i) take no action; (ii) reduce market selling prices to all customers by IEP[...] per tonne, thereby equalising the selling prices North and South; This action should totally eliminate all import/competitive problems but would be both unnecessary and impossible from a financial point of view; (iii) reduce selling prices by[...], which should be sufficient to confine cross-border imports to border areas and keep the level of packing by Round Tower Foods Limited to at or below the current level, but would not deal with the demands of multiples, etc., for equal pricing North and South; (iv) Operate a selective co-ordinated programme to take account of the most vulnerable areas, with the objective of maintaining shelf prices at the current level. This is the recommended strategy and SDL believe that, given the excellent relationships which exist in the market place coupled with the recognized branding advantage of Siucra products, it should be adopted for the balance of 1985/86 and for 1986/87. SDL consider that this is the most preferable least cost option, whilst at the same time recognizing that it cannot be guaranteed to withstand increased pressures from Round Tower Foods Limited/ importers. If the latter situation occurs serious consideration will have to be given to the more expensive options listed.³⁶"

The recommended strategy is then further detailed:

"(i) continue with [...] per parcel [15 x 1kg bags] promotion in Donegal area and extend promotion in Monaghan/Dundalk area [border area]; (...) ; (iv) Particular problems have arisen with A.D.M. because of the nature of that grouping. The cost of temporary rebate arrangements entered into with A.D.M. are set out in Appendix E4. and it is expected that additional expenditure of [...] p.a. will arise with this customer.³⁷"

58. Competing sugar packer Round Tower Foods was active as a parallel importer of sugar from Northern Ireland during this period, which it sold under its Gold Seal label. An undated handwritten note which was found in the office of Mr Keleghan states the following:

³⁵ In English in the original text.

³⁶ In English in the original text.

³⁷ In English in the original text.

"Recommendations and implications re Gold Seal Sugars: IR continue as we are, i.e. rebating as the necessity arises. Presently we rebate to:[....]. Through [...]we rebate to many independent outlets the largest being [...] Imp. [implication].This method is exceedingly dangerous both legally and commercially. Legally on the basis of selective pricing. Commercially on the same basis except that the selectivity is in favour of our smaller customers i.e.[....]... ex area manager [...] is a user of less than [...]p.a. and has a nett price of ... whilst[...],[...]who purchase from [...]to [...]t.p.a. or more than [....]tonnes collectively...."³⁸

59. In the minutes of a joint meeting of Irish Sugar and SDL of 5 June 1986 the following is reported:

"Mr C.M. Lyons [Managing Director of SDL] said that, in the light of the very low Northern Ireland prices already discussed, it was essential to maintain the IEP [...] per parcel Border promotional allowance. It was agreed to continue this promotion for the reason stated."³⁹

60. In a note to Mr Keleghan of 26 June 1986, Mr Lyons wrote the following:

"1.[...]

I spoke yesterday with Joe Lane who rang regarding the position on the [...] per parcel for July. (...) I advised him to extend the same situation for July. He went through the individual customers he had taken back and these amounted to [...] customers out of a total of [...] that he has given it to. The other [...] are loyal ones who have always remained with him but who were under pressure in the areas involved."⁴⁰

61. At a meeting of the Board of McKinney on 19 September 1986 it was reported that:

"whilst the drop in packet sugar sales was of concern, it had to be born in mind that approximately [...] tonnes of the reduction was attributable to reduced cross-border sales of McKinney sugars"⁴¹

62. In a note called "Points of discussion"⁴² the following description was given of the problems concerning cross-border sales:

" 2. BSC and Tate & Lyle cut their prices (we have not followed) by a further £12/13 in small Border Cash & Carry's (none of whom would reach 300 tonnes of sugar per year) who were only too pleased to stock their product as McKinneys was price marked and could not be used for Cross Border Traffic.

³⁸ In English in the original text.

³⁹ In English in the original text.

⁴⁰ In English in the original text.

⁴¹ In English in the original text.

⁴² The document is undated, but most likely it should be situated in or around October 1986.

We have a serious problem therefore with prices too low in these Cash & Carry's and Cross Border Merchants purchasing and dumping in the South which is now costing C.S.E.T. [Irish Sugar] approximately [...] per annum to discount in the Border area in the South as well as losing[...] retail packet market share in Northern Ireland. The problem is potentially far more serious as the amount of discounting is growing and it could trigger a National discount which could cost up to [...] million...⁴³

63. In the minutes of an SE (Irish Sugar)/SDL/JCC Committee meeting of 7 January 1987 the following is stated:

"Mr Keleghan reported that the [...] per parcel rebate had been reduced to [...] per parcel in all areas except in Donegal. It was agreed that the Donegal rebate be reduced to [...] from December 1st, 1986.⁴⁴"

64. In the minutes of a joint Irish Sugar/SDL meeting of 12 January 1987 the following is indicated with regard to cross-border sales:

"Mr C.M. Lyons said that the reduction of the cross-Border rebate from [...]to[...]per parcel had worked out well without any major problems and the reduction had not resulted in any increase in the small amount of B.S.C. and T&L sugar being imported. Mr M. Leyden confirmed a similar reaction in the Western area.⁴⁵"

65. At a meeting of the Board of McKinney of 21 January 1987, Mr Keleghan pointed out that the substantial drop in sales to James Finlay Ltd:

"reflected both reduced cross-border sales and also the loss of a major UK contract by this customer".⁴⁶

66. The minutes of the Board meeting of SDH of 18 November 1987 record that:

"Border rebates had been removed in July 1987 but might have to be reintroduced in early 1988. Round Tower appeared to have adopted a more rational policy in recent times....⁴⁷"

67. The minutes of the meeting of the Board of SDH of 29 March 1988 note that:

"the recent £20.00 increase in Northern Ireland packet sugar prices, coupled with the strengthening of sterling against the Irish Punt, had reduced cross-border imports significantly....⁴⁸"

⁴³ In English in the original text.

⁴⁴ In English in the original text.

⁴⁵ In English in the original text.

⁴⁶ In English in the original text.

⁴⁷ In English in the original text.

⁴⁸ In English in the original text.

68. The minutes of the meeting of the Board of SDH of 28 June 1988 indicate that:

*"increases in the pricing of BSC and Tate & Lyle sugars had helped to stabilise that market and reduce the amounts of sugar coming across Border"*⁴⁹.

69. In the minutes of a Irish Sugar/SDL management meeting held on 27 June 1990 it is indicated that:

*"Mr T.G. Keleghan said there was a potential threat to the home market from cross-Border imports from the North. He said that if this threat materialised it was important to react speedily with appropriate counter measures. These would include price marking on McKinney sugar and appropriate promotional activity on the home market...."*⁵⁰

II. Pricing Behaviour that discriminates against particular categories of customer

(i) Sugar Export Rebates

70. Irish Sugar's prices for industrial sugar vary according to both normal commercial criteria, such as the amount purchased and the credit terms, and also a range of other factors. Of these by far the most important, and valuable, is a sugar export rebate, which is given to customers exporting their final product, such as confectionery or soft drinks. These rebates, which Irish Sugar also refers to as "Peripheral Factor Allowances" or "PFAs", are paid according to the tonnage of sugar finally exported, and the evidence⁵¹ shows that a number of customers report their export volumes in arrears in order to claim a rebate - for example, jam makers Chivers claimed [...] for the period July to October 1994, of which IEP [...] was in respect of exports to "Britain and Europe". Irish Sugar states that some customers, such as confectionery manufacturers [...] and [...] (Irish Sugar's largest customers), have the rebate incorporated into their net price for all sugar purchases, although [...] subsidiary [...] is amongst the companies that provides Irish Sugar with periodic reports of the tonnage of "export sugar" used. Although the export rebate system is similar to that within the common sugar regime for exports outside the Community, most of the exports for which rebates are granted are to other Member States. Irish Sugar claims that the rebate system originated as a result of government encouragement to support exporters during the 1970s. The system has therefore been in place for a considerable period of time, and sugar export rebates were discussed at meetings between representatives of Irish Sugar and SDL prior to February 1990⁵².

⁴⁹ In English in the original text.

⁵⁰ In English in the original text.

⁵¹ As provided by Irish Sugar, in response to requests for information, and copied at an inspection of the company's premises on 16 January 1995.

⁵² As shown by extracts from Irish Sugar and Sugar Distributors Management Meeting Minutes during the 1980s provided by Irish Sugar on 18 May 1995.

71. In a letter dated 24 February 1994 to the Office of Consumer Affairs Mr Heaphy of Irish Sugar explained that the export rebate *"has been of the order of [...] to [...]for each tonne of sugar utilised in the manufacture of the export product"*⁵³. In a letter to the Commission Irish Sugar have stated that average export rebate figures are only available in the company's records from 1987, and have shown calculations of the total value of rebates over the total tonnage which produce an average rebate of around IEP [...] a tonne between 1987 and 1995, although how this average relates to individual customers is uncertain⁵⁴. In fact the evidence shows that export rebates can reach up to over IEP [...] per tonne, that customers exporting the same volumes receive different sizes of rebate per tonne and that the size of the rebate can vary over time without any corresponding variation in volumes purchased or exported, or without any correlation to changes in currency rates. Irish Sugar have stated that;

"...where PFAs have been granted to a company over a period of time the PFA becomes effectively built in to the company's purchase price and, consequently, the company will demand to receive the same level of rebate".⁵⁵

72. Rebates can also vary according to the Member State to which exports are made: for example, confectioner McKinney receives a [...] rebate on sugar ultimately destined for the United Kingdom and a [...] rebate for exports to other countries. These are then averaged with purchases destined for the "domestic" market to give an overall rebate of [...] a tonne on all sugar bought by this customer. Drinks manufacturer Clintock, on the other hand, receives a [...] rebate on all purchases because *"a very high percentage is exported"* - no figures are provided to show exactly what proportion or to where. Irish Sugar have explained in meetings with the Commission that rebates are granted on an ad-hoc basis with individual customers and that they are notified to the company receiving them. For example, in a letter dated 7 October 1993 to BSN Groupe, Mr Heaphy of SDL proposes a reduction of [...] a tonne in the price of sugar supplies to BSN subsidiary Irish Biscuits (as part of the annual price negotiations with BSN), then adds *"we operate an export rebate arrangement with Irish Biscuits and subject to further discussions with Irish Biscuits we are proposing a rebate of [...] a tonne"*⁵⁶. There are no set rates or thresholds for export rebates, and no general publicity is given to the system.

(ii) Discrimination against competing sugar packers

73. By the early 1990s, ASI had stopped supplying the retail sugar market, and the percentage of non-Irish Sugar products was small and virtually static (Round Tower held a steady [...] of the market, using mainly Irish Sugar sugar). However, in mid-1993 four packers, of which the most important were Gem Pack and Burcom, launched 1 kg retail packets, taking advantage of the large price difference between industrial and retail sugar. Gem Pack bought sugar only from Irish Sugar. Burcom used, over time, both imported

⁵³ In English in the original text.

⁵⁴ This is so because the method of payment varies between customers, so that for some export rebates are only paid in respect of (documented) volumes of sugar actually exported (referred to as "export sugar" by some customers,[...]), and for others export rebates are averaged down and paid for all sugar purchases, whether for "domestic" or export use. Certainly, export rebates paid in respect of volumes exported can be significantly higher than [...] a tonne.

⁵⁵ In English in the original text

⁵⁶ In English in the original text

75. Irish Sugar documents show that in 1990 Gem Pack was granted a PFA, or export rebate of [...] a tonne. Irish Sugar has not explained the reason for this, but have argued that Gem Pack received an [...] a tonne rebate to help it compete against imports of sugar sachets in the period up to 1993, when it was not competing with Irish Sugar in the 1 kg retail sugar sector. This rebate for sugar sachets ended when Gem Pack started competing with Irish Sugar in 1 kg packets. Irish Sugar have stated⁵⁷ that Gem Pack was subsequently offered an [...] a tonne rebate in October 1995 which was backdated to 1994. Irish Sugar has also argued⁵⁸ that the sugar packer Burcom also received a rebate on its price for sugar in 1994, although this was not shown in their response of August 1994, because, at a price of IEP [...], it was "*charged as if it had purchased [...] tonnes*"⁵⁹ when "*in its first year of trading (May 1993-4) Burcom purchased[...] tonnes*"⁶⁰. In this respect, it should be noted that Burcom was still being charged IEP [...] on 30 June 1994, after the end of this first year of trading and despite its rapid growth. In the year ending December 1994 Burcom purchased nearly[...] tonnes of sugar. Furthermore chewing gum maker Topps Ireland Ltd, which bought only [...] tonnes of sugar in 1994, paid a gross price only [...] a tonne higher than Burcom's.
76. Like export rebates, other rebates are arranged on an entirely ad-hoc basis and notified verbally. Thus companies facing similar conditions may receive entirely different rebates. For example, Gleeson, a soft drinks manufacturer, receives a [...] a tonne rebate because of its distance from the Dublin market, despite the fact that it is located nearer to Dublin than other customers. Batchelor's received a [...] a tonne "promotional rebate" in 1994 despite the fact that its purchase volumes had "declined significantly", according to Irish Sugar. Even Topps received a [...] rebate on top of its low gross price because when the company was set up a few years ago sales were "expected to be substantial". There appears to be a distinct lag between sales performance and any adjustment in rebates, and rebates for "start-up" and "fast growing" companies appear to be confined to those not in the sugar business.
77. As with export rebates, not only are the amounts per tonne for these "domestic" rebates variable, but the method in which they are granted, that is whether on or off-invoice, on all purchases or retrospectively (as a lump sum) if certain purchase volumes are met, also varies from customer to customer.

*** *Target rebates and selective pricing***

78. In Spring 1994 (March-May), alongside a World Cup promotion which involved ordinary quantity discounts, Irish Sugar also offered the major food wholesalers in Ireland target-based discounts on its Siucra 1 kg brand.
79. Irish Sugar has stated that wholesalers were offered an additional [...] discount on all purchases if they achieved an [...] increase on previous average weekly purchases. The reference period used to calculate the increase was the 26 weeks from April to September 1993. Documents taken at the company reveal that several wholesale groups got a higher target related discount, and two customers have confirmed this in response to requests for

⁵⁷ In its Response to the Statement of Objections of 12 July 1996 at 6.2.6.

⁵⁸ In its Response to the Statement of Objections of 12 July 1996 at 6.3.1.

⁵⁹ In English in the original text.

⁶⁰ In English in the original text.

information. National Wholesalers Grocers Alliance Ltd ("NWGA"), which accounts for around [...] of the wholesale market, received a[...] target rebate and the Musgraves group received a [...] target rebate. Irish Sugar has argued⁶¹ that these companies have given incorrect information to the Commission with regard to the percentage that was received as a target rebate. However, Irish Sugar's own records⁶² clearly show for Musgrave "*Target [...] which matches with Musgraves' own statement of the target rebate that it received. Irish Sugar does not deny that all the wholesalers involved were offered some form of target rebate.*

80. A handwritten internal "Operations Report" notes, with respect to retail sugar, that

*"promotional activity in April and May contributed to stock build ups and, therefore, to lower sales levels in June and probably July as well."*⁶³

81. Irish Sugar launched a further round of target rebates on Siucra for two weeks in October, again linked to weekly averages during the period April to September 1993. Wholesale groups received a discount of [...] per tonne (around 3% on the average wholesale price) if they achieved an 8% increase in sales over this weekly average. Invoices for Siucra 1 kg sales during this period show that many customers bought significantly in excess of the target.
82. Target rebates have also been offered on a selective basis. In December 1994 Irish Sugar offered the major retail chain [...] a target rebate for 1995. An internal note of 15 December 1994 headed [...] *1995 Proposal*" shows a "*growth incentive*" of a [...] discount on Siucra purchases in 1995, conditional on "*an increase of [...] tonnes in Siucra volumes*". Since Siucra 1 kg sugar comprised a very major part of total 1994/5 Siucra brand sales to[...] ⁶⁴, it followed that an increase in Siucra purchases would largely involve Siucra 1 kg purchases. At the time Irish Sugar was competing with Burcom for sales of 1 kg own label [...] sugar to[...] . The June 1994 Greencore Corporate Plan notes that in April 1994 [...] relaunched [...], "*supplied [...] by Burcom and[...] by ourselves*", and that "*[...] are determined to establish[...] ...[....] are giving equal shelf space to [...] and Siucra*". Any increases in Siucra volumes purchased by [...] were likely to lead to a reduction in 1 kg [...] purchases, which was the product for which Burcom was competing as supplier.

⁶¹ At the oral hearing of 26 July 1996 (Mr McCluskey).

⁶² In Annex 9 of the Statement of Objections of 25 March 1996..

⁶³ In English in the original text.

⁶⁴ An internal note copied at the investigation on 16 January 1995 shows 1994/5 Irish Sugar sales to Dunnes of [...]tonnes of Siucra 1 kg, [...] tonnes of Siucra Specials, [...] tonnes of St Bernard 1 kg and [...] tonnes of St Bernard Specials.

83. Irish Sugar has argued that Burcom ceased trading on 14 December 1994 and that the internal note therefore post-dates Burcom's closing down and that "*At the time Burcom was not competing on the market in general or for [...] account in particular*"⁶⁵. However, the target rebate to [...] is also noted in the extract from Irish Sugar's Register of Supplementary Terms, which Irish Sugar has stressed is a complete record of its terms in order to comply with the Irish Groceries Acts⁶⁶. The extract⁶⁷ clearly shows that the "*Branded Siucra [...] Growth incentive Siucra[...]*" was entered in the Register on the 8 December 1994, and was therefore determined on or before that date. Furthermore, Irish Sugar's own internal profit and loss forecasts made after the launch of the Castle brand in late 1994, envisaged Burcom's purchases of bulk sugar doubling from [...] tonnes in 1993/4 to [...] in 1994/5⁶⁸.
84. Irish Sugar have stated that in February 1995 the wholesale group[...] was offered both a target rebate and a non-target-related rebate for purchases of Irish Sugar's products for the period from March 1995 to February 1996. [...] bought approximately [...] million worth of Irish Sugar products in the preceding year. Its stated terms, which have been confirmed by[...] , were a [...] non-conditional rebate on the value of purchases and a further [...] rebate conditional on a [...] percent increase in purchases over the year.

LEGAL ASSESSMENT

Article 86

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

A. The relevant market

The relevant product market

86. As the Court of Justice of the European Communities stated in *Hoffmann-La Roche v Commission*⁶⁹,

"The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as the specific use of such products is concerned."

⁶⁵ Irish Sugar's Response to the Statement of Objections of 12 July 1996 at 7.3.4.

⁶⁶ At the oral hearing of 26 July 1996 (Mr Power and Mr McCluskey).

⁶⁷ As sent by Irish Sugar to the Commission on 18 May 1995 and in Annex 9 to the Statement of Objections of 25 March 1996.

⁶⁸ In Annex 9 to the Statement of Objections of 25 March 1996.

⁶⁹ Case 85/76, *Hoffmann-La Roche v Commission*, [1979] ECR 461, at paragraph 28; See also Case 31/80, *L'Oréal v De Nieuwe AMCK*, [1980] ECR 3775, at page 3775.

87. In its *Napier Brown-British Sugar* decision⁷⁰, concerning certain restrictive practices relating to the sale of granulated sugar, the Commission took the view that white granulated sugar formed the relevant product market.
88. Speciality sugars, liquid sugars and syrups, being used for different purposes than granulated sugars, do not meet the same needs and are not therefore part of the product market of white granulated sugar, because they are not substitutable from the customer's point of view.
89. Industrially produced sugar substitutes such as isoglucose, saccharin, cyclamates or aspartame only compete with natural sugar in limited uses such as 'diet' products, and thus do not form part of the same relevant product market as granulated sugar.
90. The Commission accepts, however, as was argued by Irish Sugar⁷¹, that the market for white granulated sugar is further subdivided into two markets, that of industrial sugar and that of retail sugar. The two markets have overlapping characteristics; both involve the same basic product, granulated sugar, and the total supply of both is constrained by the common sugar regime. However, whilst there is a degree of substitution on the supply side, in terms of the use to which the products are put, the volumes sold and the types of customers, the markets are different. Industrial sugar is sold in bulk or large (e.g. 50 kg) bags and is either processed as part of food and drink products or packaged as retail sugar. The customers for industrial sugar are therefore largely food and drink manufacturers and packers. Some sugar merchants or intermediaries are also present on the industrial market in certain Member States. Retail sugar is sold in smaller quantities, such as 1 kg packets and sachets, and is used primarily within the home or by the catering trade. The customers for retail sugar, as far as the sugar processor is concerned, are the wholesale and retail trade. These differences in the packaging, distribution and customer profiles for industrial and retail sugar lead to different pricing structures in the two markets throughout the Community.

The relevant geographical market

91. The relevant geographical market is defined by the Court as⁷²:
- "a geographic area in which it [the product in question] 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."*
92. The relevant geographical market within which the market power of Irish Sugar has to be assessed is Ireland. This is demonstrated by the following elements.

⁷⁰ Commission Decision 88/518/EEC, OJ No L 284, 19.10.1988, p. 41.

⁷¹ In its Response to the Statement of Objections of 12 July 1996 at 3.2.1-3.2.7.

⁷² Case 27/76, *United Brands v Commission*, [1978] ECR 207, at paragraph 11.

93. As indicated above, a major element of the common organization of the sugar market is that, in the Community, each Member State is given a basic quantity of beet-origin sugar, which it divides up into quotas between its beet processing companies ("A/B sugar"). Irish Sugar, being the sole processor of sugar beet in Ireland, receives the entire A/B sugar quota for that country. This quota, which currently amounts to 200 200 tonnes per annum, largely exceeds domestic consumption. Irish Sugar's production has hitherto been sufficient to cover the entire consumption of sugar in Ireland. In *Suiker Unie and others v Commission*, the Court of Justice has recognized that the common organization of the sugar market has a strong influence on the production and sales of sugar in the Community⁷³:

"It is beyond doubt that, as the beforementioned system of national quotas stopped production moving gradually to areas particularly suitable for the cultivation of sugar beet and, in addition prevented any large increase in production, it cut down the quantities which producers can sell in the common market."

"This restriction together with the relatively high transport costs, is likely to have a not inconsiderable effect on one of the essential elements in competition, namely the supply, and consequently on the volume and pattern of trade between Member States".

However;

"Whatever criticism may be made of a system, which is designed to consolidate a partitioning of national markets by means of national quotas, the effects of which will be examined later, the fact remains that it leaves in practice a residual field of competition, that field comes within the provisions of the rules of competition"

94. Irish Sugar is the only sugar producer with a well-established distribution system through which it supplies customers throughout the country. The overwhelming majority of industrial and retail customers in Ireland source their supplies in the country. They either buy their sugar from Irish Sugar or from importers but do not engage in direct imports themselves.
95. Irish Sugar has argued that in *Suiker Unie* the Court of Justice stressed that the Community system also contains elements which either promote the development of trade between Member States and, consequently, effective competition, or at least are likely to moderate the countervailing effects arising from the Community regime. In particular, reference is made to the fact that intra-Community movement of refined sugar is built into the Community system, by the creation of surplus and deficit areas⁷⁴. Although the Irish A/B sugar quota largely exceeds domestic consumption, Ireland is treated as a deficit area by the sugar regime. The significance of this is that the intervention price for sugar is higher in deficit areas such as Ireland, in order to encourage imports into deficit areas from surplus areas. It is further argued by Irish Sugar that huge surpluses of sugar in France, Germany, Denmark, Belgium and the Netherlands exist which could in principle be sold into Ireland. It should however be noted that imports of

⁷³ Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie and others v Commission*, [1975] ECR 1663, at paragraphs 16, 17 and 24.

⁷⁴ *Suiker Unie and others v Commission*, cited in footnote 72, at paragraphs 19 and 20.

sugar into Ireland have hitherto made up only a small part of total granulated sugar consumption in Ireland⁷⁵. A major barrier for importing sugar from the continent is the cost of freight, particularly in the absence of a load travelling in the opposite direction. Irish Sugar has argued⁷⁶ that, despite the statement in Greencore's Corporate Plan of June 1994 on the use of dedicated containers referred to above that "*the absence of return loads is no longer an issue*", because the containers used to import sugar can now be used for return loads. However, whatever the current situation, Irish Sugar's own statement shows that the cost of freight was an impediment to raw sugar imports for virtually all of the period under consideration. In addition, imports of bagged sugar are facing the structural handicap of industrial customers' having moved over the years to silos for stocking their sugar. This results in an ever-declining market for bagged sugar which currently is less than 7 000 tonnes.

96. Northern Ireland does not form part of the same geographical market as Ireland. Although Irish Sugar has a fairly high [...] market share in the province, the competitive climate is clearly different from that in Ireland. No sugar is produced in Northern Ireland. Imports by Irish Sugar are made through its subsidiary McKinney, and retail sugar is sold under the McKinney brand. In addition, the two UK producers, British Sugar PLC and Tate & Lyle PLC, which are not present on the market of Ireland, compete on the Northern Irish market and account for the remaining [...] There is also a significant difference on the demand side of the market, as many customers are part of groups which are also established in other parts of the United Kingdom, and are therefore more likely to source their sugar requirements from the UK producers. Furthermore, important price differences exist between Northern Ireland and Ireland. In particular, retail sugar has consistently been substantially cheaper in Northern Ireland than in Ireland, and in Greencore internal documents copied by the Commission there are references to the "*home market premium*" on sugar. During the period where a sufficiently large price difference between Northern Ireland and Ireland on the market for retail sugar existed to attract imports from Northern Ireland, Irish Sugar has shown itself able to resist any attacks on its position in its "*home market*" of Ireland. During the price war in the United Kingdom, Irish Sugar was able to continue to maintain a substantial price difference for in particular retail sugar in Ireland. As regards industrial sugar, Irish Sugar has also been able to maintain significantly higher prices for those customers operating only on the home market.
97. The relevant geographical market is therefore an entire Member State, Ireland. This is a substantial part of the common market. Total sugar consumption in Ireland in 1993/4 amounted to 173 000 tonnes. As noted above, sugar consumption per capita in Ireland is higher than the average for the Community, reflecting its role within the economically important food and drink manufacturing industry of the country, as well as on the retail market.
98. On the basis of the above characteristics, the Commission concludes that the relevant markets are those of retail and industrial granulated sugar in Ireland. It is further

⁷⁵ From Table 1 above it can be seen that in the period 1986-1994 imports have always been lower than 10% of total national consumption. Between 1989-1994 imports represented less than 5% of national consumption.

⁷⁶ In its Response to the Statement of Objections of 12 July 1996 at 3.3.6.

concluded that this is a substantial part of the common market within the meaning of Article 86 on the basis of the volumes of production and consumption of sugar.

B. Dominant position

99. Irish Sugar holds a dominant position on the granulated sugar markets for both retail and industrial sale in Ireland.

100. In *Hoffman-La-Roche v Commission*, the Court of Justice defined the concept of dominance as follows⁷⁷:

"The dominant position thus referred to [in Article 86] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers (...)

The existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of large market shares."

101. The factors which are taken into account for deciding that Irish Sugar has a dominant position on the markets for industrial and retail granulated sugar in Ireland are as follows:

102. In the period 1985-1995 Irish Sugar held above 90 % of the total granulated sugar market. Consequently, Irish Sugar's competitors in both markets have had only marginal market shares. ASI, the main importer of industrial, and, at certain periods, retail, sugar to Ireland, held a market share of around [...] or below in the period 1985-1995. Round Tower has had a [...] share of the smaller retail market for a number of years, but since 1988 has bought most of its industrial sugar from Irish Sugar. Gem Pack had a [...] share of the retail sugar market in 1993/4, but also sources its industrial sugar from Irish Sugar.

103. Irish Sugar's relatively small size in terms of production of sugar as compared to sugar producers in other Member States, some of them having major surpluses of sugar after supplying their home market, is irrelevant for determining Irish Sugar's position on the Irish market. The fact that Irish Sugar has made losses in the first half of the 1980s is not inconsistent with the existence of a dominant position⁷⁸.

104. The Community's sugar regime limits the sales of Community-produced sugar in the Community to the total of national production quotas. Irish Sugar is the sole producer of sugar on the island and it is annually allocated the entire sugar quota of Ireland. This quota is sufficient to cover the entire consumption of granulated sugar in Ireland. It has a well-established distribution system through which it supplies industrial, wholesale and retail customers all over the country.

⁷⁷ *Hoffman-La-Roche v Commission*, cited in footnote 68, paragraphs 38 and 39.

⁷⁸ See Case 322/81, *Michelin v Commission*, [1983] ECR 3461, at paragraph 59.

105. Competition afforded by imported sugar has not, since 1985, prevented Irish Sugar from maintaining high market shares, and thus from enjoying a dominant position within the meaning of Article 86. Imports of sugar into Ireland represented only a small part of total granulated sugar consumption in Ireland. In particular, imports of sugar from Northern Ireland and France have had only a marginal influence on Irish Sugar's competitive position.
106. Irish Sugar has argued⁷⁹ that it is not dominant on the industrial sugar market in Ireland because of the "*position of strength vis-à-vis Irish Sugar*" of its major industrial customers, and in particular its two largest customer [...] and [...], which together account for around [...] of its industrial sales and which, Irish Sugar argues "*could cease production in Ireland altogether if the factors of production become too expensive. In such an event these companies would be likely to produce elsewhere and therefore be lost to Irish Sugar for good.*"
107. However, even if one accepts that these particular customers have a certain buying power, they are equally reliant on Irish Sugar for their supplies of bulk sugar. As noted at paragraph 94 above, the effect of the sugar regime is to reduce the volume of alternative supplies. Moreover, the cost of transport of sugar overseas is a major barrier for importing sugar into Ireland. As was stated above, the market niche for imported industrial sugar, in particular bagged sugar, has been shrinking gradually over the last decade, as a result of industrial users' switching to silos to stock their delivered sugar. Furthermore, the small size of the Irish market makes it more difficult for sugar producers in the Benelux, France, Germany or Denmark to acquire a satisfactory return on investment on sales on the Irish market. The fact that companies are able to make relocation decisions in the long term does not rule out current reliance on a particular supplier.
108. As the Commission argued in the merger decision *Nestle/Perrier*⁸⁰, the concentration of buyers must be compared to the concentration on the supply side. In the case of the Irish industrial sugar market, on which Irish Sugar has accounted for [over 90 %] of supply over the period in question (and over [...] for most of the period), it is abundantly clear that, despite the presence of two large customers, the demand side is composed of a number of buyers which are not equally strong and which cannot be aggregated to conclude that they may constrain the market power of the supplier with over 90% of the market. The share of sales of the two largest customers does not counterbalance the dominant position of Irish Sugar. Furthermore, as was argued in *Nestlé/Perrier*, in the enforcement of the competition rules the Commission must also pay attention to the protection of weaker buyers. As is explained hereinafter, Irish Sugar has discriminated against particular categories of customers. Furthermore, average ex-factory prices for granulated sugar in bulk in Ireland have been among the highest in the Community. They have consistently been higher than average prices in the United Kingdom, which is the nearest Member State in which sugar is also produced.

⁷⁹ In its response to the Statement of Objections of 12 July 1996 at 3.3.2.

⁸⁰ Case IV/M.190 *Nestle/Perrier*, Commission Decision 92/553/EEC, OJ No L 356, 5.12.1992, p. 1.

109. Although Irish Sugar has had a slightly lower share of the retail sugar market over the period in question (above 85 %), it is also dominant in this market. The fact that the large multiple chains, such as [...] and other retail chains, have increased their share of the market over recent years relative to the wholesale groups does not rule out dominance. As the Commission has argued in both the *Nestlé/Perrier* and *Procter & Gamble/VP Schickedanz II*⁸¹ merger decisions, the strength of consumer brand loyalty must be taken into account in determining the relative bargaining power of retailers vis-à-vis manufacturers. Irish Sugar has itself acknowledged the "*recognized branding advantage*" of its Siucra brand products. Even those few retailers that offer own-brand sugar buy it from Irish Sugar, for reasons of customer loyalty to an Irish-sourced brand. Furthermore, although there have been several domestic competitors in the retail market over the last ten years these companies have very small market shares and rely on Irish Sugar for almost all their supplies of industrial sugar.
110. From the above it follows that Irish Sugar has been in a position during the relevant period to behave to an appreciable extent independently of its competitors in both markets, including companies in Ireland which are packaging sugar for retail sales on the Irish market and sugar producers established in other Member States.
111. Prior to 1990 Irish Sugar held 51% in SDH (the parent company of SDL) and appointed half of SDH's Board. However, Irish Sugar has stressed that it did not have management control of SDH in this period. The Managing Director of Irish Sugar and a number of other Irish Sugar Directors were on the Board of SDH and SDL, and the responsibilities and co-responsibilities of Irish Sugar and SDL were allocated as of mid-1982. SDL was responsible for sales and pricing decisions. Furthermore, as can be seen from the above, Irish Sugar openly discussed in joint monthly meetings with representatives of its sales subsidiaries its commercial policy approach, including the problems that both Irish Sugar and SDL/SDH faced as a result of imports and the defensive measures to be taken. Details of prices for individual customers, including details of sugar export rebates, were also discussed in meetings between representatives of SDL/SDH and Irish Sugar.
112. In addition to Irish Sugar's equity holding in SDH, its representation on the Boards of SDH and SDL, the structure of policy-making of the companies and the communication process established to facilitate it, there were direct economic ties between the companies. SDL was committed to buying all its sugar from Irish Sugar. Irish Sugar paid for all consumer promotions and rebates offered by SDL to individual customers. These economic links created a clear parallelism of interest of the two companies vis-à-vis third parties. The judgment of the Court of Justice in *Italian Flat Glass*⁸² indicates that where two independent economic entities are, on a specific market, united by such economic links and, by virtue of that fact, together hold a dominant position vis-à-vis the other operators on that market, then a position of joint economic dominance can be found between them.

⁸¹ Commission Decision 94/893/EC, IV/M.430 *Procter & Gamble/VP Schickedanz*. OJ No L 354, 31.12.1996, p. 32.

⁸² Cases T-68/89, T-77/89, and T-78/89 *Società Italiana Vetro SpA v Commission*, [1992] ECR 4-II-1403.

113. It is therefore concluded that, throughout the relevant period, Irish Sugar held an individual, or at least, prior to February 1990, a joint, dominant position on the granulated sugar market for both retail and industrial sale in Ireland.

C. Abuse of the dominant position

114. From the facts set out above, based on the documentary evidence on the file, it follows that in the period from 1985 onwards a major element of Irish Sugar's commercial policy has been the shielding of its home market in Ireland from, on the one hand, imports from other Member States and, on the other hand, competing sugar packers within Ireland. In addition, for a period of at least the last ten years, Irish Sugar's commercial policy has involved the imposition of a discriminatory pricing policy within its home market. As part of these practices Irish Sugar has had recourse to methods different from those which condition normal competition in products or services based on traders' performance, the effect thereof being that the maintenance of the degree of competition still existing in the market or the growth of that competition has been hindered. It is therefore concluded that Irish Sugar has abused its dominant position on the sugar market in Ireland⁸³.

115. A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market⁸⁴. The fact that Irish Sugar through its quota production is entrusted with certain responsibilities under the common organization of the markets in sugar, and that, partly as a consequence thereof, Irish Sugar holds a dominant position on the market of Ireland, does not dispense it from the obligation not to act abusively. Article 1 of Council Regulation No 26 of 4 April 1962 applying certain rules on competition to production of and trade in agricultural products⁸⁵, as amended by Regulation No 49⁸⁶, provides that Articles 85 to 90 of the Treaty apply to all agreements, decisions and practices referred to in Article 85(1) and Article 86 of the Treaty which relate to production of or trade in the products listed in Annex II to the Treaty. While, for the application of Article 85, Regulation No 26 provides for certain exceptions, Article 86 applies without any exception in the field of agriculture.

116. To defend its market Irish Sugar resorted to various forms of abusive conduct which were used alternatively or in combination with one another whenever it was felt necessary, throughout the period from 1985 onwards.

117. The actions taken by Irish Sugar before 1990 with regard to the transport restriction, by both companies with respect to border rebates, export rebates and the the fidelity rebate and by SDL with respect to the product swap and selective pricing, were undertaken from a position of joint dominance.

118. From the documentary evidence on the file, the Commission concludes that Irish Sugar and/or SDL engaged in the illegal practices referred to below, which, as stated above,

⁸³ See *Hoffman-La Roche v Commission*, cited in footnote 68, paragraph 91.

⁸⁴ See *Michelin v Commission*, cited in footnote 77, paragraph 57.

⁸⁵ OJ No 30, 20.4.1962, p. 993/62.

⁸⁶ OJ No 53, 1.7.1962, p. 1571/62.

were part of a sustained and comprehensive policy of protecting Irish Sugar's home markets for both industrial and retail sugar.

I. Measures to protect the home market against competition from imports from other Member States

(i) Imports from France

119. From 1985 onwards Irish Sugar and SDL took steps to impede competition from French imported industrial and retail sugar. The actions taken consisted of restricting the transport of French sugar to Ireland, selective pricing including the granting of a fidelity rebate, and product swapping.

*** *Transport restriction***

120. In 1985 Irish Sugar took steps to prevent ASI from having its French sugar shipped to Ireland by the State-owned B&I shipping line company. Irish Sugar put pressure on this carrier used by ASI, and the carrier gave in to that pressure. While at the time B&I was not the only shipping line serving sea routes between France and Ireland, it was contracted by ASI as being a possible shipper for its sugar. Irish Sugar's action inevitably restricted ASI's business of importing French sugar, resulting in ASI's initiation of legal proceedings against B&I and Irish Sugar.
121. Irish Sugar has admitted before the Commission that it advanced the proposition to B&I to withdraw its custom if B&I continued to ship CFS sugar from France to Ireland. However it argues that it felt itself under threat from CFS, a much larger sugar producer. It also considered that B&I's provision of transport services to CFS conflicted at the time with the former's obligations to their common shareholder, namely the Irish State.
122. The Commission considers that this is not a valid justification. Putting pressure on a carrier to prevent him from transporting competing goods cannot be considered to constitute a normal business practice. The object and effect of this action was the protection of Irish Sugar's position in Ireland and therewith the restriction of competition in that market to the detriment of consumers. In those circumstances it is concluded that by putting pressure on the B&I shipping company so that it would cease to transport French sugar for ASI, Irish Sugar infringed Article 86.

*** *Selective pricing***

123. In a note dated 8 March 1988 to the members of the Irish sugar/SDL/JCC Executive regarding French sugar imports, Mr Keleghan (then Sales Director of SDL) set out a policy of selective low pricing to potential customers of ASI. Those low prices were not to be offered generally, even to larger customers. Such a policy infringes the principle set out in *Michelin v Commission*⁸⁷ that a company in a dominant position has a special responsibility not to diminish further the degree of competition remaining on the market.

⁸⁷ Cited in footnote 77, at paragraph 82.

** Product swap*

124. When ASI introduced CFS' 1 kilo packet of "Eurolux" retail sugar in 1988, the Commission has evidence that SDL agreed with one wholesaler and one retailer to exchange its own sugar for Eurolux sugar. This has been admitted by Irish Sugar before the Commission. However, according to Irish Sugar, contrary to what has been stated in the affidavit of Mr Brennan, Authorized Officer acting on behalf of the Director of Consumer Affairs and Fair Trade before the Irish High Court, there was no threat of a financial sanction. For Irish Sugar, the swap was a reaction to insufficient demand for the poorly marketed French product. The product swap did not, therefore, have the effect of impeding the establishment of CFS on the Irish market.
125. Irish Sugar's reporting of the circumstances of the product swap are difficult to accept. In the case of ADM, the swap took place very shortly after ADM issued a bulletin on 15 April 1988 to all its members (i.e. the retail outlets of the Londis chain) advising them of the availability of the Eurolux sugar. The parties did not therefore allow the new product sufficient time to be launched, positioned and marketed. With respect to Kelly's, it follows from Mr Brennan's affidavit that the product at first sold well. There is no explanation as to why Kelly's suddenly had to exchange the Eurolux sugar for an equivalent quantity of Irish Sugar's corresponding product. The Commission therefore concludes that in both cases the apparent objective of Irish Sugar in carrying out the product swap was to prevent Eurolux from gaining any market presence in Ireland and thus obtaining the necessary commercial goodwill. The swap itself had the effect of hampering the entrance of a new product on the Irish market, which would compete with Irish Sugar's Siucra brand. It should also be noted that the intervention of Mr Comerford (General Manager of Irish Sugar) at the board meeting of SDL of 28 June 1988 shows that Irish Sugar did not at the time consider the Eurolux competition as a matter of minor importance. Irish Sugar had been informed by ASI of the action of SDL.
126. Product swapping by a dominant undertaking constitutes an abuse pursuant to Article 86 whenever it has as its object or effect the restriction or elimination of competition from a new entrant in the market⁸⁸. This is the case here. In fact, the product swap resulted into a consolidation of Irish Sugar's and SDL's joint position as an almost monopoly supplier of sugar in the market.

⁸⁸ *Tetra Pak II*, Commission Decision 92/163/EEC, OJ No L 72, 18.3.1992, p. 1, at paragraph 165.

*** Fidelity Rebate**

127. The agreement between SDL and ADM whereby ADM secured an advantageous price if it met a given target purchase level (that is, the price for [3x] tonnes if it bought [x] tonnes) was evidently not a normal quantity discount and represented a target or fidelity rebate that had the effect of tying a customer to the dominant supplier. This was therefore an infringement of Article 86 agreed by SDL and funded by Irish Sugar.

(ii) Imports from Northern Ireland

*** Selective Rebates (discriminatory pricing) including border rebates**

128. Irish Sugar and SDL took measures to restrict imports from Northern Ireland, particularly in the period 1985-1988, by pursuing a policy of selective or discriminatory pricing on the sugar market of Ireland. This policy included the grant of special allowances to selected customers. In particular a special rebate was granted to certain customers established in the border area with Northern Ireland ("*border rebate*"). This rebate was openly discussed between Irish Sugar and SDL and was funded by Irish Sugar. The purpose of this rebate was to reduce the imports of cheaper retail packets from Northern Ireland into Ireland. The border rebate was unrelated to objective economic factors like the sales volume of the customers. It was used and modulated whenever it was considered that the price difference between Northern Ireland and Ireland might have induced cross-border sales.
129. The application of the border rebate is an abuse of Irish Sugar's and SDL's joint dominant position within the meaning of Article 86. In fact, it means that Irish Sugar/SDL have been applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing those who did not qualify for the rebate at a competitive disadvantage. Moreover, this rebate was intended to and did deter imports of sugar from Northern Ireland, whether imports of sugar from Irish Sugar's competitors or re-imports of its own sugar, thus limiting markets to the prejudice of customers. The border rebate therefore forms part of a policy of dividing markets and excluding competitors. The rebate was not based on an objective economic justification, such as the quantities purchased by the customer, marketing and transport costs or any promotional, warehousing, servicing or other functions which the relevant customer might have performed. It was granted on the sole basis of the retailer's place of business, in particular whether or not the relevant customer is established in the border area with Northern Ireland. Such a practice of selective or discriminatory pricing has been condemned by the Commission and the Court of Justice in earlier cases⁸⁹.

⁸⁹ See *United Brands v Commission*, cited in footnote 71, at pages 298-299; *Suiker Unie and other v Commission*, cited in footnote 72, at pages 2000-2005; *ECS/AKZO*, Commission Decision 85/609/EEC, OJ No L 374, 31.12.1985, p. 1. Hilti, Commission Decision 88/138/EEC, OJ No L 65, 11.3.1988, p. 19, at pp.36-38, subsequently upheld by the Court of First Instance by judgment of 12 December 1991, Case T-30/89, [1991] ECR-II 1439.

130. In general Irish Sugar does not deny that it, together with SDL, engaged in practices to compete with cheap imports from Northern Ireland to Ireland. However, Irish Sugar has submitted that the Commission should assess the relevant conduct against its economic and factual background. In particular, reference is made to the fact that the practices in question were pursued principally from 1984 to 1986, at the time of the price war between British Sugar and Tate & Lyle, which was also fought out in Northern Ireland. Irish Sugar argues that since it was making heavy losses at the time, it could not react to those cheap imports by dropping its prices to the level of competing imports.
131. Irish Sugar has argued further in its response to the Statement of Objections that its policy of selective pricing, as regards both French and Northern Irish imports, was a defensive measure. Irish Sugar have referred to a provision in the Commission's decision for interim measures in *ECS/AKZO*⁹⁰ to argue that "*it is not abusive for a dominant supplier to align its prices to match competing offers made to its existing customers*"⁹¹. Irish Sugar has contended in essence that by these practices it sought to preserve its viability as a sugar supplier. Irish Sugar argues that they were designed to ensure that Irish Sugar is capable of performing its duties under the CAP by seeking to curtail trade in its own products which was increasing its losses and threatening its viability, trade which was only possible because of price differentials not created by the undertaking in question and aggravated by the expansionist pricing strategy of larger sugar processors in other Member States.
132. Irish Sugar has also referred to the Commission's Decision in the case of *BPB Industries plc*⁹², in which the price reductions offered by BPB Industries to customers in a specific geographic area in which it faced competition from Lafarge UK Ltd were not an abuse of its dominant position since they "*amounted to a small price reduction*" (4-5.5%) and were "*not in themselves predatory, nor were they part of any scheme of systematic alignment.*"
133. It should be noted, first, that the selective pricing practised by Irish Sugar and SDL went significantly beyond the practices that they have referred to. In particular, in the case of the border rebates, as can be seen from the above, these were offered to a wide range of customers in various border counties at various periods. They also involved discounts of [higher than 5.5 %]⁹³. Moreover, the application of selective prices in both instances was part of a systematic policy of deterring imports into the market in which they had a joint dominant position, and therefore restricting the limited competition that was present. In the case of offers made to potential ASI customers, these sought to impede the growth of one small company that was importing industrial and retail sugar into the Irish market.

⁹⁰ Commission Decision 83/462/EEC; OJ No L 252, 13.9.1983, p. 13.

⁹¹ Irish Sugar response to the Commission's Statement of Objections of 12 July 1996 at 9.3.3 and 9.3.4, citing ECS AKZO Decision.

⁹² Commission Decision 89/22/EEC, OJ No L 10, 13.1.1989, p. 50, at paras. 132 and 133.

⁹³ Based on discounts of [...] per parcel and [...] per tonne, as referred to in Irish Sugar and SDL internal documents above, and 1985/6 and 1986/7 prices for retail sugar, as provided by Irish Sugar, of [...] and [...] a tonne. It should be noted that in the case of at least one customer[...] "additional expenditure.....will arise" (paragraph 57 of this Decision).

134. There is no doubt that a firm in a dominant position is entitled to defend that position by competing with other firms in its market. However, the dominant firm must not deliberately attempt to effectively shut out competitors. It has a special responsibility not to diminish further the degree of competition remaining on the market⁹⁴. Firms which may be strong or even dominant in one geographic market are in a different position with respect to other geographic markets where they are confronted with a local dominant undertaking. The maintenance of a system of effective competition does, however, require that competition from undertakings which are only small competitors on the geographic market where dominance prevails - regardless of their position in geographic markets which are separate for the purpose of assessing dominance - be protected against behaviour by the dominant undertaking designed to exclude them from the market not by virtue of greater efficiency or superior performance but by an abuse of market power. In the Commission's final decision in *ECS/AKZO*⁹⁵ it was held to be abusive for a company with a 50% or more market share to offer selectively low prices to customers of a small competitor whilst maintaining substantially higher prices for its existing customers. This principle was upheld by the Court. In the period in which it sought to restrict imports, Irish Sugar had over 90% of both the Irish industrial and retail sugar markets.
135. The Commission concludes that all of the above-mentioned practices, i.e. the border rebates, transport restriction and the product swap and fidelity rebate, were directed to the same end, namely protecting the market position of Irish Sugar in Ireland. The cumulative effect of these practices contributed to the foreclosure of that market to competitors. It is therefore concluded that Irish Sugar and SDL abused a joint dominant position by engaging in these practices.

II. Pricing behaviour that discriminates against particular categories of customer

(i) Sugar export rebates

136. By granting rebates to certain customers, depending on the final destination of the sugar, Irish Sugar is abusing its dominant position by discriminating on price, that is, by applying dissimilar conditions to equivalent transactions within the meaning of point (c) of Article 86, thereby placing them at a competitive disadvantage.
137. In the first place, there is discrimination within the export rebate system, since there are "exporters" who do not benefit to the same extent as others, either because they export only a small percentage of their production or because Irish Sugar decides to grant them a relatively low export rebate for the proportion that they do export. Some companies provide records of their actual exports whereas for others it is simply assumed that a high percentage is exported. Although Irish Sugar has argued that a primary reason for the export rebate system has been currency fluctuations and changes in other cost factors for exporters, the facts show, and Irish Sugar admits, that once a particular level of rebate has been agreed with a company, it has tended to remain in place for years despite changes in relative exchange rates and other production factor costs. Irish Sugar has stated in its Response to the Statement of Objections that it will "revise" its system of export rebates and, for example, audit claims for export rebates.

⁹⁴ *Michelin v Commission*, cited in footnote 77, at paragraph 57.

⁹⁵ Cited in footnote 88, at point 82(iii).

138. Furthermore, the system of rebates is in itself discriminatory. The fact that the industrial sugar is processed and exported to other Member States does not change the nature of the transaction, and there is no difference in the nature of the product sold or the costs of supply borne by Irish Sugar.
139. Moreover, Irish Sugar has argued that, over the period in question, there has been an increase in the volume of manufactured food products imported into Ireland. This, they argue, is in part;

"the development of new trade alliances in Ireland.....between UK buying groups and southern Ireland buying groups, as well as between mainland European buying groups and Irish buying groups. These trade changes have brought significantly increased competition, as well as different trade terms and prices coming from large food manufacturers in the UK, UK multiples and UK buying groups. Initially this has come through Northern Ireland....but more recently directly into Ireland⁹⁶."

Irish food manufacturers supplying the domestic market, including, as Irish Sugar admits, sugar packers, have therefore been faced with increased competition and a more difficult market environment. Furthermore, according to Irish Sugar, this appears to be a consistent trend, whereas exchange rates by their very nature fluctuate in both directions. Yet Irish Sugar has consistently chosen to practice price discrimination against domestic food manufacturers.

140. The Commission does not accept Irish Sugar's argument that sugar export rebates are not discriminatory because those manufacturers who choose to sell only on the domestic market *"are not at a competitive disadvantage⁹⁷"* compared to exporters. Irish Sugar has ignored the fact that, in an economy which both exports to and imports from other Member States, such factors as currency fluctuations affect all companies manufacturing tradeable goods, whether "domestic" or "exporting". A "domestic" Irish Sugar customer which competes with a company from another Member State on the Irish market is clearly at a competitive disadvantage when compared to a subsidised "exporting" customer competing with the same "foreign" company in that company's home Member State. In focusing on the relationship between its customers, Irish Sugar has ignored the fact that they can be placed at a competitive disadvantage *vis-à-vis* third parties.
141. Secondly, Irish Sugar has not taken into account the fact that export rebates cross-subsidise sugar that is destined for the Irish market. As has been noted, the sugar export rebate scheme is frequently applied to total sugar purchases without any check on the volume exported in processed form. Even if the system were adequately supervised, however, cross-subsidisation would still occur. This is because, from the customer's point of view, its purchases - whether ultimately for the home market or export - are identical. Any rebates given are simply averaged out over all purchases in the company's internal accounting, to give the average cost price for sugar. This raw material cost price is used for all processes.

⁹⁶ Statement of Mr Noel McCluskey to the oral hearing on 26 July 1996.

⁹⁷ Irish Sugar Response to the Statement of Objections of 12 July 1996 at 5.4.1(ii).

142. In *United Brands v Commission*⁹⁸ the Court placed an even wider definition on the notion of "competitive disadvantage", when it found that United Brands had discriminated on the price of green bananas between distributor/ripeners who operated in different Member States "*according to the circumstances of the Member States*"; and had placed certain distributor/ripeners at a competitive disadvantage "*since compared with what it should have been competition had thereby been distorted*". The Court therefore ruled against the geographic price discrimination practised by United Brands, despite the existence of different market conditions in the different Member States in which these purchasers were operating.
143. The system of export rebates has the additional effect of placing the sugar packagers on an unequal competitive footing *vis-à-vis* Irish Sugar at the resale level, and thus has elements of the vertical disparities found between distributors/ripeners and UBC in the *Chiquita*⁹⁹ decision of the Commission. Again, by comparing its customers only with each other, Irish Sugar has ignored their competitive relationship with third parties, including Irish Sugar itself.
144. Moreover, the discriminatory nature of the export rebate scheme is emphasized by the fact that it is not in line with the objectives of the common sugar regime. As Irish Sugar has itself pointed out, Ireland is treated as a deficit area by the sugar regime, and the intervention price for sugar is higher in order to encourage imports of sugar. However, the company's export rebates are likely to distort the regime by subsidising exports of sugar out of Ireland to other Member States, acting as a barrier to imports and increasing the isolation of the national market.

(ii) Active discrimination against competing packers

*** *Price charged for industrial sugar***

145. Whilst Irish Sugar's system of export rebates might not have as its primary object discrimination against competing sugar packagers, the system of additional rebates reveals a more active bias against them. Irish Sugar is not only applying dissimilar conditions to equivalent transactions, but is also unable to provide any reason that does not seem like an *ex-post* attempt to justify its discrimination against sugar packagers. The explanations that Irish Sugar has given for "start-up" and "fast-growth" rebates would be equally applicable to at least two of the sugar packers.
146. Irish Sugar has argued that the practice of offering no rebates to competing sugar packers was not an abuse because the packers "*cannot be placed at a competitive disadvantage vis-à-vis other industrial customers because the packers do not compete with them*¹⁰⁰". This ignores the Court's ruling in *United Brands v Commission*¹⁰¹ that it is the interplay of supply and demand between the supplier and initial purchaser, and not in the market in which the purchaser operates, that should be taken into account when assessing whether discrimination has taken place. The sugar packers bought exactly the same product, bulk

⁹⁸ See footnote 71.

⁹⁹ Commission Decision 76/353/EEC, OJ No L 95, 9.4.1976, p. 1.

¹⁰⁰ Irish Sugar Response to the Statement of Objections of 12 July 1996 at 6.4.3(ii).

¹⁰¹ *United Brands v Commission*, cited in footnote 71 at pp. 229, 230.

industrial sugar, from Irish Sugar as its other customers, with the same standard conditions of sale and delivery.

147. Furthermore, in the Commission's Decision in *Napier Brown/British Sugar*¹⁰² it was found that British Sugar, in refusing to supply only sugar of beet origin to Napier Brown, on which the latter could receive an EC storage rebate and therefore an effective reduction in the cost price, had discriminated against it *vis-à-vis* other customers which were not sugar packers and were guaranteed a supply of beet-origin sugar. The Commission considered that, in denying exclusively beet-origin sugar (and therefore effectively raising the relative price of sugar) to Napier Brown while supplying it to customers which were not sugar packers, British Sugar applied "*discriminatory conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*".
148. In contrast, the view that competing sugar packers face no competitive disadvantage would, if followed to its logical conclusion, imply that suppliers in a dominant position were entitled to make unilateral decisions about the competitive conditions and relevant product markets in which their customers operated, including determining the substitutability of the differing products that their customers produced, and to divide their customers into different price categories accordingly. The prices set in one arbitrarily determined category would, presumably, need to bear no relation, in terms of volumes sold or other costs of delivery, to prices in the other categories.
149. As a company in a dominant position, irrespective of the reasons for which it has such a dominant position, Irish Sugar should not "hinder the growth of the degree of competition still existing in a market where, as a result of the very presence of that undertaking, competition is weakened" (*Hoffmann La-Roche v Commission*, as cited in *Tetrapak*¹⁰³). Its system of rebates demonstrates a clear abuse of its dominant position.
150. Moreover, although there is no legal requirement for a company in a dominant position to charge identical prices or to publish its terms, the sheer lack of transparency of Irish Sugar's entire rebate system, including export rebates, in which neither the scale of rebates nor the volumes to which they relate is either uniform or communicated in writing to customers may be seen as an abuse of its dominant position. In *Michelin* the *ad hoc*, unobjective (i.e. not comparable between customers) and verbal nature of the company's rebate system was attacked by the Commission as discriminatory. Furthermore, the Advocate-General concluded that establishing a bonus and discount system that was fixed on an individual basis and hence not communicated uniformly to all dealers in advance made discrimination between them possible and was in itself an abuse of Article 86¹⁰⁴. Irish Sugar's non-transparent and variable system of rebates provides an easy opportunity for it to restrict the already limited competition on the industrial sugar market in Ireland.

¹⁰² Commission Decision 88/518/EEC, cited in footnote 69 at paragraph 73.

¹⁰³ Judgment of the Court of First Instance in Case T-83/91, [1994] ECR II-755 at paragraph 114.

¹⁰⁴ Cited in footnote 77; Opinion of the Advocate-General.

*** Target rebates and selective pricing**

151. In Spring 1994, Irish Sugar offered the major food wholesalers in Ireland discounts that were based on their achieving certain increases in their purchases of its 1 kg Siucra brand over three months. The reference period used to calculate the increase was April-September 1993. In October 1994 a further target-based discount was offered to wholesalers on Siucra, using the same reference period. In early December 1994, Irish Sugar offered the major retail chain [...] a target-based discount or "incentive" to achieve an agreed increase in its purchases of Siucra 1 kg sugar in 1995, at a time when Irish Sugar was competing with Burcom to supply 1 kg own-label sugar to[...]. The fact that Burcom finally ceased trading in mid-December does not mitigate the fact that, at the time the target rebate was envisaged and arranged, Irish Sugar was competing with Burcom for [...] business, and the likely effect of the rebate was to tie [...] to Irish Sugar. In 1995 Irish Sugar offered a target rebate to [...], a major customer of Gem Pack, again for a one-year period. There is no evidence to suggest that Irish Sugar has since ceased the practice of offering target rebates.
152. The granting of discounts by a company in a dominant position, which are conditional on a company meeting particular targets that are higher than previous purchase amounts is an infringement of Article 86, because the practice is clearly aimed at tying customers closely to the dominant company and making it difficult for competitors to gain a foothold in the market. As the Court determined in *Michelin v Commission*¹⁰⁵, the effect of such practice is accentuated if there is a wide divergence between the market share of the dominant firm and those of its competitors. Moreover, given that five domestic competitors all launched new retail brands in the summer of 1993 (i.e. after the start of the reference period for the 1994 promotions for wholesalers), the volume-related discounts that Irish Sugar granted in Spring 1994 and October 1994 based on purchases during the preceding summer must have been closely related to the customer's total requirements for retail sugar. The only other sugar packers on the retail market before mid-1993 accounted for around [below 10 %] of sales. Irish Sugar itself noticed that wholesale customers had stocked up with Siucra 1 kg sugar during the Spring 1994 promotion, and had subsequently reduced their purchases of 1 kg sugar. This stocking-up must have adversely affected purchases from competing sugar packers.
153. The fact that the rebates were dependent on meeting volume targets did not make them quantity discounts, which are normally unobjectionable. Quantity discounts are normally paid in respect of individual orders (i.e. unrelated to the customer's purchases over a period of time) and in return for cost savings achieved by the supplier. This is not the case with respect to the rebates which Irish Sugar has granted to certain customers on the basis of individual weekly, monthly or annual targets. Such target rebates are considered as abusive behaviour by dominant firms in the meaning of Article 86.
154. These target rebates also involved price discrimination between different customers, since they were dependent on percentage increases in purchases rather than absolute purchase volumes. The size of the target discount also varied between customers. The target-based offers to particular customers of competing sugar packers, such as [...] and [...] also involved selective and discriminatory pricing. As stated in *Michelin v Commission*¹⁰⁶, a

¹⁰⁵ Cited in footnote 77, at paragraph 82.

¹⁰⁶ Cited in footnote 77, at paragraph 57.

company in a dominant position has a special responsibility not to diminish further the degree of competition remaining on the market. By offering the customers of much smaller competitors prices that were not generally available, Irish Sugar was obviously flouting this requirement. The target rebates offered to all wholesalers in 1994 and to particular customers of competing sugar packers in 1994 and 1995 were part of a policy of restricting the growth of competition from domestic sugar packers.

D. Effect on trade between Member States

155. In *Société Technique Minière v Maschinenbau Ulm*, the Court of Justice stated that trade between Member States is affected by anti-competitive behaviour whenever it is

"possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the aim of a single market in all the Member States."¹⁰⁷

156. In this respect it should be noted that the abuses, as described above, that Irish Sugar and/or SDL practised in order to protect its home market from imports had as their object and effect to protect the position of the sole producer of sugar in Ireland against competition from imported or re-imported sugar from Northern Ireland and France. In particular, the pressure put on the B & I shipping company, the fidelity rebate granted to ADM and the swapping of Eurolux sugar for Siucra sugar affected the volume of sugar imported from France, and the border rebate affected the (re-)importation of sugar from Northern Ireland. The Commission therefore concludes that the abuses affected trade between Member States within the meaning of Article 86.
157. Irish Sugar's practice of granting export rebates on sugar exported, in processed form, to other Member States is likely to distort trade in both industrial sugar and processed food products containing a significant proportion of sugar, and thereby to affect trade between Member States.
158. Irish Sugar's efforts to restrict competition from competing sugar packers have also had an effect on trade between Member States. Of the sugar packers which started competing with Irish Sugar in mid-1993, one (ASI) used only imported sugar, one (Burcom) used both imported and Irish sugar and the others used only Irish sugar. Irish Sugar's cumulative efforts to hinder the growth of competition on the retail market in Ireland, which have (as in *Napier Brown/British Sugar*) the intention or foreseeable result of precipitating the removal of competitors from the market, therefore have a potential effect on the structure of competition and trade within the common market, and thus on trade between Member States within the meaning of Article 86.

¹⁰⁷ Case 56/65, *Société Technique Minière v Maschinenbau Ulm*, [1966] ECR 235, at page 249.

E. Appreciability

159. Irish Sugar is the only sugar processor on the island of Ireland and throughout the period in question has had at least 90% of the industrial sugar market and 88% of the retail sugar market in Ireland. Throughout the relevant period prices on both markets have been amongst the highest in the Community. Irish Sugar's and SDL's practices to restrict competition from imports of industrial and retail sugar and Irish Sugar's policy of subsidising exports of processed sugar from Ireland and of restricting competition from domestic sugar packers have therefore been an appreciable restriction of competition affecting trade between Member States.

ARTICLE 3 OF REGULATION No 17

160. Pursuant to Article 3 of Regulation No 17, where the Commission, upon application or upon its own initiative, finds that there is an infringement of Article 85 or Article 86 of the Treaty, it may by decision require undertakings or associations of undertakings concerned to bring such infringements to an end.
161. As regards the measures taken between 1985 and 1990 to restrict imports of sugar from other Member States, the Commission has no evidence that these practices have continued. As regards the practice of discriminatory pricing on industrial sugar, whether to subsidise sugar exports or to discriminate against competing sugar packers, and the policy of selective pricing, including target rebates, to customers of competing packers of retail sugar there is evidence that this is on-going. It is therefore necessary for the Commission to require Irish Sugar to bring the infringements to an end, if it has not already done so, and henceforth to refrain from any agreements or behaviour which may have the same or similar object or effect.
162. It is also considered necessary to require Irish Sugar to submit to the Commission, at appropriate intervals, details of the prices that it has charged to its customers for industrial and retail sugar, together with details of the volumes of sugar sold to those customers, so that the compliance of Irish Sugar with the decision can be monitored. The requirement that Irish Sugar refrain from selective or discriminatory pricing should not be limited in time, but it is considered appropriate that the period during which Irish Sugar should submit these details should be limited to three years.

ARTICLE 15 OF REGULATION No 17

163. Under Article 15 of Regulation No 17, infringements of Article 86 may be sanctioned by fines of up to ECU 1 million or 10% of the turnover of the undertaking in the preceding business year, whichever is the greater. Regard must be had to both the gravity and the duration of the infringement.
164. According to Article 1(1)(b) of Council Regulation (EEC) No 2988/74¹⁰⁸ concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition, the power of the Commission to impose fines or penalties for infringements of Article 86 is subject to a limitation period of five years. Paragraph 2 of the same Article provides that time shall

¹⁰⁸ OJ No L 319, 29.11.1974, p. 1.

begin to run upon the day on which the infringement is committed. Article 2(1) of Regulation (EEC) No 2988/74 provides that any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement is to interrupt the limitation period in proceedings. Actions which interrupt the running of the limitation period include *inter alia* investigations carried out on the basis of Article 14 of Regulation No 17. Article 2(3) of the Regulation provides that each interruption starts time running afresh.

165. On 25 and 26 September 1990 the Commission inspected the Head Office of Irish Sugar in Dublin. On 7 and 8 February 1991 inspections took place in the offices of SDL in Dublin and on 13 February 1991 the office of McKinney in Belfast was inspected. On 16 January 1995 the Commission inspected the offices of Greencore in Dublin and Irish Sugar in Carlow.
166. In view of this, it should be established which specific actions of Irish Sugar and SDL can be taken into consideration for purposes of fines. In particular, the transport restriction is not liable to fines. The specific action is to be situated around July-August 1985.
167. The other abusive behaviour of Irish Sugar and/or SDL, i.e. the product swap and fidelity rebate, border rebates, sugar export rebates, price discrimination against competing sugar packers, target rebates and selective pricing are not time-barred for fining purposes. Irish Sugar has sought, by this behaviour, to maintain or reinforce its dominant position and, in the period prior to February 1990, Irish Sugar and SDL sought, by their behaviour, to maintain a position of joint dominance. Moreover, the Community's competition rules have been sufficiently developed by previous decisions of the Commission and judgments of the Court of Justice and the Court of First Instance, or are sufficiently clear from the provisions of the EC Treaty in the areas covered by those abuses, for Irish Sugar and/or SDL to have had to be aware of the illegality of their actions. The Commission therefore considers that Irish Sugar has intentionally or at least negligently abused its dominant position and that, prior to February 1990, Irish Sugar and SDL intentionally or at least negligently abused their joint dominant position. The Commission therefore intends to impose a fine on Irish Sugar for its own infringements and, as appropriate, as successor in title, for the infringements of SDL prior to February 1990.

In fixing the fine in this case the Commission will take particular account of the following factors:

Gravity of the infringement:

- All of the said actions are important abuses which were designed to have the same effects; namely, to severely damage or even eliminate any form of competition be it from imported sugar produced in other Member States, re-importations of its own sugar or sugar packed by competing sugar packers. However, the Commission does accept that, on the basis of the documentary evidence on the Commission's file, the product swap involved only small quantities.
- Sugar constitutes an important ingredient in the food-processing industry and is used in its retail form frequently by practically every household; thus the consequences of anti-competitive behaviour have widespread effects.

- Irish Sugar is the dominant supplier of sugar in Ireland and has protected its "home market" vigorously against any form of competition from imports. It has practised a form of discriminatory pricing which has had as its effect the subsidy of sugar exports to other Member States, and the distortion of the common market. It has also sought to protect itself from competing sugar packers regardless of whether they were using imported sugar or Irish Sugar's own industrial sugar.
- Through its infringements Irish Sugar has been able to maintain a significantly higher price level for retail sugar in Ireland compared with that in other Member States, notably in Northern Ireland, and has been able to keep its ex-factory prices, particularly for sugar for "domestic" consumption, among the highest in the Community, to the detriment of both industrial and final consumers in Ireland.

Duration of the infringement

- The product swap and fidelity rebate took place in 1988, when Irish Sugar and SDL were abusing their joint dominant position by seeking to restrict imports of sugar from France.
- The border rebates were operated at particular periods during 1986-1988, when Irish Sugar and SDL were abusing their joint dominant position by seeking to restrict imports of sugar from Northern Ireland.
- The price discrimination against competing sugar packers has existed since mid-1993, when several companies started to compete with Irish Sugar on the retail market. The target rebates and selective pricing are also part of a policy of restricting competition from other sugar packers and have taken place at particular times since 1993.
- The sugar export rebates have existed since before 1985 and Irish Sugar has stated that the system originated in the 1970s.

Intentional or negligent infringement of the competition rules

- The abuses are serious infringements of the Community's competition rules. Several have been recognized as abuses of a dominant position by the Court of Justice. Irish Sugar and/or SDL should have been aware of the illegality of their actions.
- Irish Sugar's parent company, Greencore, issued in September 1992 a Competition Law Compliance Manual for its employees in which the potential illegality of certain practices, such as discriminatory pricing and payment of fidelity rebates "or the like" by a firm in a dominant position are made clear. However, despite the existence of the Manual, sugar export rebates, price discrimination against competing sugar packers, selective pricing and target rebates have all either been continued or operated by Greencore employees after September 1992.

Relevant commercial data

- In the year ending 27 September 1996, Irish Sugar had a turnover of IEP 134.7 million (29% of Greencore's aggregate turnover) and an operating profit of IEP 27.2 million (56% of Greencore's aggregate operating profit). Approximately 80% of Irish Sugar's sales are within Ireland.

HAS ADOPTED THIS DECISION:

Article 1

Irish Sugar plc infringed Article 86 of the EC Treaty by having recourse - as part of a sustained and comprehensive policy of protecting its position on the sugar market in Ireland - to methods different from those which condition normal competition in products or services based on traders' performance, the effect thereof being that the maintenance of the degree of competition still existing in the market or the growth of that competition has been hindered. To this effect, Irish Sugar plc (and/or Sugar Distributors Limited in the period before February 1990) engaged in the following abusive conduct on the granulated sugar market for retail and industrial sale in Ireland:

1. In the period 1986-1988, granting a special rebate to certain retailers established in the border area with Northern Ireland ("border rebate") and granting selectively low prices to customers of an importer of French sugar;
2. Agreeing in 1988 with one wholesaler and one retailer to swap competing retail sugar products, i.e. Eurolux 1 kilo packet sugar of Compagnie Française de Sucrierie, for its own product;
3. In 1988, practising with the potential customer of a competitor a fidelity rebate, that is, a rebate that was conditional on the customer's purchasing all or a large proportion of its retail sugar requirements from Irish Sugar plc;
4. In the period since (at least) 1985, practising a system of "sugar export rebates", that is rebates granted on sugar exported in processed form to other Member States, which discriminate against customers of industrial sugar supplying the domestic Irish market;
5. In the period since 1993, practising price discrimination against competing sugar packers which sourced or source their industrial sugar from Irish Sugar plc;
6. In the period since 1993, practising a policy which adversely affects the competitive position of other Irish sugar packers in the retail sugar market, in particular by:
 - (i) granting, at certain periods in 1994, rebates to wholesale groups in Ireland which were dependent upon increases in their purchases of retail sugar from Irish Sugar plc, and had the effect of tying them to Irish Sugar plc to the detriment of competing sugar packers;
 - (ii) granting, in December 1994 and February 1995, selective rebates to certain customers of competing sugar packers which were dependent on those customers increasing their purchases of retail sugar from Irish Sugar plc over a period of 12 months and were thus intended to restrict competition from the competing sugar packers.

Article 2

For the infringements referred to in Article 1, a fine of ECU 8 800 000 is hereby imposed on Irish Sugar plc.

The fine shall be paid, in ecus, within three months of the date of notification of this Decision, into bank account No 310-0933000-43 of the Commission of the European Communities, Banque Bruxelles Lambert, Agence Européenne, Rond Point Schuman 5, B-1040 Brussels. After the expiry of that period, interest shall be automatically payable at the rate charged by the European Monetary Institute for transactions in ecu on the first working day of the month in which this Decision is adopted, plus 3.5 percentage points, namely 7.5%.

Article 3

Irish Sugar plc shall immediately bring to an end the infringements referred to in points 4, 5 and 6 of Article 1 in so far as it has not already done so.

Irish Sugar plc shall refrain from repeating any act or conduct described in points 4, 5 and 6 of Article 1, and from adopting any measure having equivalent effect.

In particular, Irish Sugar plc shall refrain from applying dissimilar conditions to equivalent transactions with its industrial sugar customers, such as sugar export rebates and other rebates that, because they bear no relation to the quantity of sugar supplied and the costs of the transaction, discriminate against competing sugar packers. Irish Sugar plc shall inform its industrial sugar customers accordingly, in writing, within three months of the date of notification of this Decision.

Irish Sugar plc shall also refrain from a policy of pricing of retail sugar that adversely affects the competitive position of other sugar packers, including selective pricing to customers of competing packers and the granting of target rebates to retail sugar customers. Irish Sugar plc shall inform those of its customers that are currently receiving rebates or that have been offered rebates that are dependent on achieving particular volumes or increases in volumes of purchases from Irish Sugar plc that such rebates no longer apply, in writing, within three months of the date of notification of this Decision.

Article 4

Irish Sugar plc shall, for a period of three years from the date of notification of this Decision, furnish to the Commission within three months following the end of each calendar year, a list of the prices offered in the preceding year, including all rebates and discounts, to its industrial sugar and retail sugar customers, together with details of the volumes of sugar purchased by each customer in that year.

Article 5

A periodic penalty payment of ECU 1 000 shall be imposed on Irish Sugar plc in respect of each day of delay in carrying out the requirements set out in Articles 3 and 4, following the expiry of the three-month time limit specified for their implementation.

Article 6

This Decision is addressed to Irish Sugar plc, Athy Road, Carlow, Ireland.

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

Done at Brussels, 14 May 1997

For the Commission

Karel VAN MIERT
Member of the Commission