

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 5 December 1988

relating to a proceeding under Article 86 of the EEC Treaty

(IV/31.900, BPB Industries plc)

(Only the English text is authentic)

(89/22/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 3 and 15 thereof,

Having regard to the application made to the Commission by Iberian Trading UK Limited on 17 June 1986, alleging infringements of Article 86 by BPB Industries plc,

Having regard to the Commission's decision of 3 December 1987 to initiate proceedings in the case,

Having given the undertaking concerned an opportunity to reply to the objections raised against it, in accordance with Article 19 (1) of Regulation 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Regulation No 17⁽²⁾,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

- (1) This Decision concerns practices by BPB Industries plc and its subsidiary British Gypsum Limited in

the United Kingdom and Ireland, constituting abuses of dominant positions in the supply of plasterboard.

A. The undertakings

- (2) BPB Industries plc (together with its subsidiaries, BPB) is the British holding company of a major group having worldwide interests notably in gypsum products, other building materials, paper and board. BPB had a consolidated net turnover of £ 750 million (ECU 1 116 000) in the year to end March 1987.
- (3) In Great Britain, BPB operates in the building plaster and plasterboard sectors essentially through a wholly owned subsidiary, British Gypsum Ltd (BG). Apart from plasterboard and building plasters, gypsum products produced by BG include industrial plasters and crushed gypsum rock, which is used in large quantities in the production of cement as well as in diverse other industries.
- (4) In Ireland, gypsum products, in particular building plasters and plasterboard, are produced by BPB's Irish subsidiary Gypsum Industries plc (GIL) which supplies the market in Ireland and, through BG, Northern Ireland. The UK turnover of BPB in the building materials sector amounted to £ 350 million (ECU 521 million) in 1987, generating an operating profit of £ 63 million (ECU 94 million).

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

(5) BPB is the largest producer of plasterboard in the world outside the United States of America. It controls about half of plasterboard production capacity in the Community. In Great Britain, BG produces plasterboard at eight plants situated in the Midlands, the South East and Northern England. BPB's sales of plasterboard and accessories in the year 1985/86 amounted to £ [...] ⁽¹⁾ (ECU [...] in Great Britain, £ Irl [...] (ECU [...] in Northern Ireland and £ Irl [...] (ECU [...] in Ireland. BPB normally supplies the British plasterboard market from mills in Great Britain, whereas the mills in Ireland supply the market in Ireland and Northern Ireland.

plasterboard not subject to secondary processing or containing special additives.

(6) Elsewhere in the Community, BPB has interests in other plasterboard producers. Its French subsidiary, Placoplatre SA, is the largest producer and market leader in France, with a market share of some 50 %. Gyproc Benelux SA, in which it holds 45 % of the capital, is the main supplier in Belgium and the Netherlands, and also operates through subsidiaries in West Germany.

(10) The major areas of plasterboard use are in the construction of ceilings and the lining of internal and external walls in housing, and in the construction or lining of internal walls in commercial, administrative and institutional buildings, especially offices. The main qualities of plasterboard in relation to other sheet materials for building construction include its consumer appeal as a decorating surface, its stability, hardness, fire resistance and low cost.

(a) *The distribution of plasterboard*

(7) BPB also has substantial participations in large plasterboard producers in Scandinavia and Canada. In 1987, it acquired the plasterboard interests of Rigips, the second largest producer in Germany. It has recently made investments in gypsum and plaster producers in Spain and Italy.

(11) Plasterboard used in the United Kingdom and Ireland is almost all supplied through builders' merchants. Only since 1976 has BG supplied large users in Britain, on the same terms as merchants under the terms of an undertaking given to the Office of Fair Trading. A large user, as now defined, is one who has purchased at least 80 000 m² of plasterboard over the 12 months prior to the order. Under 10 % of BG's sales of plasterboard are direct to users.

(12) Merchants in the building materials sector have the traditional role of holding stocks and distributing the products. In fact, as BPB has emphasized, only through merchant stockists can an effective chain of distribution to a very large number of builders be assured. In addition however, merchants have the important function of assuming the credit risk of builders. Over the relevant period, there was an ongoing trend of concentration in the builders merchanting sector, the large multi-branch merchants with national or regional coverage gaining share over second-tier merchants, typically family-owned merchants with only a few branches. In many cases, second-tier merchants have been taken over by large multi-branch groups.

B. The products

(8) Plasterboard consists of a core of gypsum plaster, set between two sheets of heavy paper. It is cut to various sizes and supplied essentially in two main thicknesses. The fire resistance of plasterboard may be improved by including additives in the plaster core at the manufacturing stage. Such board is marketed by BG as 'Fireline' board.

(b) *The plasterboard market*

(9) Plasterboard may be subject to secondary processing by laminating it with other materials designed to give it enhanced thermal or acoustic insulating properties, or to provide a vapour barrier. It may also be coated with a plastic film to provide a surface with a pre-decorated finish. Plasterboard may also be formed into prefabricated partition units consisting of two or more sheets of plasterboard bonded on either side of a cellular core. Of the 130 million m² of plasterboard sold in the UK by BG in 1985, about 90 % was standard

(13) The market in relation to which BPB has abused its dominant position is that for the supply of plasterboard, and the competition which has suffered as a result of those abuses is that from competing suppliers of plasterboard.

(14) BG considers that standard and speciality boards should be considered as forming a single market. There is a large degree of substitutability between standard board, used together with other materials providing thermal or acoustic insulation or a vapour barrier, and speciality plasterboard incorporating these materials. Fire-retardant boards

⁽¹⁾ In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

produced by adding various other materials to the gypsum at the primary manufacturing stage appear largely substitutable for specifications using standard board in many plasterboard applications.

- (15) During the procedure BG has argued that traditional wet plastering is an alternative to plasterboard in the facing of masonry surfaces. BG has submitted evidence that the direct installed cost of wet plastering is lower than that of dry lining. One main advantage of dry lining is that it can be more quickly applied and the drying time which may be associated with wet plastering is avoided so that buildings may be completed, fully decorated and occupied more rapidly. These advantages may be particularly relevant in projects involving similar large buildings or several units, and in prefabricated or standardized buildings.

- (16) BG has claimed that in Britain 60 % of masonry wall surfaces in buildings are dry lined with plasterboard, 40 % being wet plastered. The latter includes some wet plastering applied in situations where dry lining would be technically or economically inappropriate. For example in some refurbishment situations, or in some industrial buildings where large quantities of plaster may be merely sprayed onto wall surfaces.

BG itself has considered that with current building methods much of wet plastering is well entrenched and not readily susceptible to substitution by dry lining. BG seeks to gain maximum penetration in the wet plastering sector by offering plasters specifically designed for use on various surfaces. BG is the only producer of building plasters in the United Kingdom and the Republic of Ireland supplying over half the wet plastering market. Any further developments in the historical trend towards the greater use of dry lining as against wet plastering would be to a large degree at the expense of BG's plaster sales.

- (17) BG has also estimated that plasterboard accounts for about 56 % of the internal-partition market. This figure takes into account several types of non-gypsum material's which in terms of cost and characteristics would not be considered an alternative in the vast majority of plasterboard applications. It also includes domestic housing and commercial or industrial buildings. In the latter, the use of plasterboard is lower whilst for internal partitions in housing the degree of plasterboard use is greater. An expert consulted by the complainant

has estimated that as regards new housing construction, 80 % of internal walls are lined with plasterboard. BPB's figures cited above are not clearly inconsistent with that estimate.

In the housing sector BPB evidence indicates that over 90 % of all ceilings are lined with plasterboard, whilst in commercial and industrial buildings the use of plasterboard in ceilings is lower. This includes suspended ceiling systems in which plasterboard use is relatively limited.

- (18) In considering the competition to which plasterboard may be subject from wet plastering, the structure of supply is also relevant. In contrast to the position of BG in the supply of manufactured plasterboard, wet plastering is characterized by a very large number of small independent plasterin contractors. Furthermore, a substantial increase in the proportion of masonry walls which are wet plastered would require several years (two-and-a-half to three years according to BG, five years according to Iberian Trading UK Limited) before additional skilled wet plasterers could be trained.

- (19) BG documents indicate that the existence of alternatives such as wet plastering has not been regarded by BG as a factor limiting its freedom in relation to its plasterboard prices. On the contrary, whilst BG considered alternative supplies of plasterboard at competitive prices to be a limiting factor, once such price competition from other suppliers of plasterboard was eliminated, it would be able to increase the level of its prices in order to recoup lost revenue from earlier price cuts in response to plasterboard competition or to cover the costs of rebates made to customers on account of that price competition.

- (20) In the course of the administrative procedure BPB has recognized that it has a dominant position in the supply of plasterboard in Britain and Ireland.

C. The geographic markets

- (21) BPB produces plasterboard products in France and Ireland. It has not normally supplied the market in Great Britain from those plants. In the same way, those markets have not been supplied from Great Britain. BG estimated in 1986 that the cost of shipping plasterboard from Zaragossa to Shoreham, free on lorry, amounted to £ [...] per 100 m² of standard 12,5 mm plasterboard, or [...] % of BG's ex works price at the time for this product.

BG's policy is not normally to supply customers in Northern Ireland from plants in Great Britain. Such supplies would not be price competitive with plasterboard supplied from Ireland. However, BG does allow customers in Northern Ireland to collect plasterboard from plants in Great Britain where, for non-economic reasons, those customers insist on doing so.

- (22) Though Lafarge UK Ltd (Lafarge) and Iberian Trading UK Limited (Iberian) have supplied imported plasterboard in Great Britain, the quantities have been relatively small and have amounted only to the establishment of a foothold in the market. If a supplier wished to develop sales of plasterboard in Great Britain on a larger scale it would be bound to set up production facilities there, as it was rumoured Lafarge would at the end of 1985. In recent months, Redland Plasterboard, a consortium led by a powerful British building materials group, announced that it would be importing plasterboard in order to establish a position in the market pending the completion of two plasterboard plants it is building in Britain over two years. A similar approach has been adopted by Knauf, the largest German producer of plasterboard which has also recently announced its intention to build a production plant in Great Britain.

- (23) In Northern Ireland, BG markets plasterboard produced at the factory of its Irish subsidiary, GIL. GIL itself markets plasterboard of its own manufacture in Ireland.

- (24) Great Britain and the island of Ireland are the only areas in the Community where BPB is both the sole producer and has a near monopoly position in the supply of plasterboard.

D. The market in Great Britain

(a) BG's pricing structure

- (25) As a result of an undertaking given to the British competition authorities in 1976, BG operates in Great Britain both 'ex works' prices and delivered prices for plasterboard. The latter are required to reflect the average cost of transport to the place of delivery on the basis of a geographical breakdown into 64 districts, based on the countries of England and Wales and the regions of Scotland. In fact the 'ex works' prices include a loading charge and are in effect free on lorry prices.

- (26) Ex works and delivered prices and other terms and conditions are set out in a price list supplied to customers. On account of the geographical distri-

bution of BG's production plants, delivered prices in various parts of Great Britain vary significantly. On the basis of 20-tonne lorry loads of standard board, prices in most areas are not more than 4 % above the lowest delivered price, which is for Nottinghamshire. However, the effect of transport costs on delivered prices is higher in West Wales (between 5 and 6,5 %) and especially in Northern Scotland (between 5,5 and 14,5 %) and throughout South West England (from 5 % in Wiltshire to 14 % in Cornwall). In the South West, the differentials with ex works prices range from 7,5 to 16,5 %.

Delivered prices for each area also depend on the size of the particular delivery. For standard plasterboard there were five price levels at the relevant period, as follows :

Price schedule (approximate)	Size of delivery	
	m ²	tonnes (approximately)
A	2 400	20
B	over 1 850	over 15,5
C	over 900	over 7,5
D	over 450	over 3,8
E	over 225	over 1,9

NB: m² of 9,5 mm plasterboard equivalent, other thicknesses being converted.

- (27) In the case of Cornwall, where the transport element in delivered prices is the highest in England, the flat rate premiums payable for schedule B and C loads amount to 0,6 % and 1,8 % above schedule A prices. For schedule D loads the premium is 3,9 % and for schedule E it is 17 %, taking account of the additional merchant discounts on schedule D and E deliveries. Orders by merchants or users may be either delivered to 'stock', that is to say to the customer's warehouse, or 'site' deliveries to the place where it is to be used, the zone price being determined according to the place of delivery. Some 90 % of BG's orders are under schedules A, B or C. Most schedule D and E deliveries are 'site' deliveries, where the higher price is set off by the merchant's savings in not having to take the goods into stock and then deliver them himself, since delivery is made direct by BG to the merchant's customer.

- (28) In order to qualify for ex factory prices, buyers must arrange for the collection of full 20-tonne loads with suitable vehicles. Customer choices whether to have plasterboard delivered or to collect

it are based on individual assessments of costs and benefits, taking into consideration the minimum load size for collections, the potential for obtaining return loads for vehicles, and the administrative burden of organizing transport and finding return loads. In practice only a very small proportion of orders are collected, though in some areas, for example in Devon, collections have been more prevalent.

- (29) In order to obtain supplies from BPB and benefit from merchant discount, merchants must fulfil certain requirements regarding for example, dry storage facilities, vehicle access for deliveries, experience in handling and selling plasterboard, credit references and the prospect of a reasonable amount of plasterboard business. Small merchants who do not buy direct from BPB, but from other merchants, may usually expect to share a part of the merchant discount received by the latter.

(b) Imports

- (30) Prior to 1982 there were no regular imports of plasterboard into Great Britain. In that year, Lafarge, a part of the French cement and plaster group, Lafarge Coppée, began importing plasterboard produced in France.
- (31) Lafarge largely concentrated its activities in the South of England importing through Grays, in Essex. The range of standard and speciality boards supplied by Lafarge has been substantially less extensive than that of BG. On the basis adopted by BG for comparing product ranges Lafarge offered 35 items as against 331 from BG.
- (32) Lafarge gradually built up its imports from 590 000 m² in 1983 and 1 900 000 m² in 1984 to a peak in early 1985. The final figure for 1985 was 3 300 000 m² and for the first six months of 1986, 1 500 000 m².
- (33) Lafarge operated a price structure almost identical to that of BG, though initially the level of its prices was slightly lower. From early 1985, persistent BG field reports indicated that Lafarge was not seeking new business, suggesting that it had reached its target level of sales in the UK, and that it was concentrating on a limited number of customers. With effect from 29 April 1985, Lafarge increased its prices, taking its zone prices above those of BG in many areas and aligning its ex works prices on those of BG. Field reports thereafter stated that Lafarge was not applying the increase to the small

number of major customers on which it was now concentrating but that a number of the other merchants to whom the increase was applied were buying more plasterboard from BG, or switching entirely to BG.

- (34) Nevertheless BG continued to consider Lafarge as a competitor in the British plasterboard market. One of the options discussed by BG in April 1986 in response to competition from imports was to 'put pressure on Lafarge to fully implement their last price increase', which it was still not applying to major customers.

There were reports that by concentrating its efforts particularly on a limited number of customers, Lafarge was able to provide those customers with a delivery service which they generally regarded as more flexible and more reliable than that of BG.

On several occasions it was reported that Lafarge was unable to maintain normal deliveries to many of its customers owing to supply difficulties attributed to its dependence on a single plant in France and problems with shipping and transport.

- (35) In May 1984, Iberian began importing plasterboard manufactured by Española de Placas de Yeso (Epysa) in Northern Spain, through the port of Shoreham on the south coast of England. Much of Iberian's activities were initially in the North and the Midlands but by about March 1985, the emphasis had largely shifted to Southern England. In about January 1986, Iberian began also to import through Exmouth in South-West England.
- (36) Imports by Iberian into Great Britain were 600 000 m² in 1984, 1 800 000 m² in 1985 and 860 000 in January to June 1986.
- (37) Iberian adopted a pricing policy based on similar ex store prices in Shoreham and Exmouth. Its prices were lower than those of BG, the differential varying generally between 5 and 7 %, though greater and smaller differences were encountered. The same areas, and especially in the South-West, where it operated from Exmouth, Iberian's customers had a substantial cost advantage over BG's for whom the delivered price from East Leake in Cornwall was 16,5 % above BG's 'ex works' price. In real terms the price difference was not as large as this, since many customers saved on BG's delivered price by making collections from BG's plant at a total cost significantly lower than the delivered price.

(38) The range of products supplied by Iberian was restricted to a limited range of standard plasterboard sizes. BG has calculated that in comparison with the 331 different sizes and specifications available from BG, Iberian supplied 11.

(39) As BG has pointed out, Iberian encountered supply difficulties on several occasions, attributed to a failure at the Epysa production plant, a dock strike and other shipping and transport problems. One disadvantage for merchants in buying from Iberian was indeed the risk of lack of continuity of supply, with the result that merchants who handled Spanish board had to maintain higher average stocks than if they were buying those products from BG and had to accept perhaps being unable to provide their customers with normal supplies of Spanish board in the event of severe disruptions of supplies. In such cases the merchant could either turn to another supplier or warn customers that supplies would be interrupted. However, Iberian sought to maintain regular supplies to its most valued customers.

(40) At the beginning of 1985, BG learned that Iberian's supplier, Epysa, had increased its export prices. Iberian implemented an increase to reflect this, though some of its customers apparently benefited from a lower increase initially.

(c) *BG's market position*

(41) In 1985 and 1986 BG supplied about 96 % of plasterboard used in the United Kingdom and a similar proportion of that supplied in Great Britain, the remainder being shared between Lafarge and Iberian.

(42) During the course of the procedure, BG has stressed many factors which incline customers to prefer BG over its competitors as a supplier of plasterboard. BG has laid emphasis on the 'total service' which it provides. It supplies an exhaustive range of standard and speciality plasterboard products, accessories and systems fully covering virtually every plasterboard application. All these products are manufactured by BG itself with the minor exception of some accessories which are bought in. BG plasterboard is supplied in a very large variety of specifications, sizes and thicknesses. The range of products is much wider than that which could economically be supplied by an importer. BPB states that the only economic way to supply the market, whether users or merchants, is to provide a

full range of products available at short notice as part of a total service. BG has provided figures which show that [...] % of its deliveries are mixed loads comprising more than one type of plasterboard and that [...] % of deliveries comprise at least [...] types.

(43) In view of the scale of BG operations in the supply of gypsum products, it maintains a strong network of representatives which provides technical support and after-sales services to customers. This support is backed up by BPB's undeniable technical expertise as a pioneer in the plasterboard sector and as one of the largest producers in the world, and by its research and development facilities and testing laboratories. BG's network also maintains direct contact with builders through visits to building sites, providing technical support and promoting BG products. Its representatives collect information regarding building projects and contact architects involved in order to 'create specifications' by encouraging them to specify BG products. Many of BG's field representatives are assigned exclusively to maintaining such contacts with architects. BG has also pointed to the support it gives to merchants through staff training, participating in promotional activities such as receptions, exhibitions and seminars for merchants' customers and *ad hoc* contributions to cooperative advertising by merchants and BG. These various forms of direct and indirect support to merchants in selling BG products are an important part of the total package offered by BG, and a significant advantage for merchants in dealing in BG plasterboard as against that of its competitors.

(44) The strength of BG's position on the market is underscored by its integrated operation producing its own gypsum, plaster and plasterboard. BG currently controls virtually all the gypsum production and gypsum deposits being worked in Britain. BPB also produces all the liner paper used by BG. Control of supplies is important, for liner paper accounts for over half the production cost of standard plasterboard, compared with less than one-quarter of the production cost attributable to plaster. Almost all BG's plasterboard is manufactured in plants which are fully integrated with adjacent plaster production and gypsum quarries or mines. Major production facilities recently brought on stream, as well as those for which plans have been made public, are set up in this manner, which BG states offers significant cost savings.

- (45) Any market entrant wishing to establish plasterboard production in Great Britain faces a substantial lead time and large capital expenditure required to establish the necessary integrated facilities for crushing gypsum, producing plaster and manufacturing plasterboard. The minimum production capacity for an efficient plasterboard plant is about 20 million m² per annum. A market entrant would also face the disadvantage of having to import gypsum or developing new mines or quarries at great capital cost. BG has stated that in order to be worthwhile, a gypsum deposit must be large enough to sustain 20 years' production. A new producer would also have to consider the market effects of the overcapacity which might result, bearing in mind the financial strength of BPB, in view of BPB's policy of maintaining capacity sufficient to meet the demand for plasterboard in Great Britain at all times, including peak periods, with a further margin for contingencies.
- (46) In view of the large number of production plants operated by BG at each production stage, and its policy regarding capacities, it is able to offer continuity of supply even in the event of a major breakdown. BG has stated that 85 % of its products are available at three days' notice and BG has a policy that the delivery period for high-volume plasterboard products should not in any event exceed four days.
- (47) Regular and reliable supplies are of major importance to merchants in view of the financial burden of holding stocks and the costs of dry storage. Builders' merchants are very conscious of the cost of stock in trade, which is a major financial burden in their business. There is particular awareness of this in relation to plasterboard, on which merchants' margins are small, and especially within the larger merchant groups which tend to operate strict internal financial controls over inventory levels and stock turnover. Many merchants' branches do not have the dry storage space to readily increase their stocks of plasterboard. Those who could increase their stocks of plasterboard, at the expense of other products, are unlikely to readily accept the opportunity cost of doing so.
- (48) Those merchants who trade in Lafarge or Iberian plasterboard are generally not in a position to cease trading with BG. First, many plasterboard products which are available from BG are not supplied by Lafarge and, especially, Iberian. Secondly, BG products, including standard plasterboard, are often required by name in architects' specifications as a result of BG's long-established position in the market, and the activities of BG representatives encouraging architects to specify BG products. In so far as merchants therefore have to trade with BG anyway, there are strong incentives to obtain all their plasterboard requirements from that source. Apart from administrative convenience, it is to the advantage of a merchant, or individual branch in the case of multibranch groups, to combine its stock orders for speciality plasterboards with quantities of standard plasterboard so as to obtain the lowest possible delivered prices or unit transport costs and in order to avoid unnecessarily high stock levels, by ordering the fullest possible loads from BG.
- (d) *The impact of imports on the market*
- (49) The result of competition, and especially price competition, from imports was to unsettle the stable market conditions which had existed previously. As some merchants began to sell imported plasterboard and to compete on price with other merchants purchasing from BG, the latter came under pressure to do likewise. BG documents clearly establish the knock-on effects of competitive pricing by Lafarge and Iberian, as a result of which merchants began handling Iberian products in response to competition from Lafarge board, and *vice versa*. Price competition from imports also gave rise to pressure on BG especially from larger merchant chains to reduce their prices, through quantity discounts. The major multibranch merchants were customers of particular importance to Iberian, because of their ability to introduce Spanish plasterboard in the market over a wide area and in substantial quantities.
- (50) Though BG has laid emphasis on price competition from the importers, and especially on Iberian's prices, its internal documents reveal that in fact Iberian's and Lafarge's plasterboard was also competing on quality. Lafarge was apparently also able to improve on BG's service to a limited number of its most important customers, especially as regards the flexibility and reliability of deliveries.
- (51) Throughout the period from June 1984 to mid-August 1986, BG received persistent field reports that merchants and users considered the quality of

both Lafarge and Iberian plasterboard better and more consistent than that of BG. The repercussions of this on BG's strategy are illustrated in particular by the following documents:

(52) The general sales manager's annual report of December 1984 showed that during the year customers had in some cases turned to importers for reasons of quality.

(53) In February 1986, BG's general sales manager reported: 'Whilst our battle with importers (predominantly in the South) revolves mainly around price, there are a growing number of customers stating a preference for imported boards for quality reasons. The lost business in these situations is much more difficult to recover than where price is the dominant factor.'

(54) In a report by BG's regional sales manager for the South, dated March 1986, it is stated: 'When we were first faced with competition from imported plasterboard, our policy was to beat the competitors on quality and service but unfortunately, we have not been able to do this. We are now receiving too many reports that imported board is preferred purely because of superior quality. Even if we can show noticeable improvements in quality, to win back customers which we lost for this reason is far more difficult than if it was merely a case of meeting the lower prices quoted by competitors.'

(55) From June and July 1984, BG's general sales manager began to report supplies of Spanish plasterboard to builders' merchants [...] and [...]. In August 1984 it was reported that [...] had taken Spanish plasterboard in five branches but only in limited quantities to test the market, and they were selling it at BG prices. This was confirmed at a meeting of BG with [...] to discuss their 'involvement with Spanish plasterboard, ... on 31 August 1984.' [...] told BG they would continue to buy most of their plasterboard from BG, and were not keen to buy imported goods. Their action was a defensive measure, in case they should face price competition from others with imported board. BG noted at this time that 'two large merchant groups — [...] — have stated that they do not intend buying imported plasterboard'.

(56) However, BG's general sales report for September 1984 stated that the plasterboard market was being unsettled by imports from France and Spain. Iberian's prices were very competitive. As a result of the growing competition requests were being

received, particularly from the major groups, for quantity discounts. Spanish board was being handled by a merchant in [...] and [...] by [...] in [...] and by [...] in [...]. [...] Head Office had decided that all [...] of their branches in [...] (under the name [...]) should receive Spanish board. BG considered Spanish board a threat also in the Midlands mainly due to the activities of [...] who were taking it into more branches. In the South, the main competition was still from Lafarge, though Iberian was selling Spanish board in the South-West through branches of [...] and [...]. The report for October 1984 referred to increasing instances of Spanish plasterboard activity across the country, with further branches of [...] involved. In November 1984 it was reported that BG's markets were under increasing threat from competition. Some business in the South was being regained from Lafarge due to a special discount for 25-tonne 'Super Schedule A' loads which had been introduced by BG for deliveries in Hampshire and Dorset.

(57) From January to March 1985, BG made payments to [...] described as 'Contributions to material expenses in advertising and promotion of British Gypsum goods' at a rate of £[...] per month. In April 1985, the monthly payments to [...] were reduced to £[...] per month and in October 1985 to £[...] per month.

In the course of the procedure it was stated by BPB that BG had agreed to accede to [...] request for recognition of their buying power by supporting and ambitious advertising project by [...]. BG also saw this as an experiment to establish whether such cooperation could be successful. Payments were subsequently reduced when BG formed the view that the level of BG's support was too high in relation to the promotional efforts which it expected [...] could sustain.

(e) *Loyalty payments by BG*

(58) On 16 January 1985 a senior management committee of BG reviewed plasterboard competition from France and Spain. To conclude, the managing director of BG requested the marketing director to consider in formulating marketing strategy, how BG could 'reward the loyalty of merchants who remained exclusively with us'. Numerous BG documents demonstrate that during the period from January to June 1985 such a scheme was formulated under which regular payments would be made to the larger merchant

chains who were prepared to buy plasterboard and associated products exclusively from BG. Such payments were to be in the form of regular contributions by BG to merchants' advertising and promotional expenses. The arrangements were to be negotiated at the highest level with selected merchants and would not be disclosed publicly. The level of payments to merchants who agreed to buy plasterboard exclusively from BG was to be of the order of [...] of the value of purchases of plasterboard products and accessories. A list of the largest customers of BG was drawn up and it was proposed that they 'be given the opportunity to trade with (BG) exclusively'.

- (59) The benefits to accrue to BG as a result of the exclusivity condition under the planned scheme were specifically examined in two BG documents. In a memo of 1 March 1985, the marketing director considered the cost of the payments and noted that if BG could 'by the exclusivity claw back say [...] m² of plasterboard' from the importers the scheme would be self-financing. At this time imports by Iberian were [...] m² per annum, and those by Lafarge [...] m².

In a note to BG's group operating director dated 1 May 1985, under the heading 'Plasterboard Competition — Sales and Pricing Strategy', the managing director set out the conditions BG would negotiate in connection with their support for large merchant groups. The first condition is 'exclusivity', whereby the merchant would undertake to buy all his plasterboard and related products from BG. Under this heading it is stated: 'It is difficult to quantify how we would benefit from this action. On one hand, it will prevent our losing more of our existing customers and hence loss of revenue — on the other hand, it could get back market from our competition who would either accept a reduced level or attempt to take back that share elsewhere. In the latter case, if they decide to fight back, it would also mean they would have to spend more effort and possibly more on distributing their products'.

- (60) On or before 2 July 1985 it was decided that the scheme should be offered to [...] a very large customer of BG, who had remained faithful to BG but whose management were under pressure to reconsider their buying policy in view of the competition which branches were facing from the other merchants selling Lafarge and Iberian plasterboard. Payments of £[...] per month to [...] began in August 1985.

Thereafter similar arrangements were offered in meetings with other merchants all of whom with one exception were or had been handling plasterboard from Lafarge or Iberian.

- (61) At the July 1985 meeting of BPB's executive committee it was reported that Iberian's main outlets continued to be with the larger groups such as [...], [...] and [...]. The general sales report for August 1985 stated: 'Discussions have been held with some of the major groups handling imported boards and it is hoped that they may be persuaded to revert to buying from us exclusively'.
- (62) Monthly payments by BG to [...] (£[...]) and [...] (£[...]) began in September and October 1985. At the BPB executive committee meeting in October 1985 it was reported that [...] and [...] had recently issued instructions to branches not to order further supplies of Spanish board.
- (63) In December 1985, BG began monthly payments (£[...]) to [...], a merchant who had been purchasing Lafarge plasterboard and which was considering an attractively priced offer by Iberian which was about to begin importing through Exmouth. Exmouth was much closer to [...] main area of operations than Shoreham. On 23 December 1985 [...] wrote to BG in response to BG's offer of promotional payments, confirming that they would in future purchase all gypsum products from BG.
- (64) In or before December 1985 [...] took over a merchant chain, [...], one of the prominent distributors of Spanish board which had been 'the biggest problem for other merchants through "special offers"'. This chain was absorbed by [...] and the branches concerned progressively ceased buying Spanish board. By February 1986, it had become clear that the branches absorbed by [...] would cease handling Spanish board, and monthly payments to [...] were increased from £[...] to £[...] per month.

When the builders' merchants [...] were taken over by [...], payments to the latter were increased in [...] from £[...] to £[...] per month.

- (65) BG's general sales report for February 1986 stated: 'With some of the other large merchant groups no longer handling Spanish board, Iberian Trading is obviously seeking outlets elsewhere. [...] have recently taken supplies for the first time.' At the BPB executive meeting of March 1986, it was reported: 'Progress has been made with Iberian's existing customers, but as merchant groups return to British Gypsum, Iberian remain very active in attempting to obtain alternative outlets.'

- (66) On 7 April 1986, the marketing director addressed to the managing director a note reviewing the current situation regarding 'Spanish imports through Exmouth', and setting out the policy options considered by the marketing division and his own proposals. It was reported that 'there is no foreign board in Cornwall now that the [...] [...] and [...] are all buying British Gypsum' and 'the only two companies in the South West known to be buying Spanish board are [...] and [...] — both not large accounts'.

The policy options considered in this document include: '(to) continue with the policy of picking off selected customers in the short term. From the reports in Cornwall, this is proving very effective and as the merchant groups get larger, our hold will be stronger'.

- (67) In April, June and August 1986, BG began monthly payments to [...], (£ [...]), [...] (£ [...]), and [...] (£ [...]) (which controls [...]). On 23 June 1985, it was reported by BG's Midlands sales office that 'all branches of [...] have had a directive from (their) head office to discontinue stocking and selling Spanish board'. In July 1986 a first quarterly payment (£ [...]) was made by BG to another customer, [...] under an arrangement which took effect in April 1986.

- (68) During the procedure, BG supplied copies of letters offering and accepting the monthly payments, while in other cases, offer and/or acceptance were made verbally. The terms of all these letters confirm that the payments were based on considerations which included recipients purchasing plasterboard exclusively from BG. BG has confirmed that the basis of the payments to all merchants was identical, whether verbally agreed or recorded in correspondence.

- (69) From September 1986, the payments to merchants were phased out as BG introduced a stock incentive scheme (Super Stockist Scheme) which is being considered by Commission under a separate procedure.

(f) *Super Schedule A discounts*

- (70) In August 1984, BG introduced reduced prices for plasterboard delivered in 25-tonne 'Super Schedule A' loads in Hampshire and Dorset. The reason

given for the scheme was to enable BG to assess the cost advantages of operating large 38-tonne lorries, which were authorized from May 1983 in the United Kingdom, raising the limit from 32 tonnes. Super Schedule A loads contain 2 900 m² of 9,5 mm wallboard or the equivalent in other sizes and thicknesses. The previous largest load of 2 400 m² was equivalent to about 20 tonnes. BG has argued that there was at the time much uncertainty about the transport cost savings which could be expected, particularly because of doubts over fiscal aspects, truck configurations and other matters. The limitation of the Super Schedule A offer to the two counties was said to be intended to enable BG to gain experience and better assess costs in operating larger lorries, before extending the scheme more widely.

- (71) At a South West area sales meeting on 24 and 25 October 1984, the chairman reported that 'this arrangement had been welcomed by merchants seeking to compete with imported board. It was important, however, to bear in mind the stated reasons for the introduction of the new Schedule viz: a trial period to determine the viability of 25 tonne loads'.

In a note of 14 February 1985, the managing director stated that the scheme 'has achieved the desired result, allowing us to regain much of the market lost to Lafarge'.

- (72) Until Lafarge's price increase of April 1985, BG's Super Schedule A prices were substantially the same as Lafarge's delivered prices in Hampshire, and some 2 % lower in Dorset. On the other hand BG's ex works prices were some 2 % higher than those of Lafarge.

- (73) The price reductions under the scheme were of the order of 4 % in Hampshire and 5,5 % in Dorset. On the basis of information supplied by BG, the Commission has calculated that the scheme, as implemented, could be expected to lead to cost savings of the order of 1,5 % at the most. BG has recognized that the scheme as implemented in the limited geographical area of Hampshire and Dorset could not be expected to yield savings commensurate with the price reduction, and also that some cost savings which were expected did not materialize in practice because the scheme was limited to the two counties. Nevertheless, when this became apparent, BG states that it decided to keep the

scheme in operation as a response to even lower prices being charged by Lafarge to an important customer in that area.

- (74) On 13 April 1987, BG implemented a scheme of Super Schedule A prices in the whole of the United Kingdom.

(g) Offer of Irish plasterboard at reduced prices

- (75) During the first three months of BG's 1985/86 operating year which runs from April to March, the company recorded a deficit of some [...] m² or [...] % in sales of lath in the southern region. Competition from Spanish plasterboard was identified by BG as the cause.

- (76) Lath is a narrow sheet of plasterboard mainly used for ceilings, especially in the housebuilding sector, where it is attached to wooden joists traditionally used in the United Kingdom to support floors and ceilings, and on timber framed partitions. During the investigation, BG stated that only in the South West of England is lath rather than other plasterboard sizes traditionally used. Lath is supplied by BG at a lower price than wallboard. Iberian do not supply lath. However, Spanish wallboard, which was competitive with BG lath in price terms in the South West, was being used in place of BG's lath.

- (77) On 29 August 1985, BG's southern region sales manager circulated details of a 'special offer we wish to make to selected merchants in the South West of England'. This offer related to full loads of lath together with up to 50 % of wallboard produced by GIL, BPB's subsidiary in Ireland, and imported by BG. The discounts offered were [...] on full loads of lath, and [...] on mixed loads of lath and wallboard. It was intended 'initially (to) use this offer to repay loyal merchants'. In a BG memo of 5 September 1985 loyal customers are defined as 'those who have previously not indulged in imported French or Spanish plasterboard'. The offer was available only for deliveries in the south western counties of Devon, Cornwall, Somerset and Avon. This memo notes that the 'arrangement is intended as one of our responses to imported boards selling at cheap prices but it should be regarded as a special offer by GIL to take up some of the normal capacity from that plant, which is also faced with competition from cheap imports'.

- (78) Special more advantageous terms were subsequently offered to [...] merchants [...], [...] and [...], allowing higher proportions of wallboard to lath in mixed loads and in some cases the discounts were structured more favourably though this is attributed by BG to a misunderstanding.

- (79) Apart from a positive interest of [...] and [...] in the special terms above, the scheme met with limited interest on the part of the merchants to whom it was offered. When the special terms for the three merchants were terminated they in turn lost interest. About [...] m² of plasterboard was supplied under the scheme.

- (80) In the course of the procedure BG recognized that the scheme was intended initially to reward loyal merchants. However it drew attention to evidence that within a short period the offer of Irish board was being extended to other merchants which had not been customers of BG only.

Though BG has referred to a discussion about the Irish offer with [...] on 12 September 1985, this cannot be regarded as indicating an extension of the scheme to non-loyal merchants since [...] had already agreed prior to 6 September 1985 to purchase plasterboard exclusively from BG. The first evidence of the offer being extended to stockists of imported plasterboard concerns discussions with a branch of [...] on 2 October 1985. Nevertheless, this did not signal a general extension of the offer to all merchants in the area for it is established that on 31 October 1985 it was still the position the BG did not intend to make the offer to [...], which was selling some Lafarge plasterboard.

(h) Priority delivery of plaster for loyal plasterboard customers

- (81) In July 1985, BG drew up a scheme for allocation of supplies of plaster during expected delivery delays due to the temporary shutdown of BG plants. The objectives of this were: 'to try to control the situation and also create a situation whereby we want to help those loyal merchants who have not regularly bought and stocked imported plasterboard'. A list of merchants stocking Lafarge or Iberian board was drawn up and circulated to sales offices, which were instructed in effect that if it were necessary to accommodate a priority order, an order for a

merchant on the list would be delayed. It was made clear that the object of the scheme was not to enable customers to obtain more than their normal supplies, but to speed up plaster orders for loyal merchants where extended deliveries caused them particular problems. On the other hand no effort would be made to alleviate difficulties which might arise for merchants who were regular stockists of imported plasterboard.

(82) It was further stated in instructions to sales offices that 'we will create some space in the order book to accommodate additional priority requests' and they were instructed to use this to meet delivery dates requested by loyal customers. In particular [...] and [...] were to be given immediate delivery if requested.

(83) An extended delivery situation did arise as a result of the downtime, a breakdown and industrial relations problems which delayed reopening at a major works. After one week, the normal delivery period of three days had reached eight days at BG's northern plant and four or five days in the Midlands. After two weeks this had been returned to five days at all plants. After three weeks normal deliveries had been resumed.

(84) In a letter submitted during the procedure, BG stated that during the shortages in the summer of 1985 some customers were informed by BG that they would not receive priority supplies of plaster and that any priority orders would be given to regular supporters first.

BG has stated during the procedure that due to the way ordering procedures operated, the worst penalty which a non-loyal merchant might suffer as a result of a priority order being put through for a loyal merchant would be that his delivery might be postponed by one day.

(85) In February 1986, an article was published in the *Building Trades Journal* reporting on sales of Spanish plasterboard in Britain. This suggested that many merchants handling Spanish board feared reprisals if BG realized how much imported board they were selling. BG's southern regional manager, asked whether these fears were justified, stated that if a shortage arose an allocation system based on past purchases would be put into operation. For any surplus normal commercial judgment would apply and the company would be inclined to look more favourably on its loyal customers.

E. Ireland and Northern Ireland

(86) In the island of Ireland, BPB is the only producer of plasterboard. By its own estimates, its share of the market is 93 and 90 % respectively in Ireland and Northern Ireland. BPB claims that these figures may overstate its share of the market, being based on import statistics which may be incomplete. In Ireland and Northern Ireland GIL and BG enjoy the advantages which have already been identified in being part of the BPB group, and the benefits which flow from producing plasterboard locally, rather than importing from overseas. In Ireland and Northern Ireland, the market position of plasterboard in relation to wet plastering is even stronger than in Great Britain. In Northern Ireland, BG sells plasterboard imported from Ireland, where it is produced by Gypsum Industries plc, BPB's Irish subsidiary.

(87) In the spring of 1984, [...] was supplying Lafarge board in Northern Ireland. BG made a price cut to meet this competition. BG's Northern Ireland sales manager commented 'we need further positive action if we are to halt the activities of imports... I believe that price reduction is the only way to defeat our competition, it will mean short term hardship but a long term solution. Means of recouping our loss can be looked at when we get control of the market at a later date'.

(88) An internal 'situation report' of 21 January 1985 indicated that [...] was now importing Spanish board into Northern Ireland, but that merchants were refusing to deal with them. They were therefore selling direct to users. In another internal memo on 'N. Ireland — Plasterboard imports' it is stated that 'when [...] threatened to enter the market, (the merchants) came to (BG) for help to protect their businesses and that this was successful'. [...] had 'their access to merchants blocked'.

(89) On 26 March 1985, the Commission accepted a price undertaking from the Spanish supplier EPYSA regarding the export prices to Ireland and Northern Ireland. This terminated an anti-dumping complaint filed by GIL in July 1984 concerning EPYSA's plasterboard exports to the island of Ireland.

(90) A note for the executive committee of BPB in May 1985 reported that the activities of [...] had almost ceased. The situation was being monitored in view of rumours of greater Lafarge interest in Northern Ireland and of some merchants pursuing the idea of importing plasterboard themselves.

- (91) In a BG memo of 14 June 1985 it was noted that a consortium of merchants in Northern Ireland had collectively taken over the agency for Spanish plasterboard. In reply to assurances that the merchants did not intend to disrupt the market but maintain a stable market for the benefit of BG and themselves, they were told by BG that BG regarded the Northern Ireland market as its own and intended to keep a maximum share of it. BG viewed imports by builders' merchants themselves as particularly unsettling for the market.
- (92) This memo noted the 'action taken to date': a [...] rebate on standard plasterboard sizes which was being offered was withdrawn from the four merchants importing plasterboard. It was then proposed to offer the other merchants in Northern Ireland a [...] discount on plaster and an increased discount of [...] on BG plasterboard of the same sizes as those to be imported from Spain. The [...] rebate was seen as 'a weapon available to (other) merchants before imports arrive', and might be adjusted under the flexible approach proposed, in the light of price at which the imports would be offered. The conditions to be attached to the rebates included that '(BG) get exclusivity of supply in respect of our products' and that '(merchants) do not deal in imported gypsum material'. This memo makes it quite clear that the description of the rebates as 'promotional' and the inclusion of the condition that participating merchants should stock and generally promote BG products was intended to provide a justification for the rebates should they be questioned by the national competition authorities. In addition, loyal merchants would be given priority loading at busy times, described in the implementing circular to merchants as 'at peak times, such as ahead of holiday closures, or in the event of any temporary (albeit unlikely) interruptions to supplies'. BG wrote on 17 June 1985 to all northern Ireland builders' merchants implementing all the measures outlined above.
- (93) Soon after, BG was approached by [...], a builders' merchant within the [...], with a request to receive the rebate. This group was one of the importers, but [...] claimed independent buying powers and confirmed that they had no intention of selling imported board. The rebate was nevertheless refused by BG on the grounds that 'if the [...] are seen to be involved in the importation and/or sale of imported plasterboard, then the criteria would not be met'.
- (94) In a BG internal note preparing for a meeting on 2 July 1985 with the importers, it was proposed that if they were prepared to agree with BG not to make further imports, the following measures would be taken:
- price cooperation between the importers and BG in disposing of existing stocks of imported board, so as not to disrupt the market,
 - a 'Peace Arrangement' through the Merchants' Association, under which all merchants would agree to maintain BG prices in the face of any other imports and a verbal agreement with the association to combat future imports through cooperation between BG and all the members,
 - the rebates on plaster and board would be restored for the importers once their stocks of Spanish board were exhausted,
 - after the expiration of these rebates, loyal merchants would be given a modest discount over a short period to repay their support.
- This note suggests that the [...] rebate on plaster given to merchants not involved in imported plasterboard was the measure which proved the most effective in bringing the importers of plasterboard to the negotiating table.
- (95) The meeting of 2 July 1985 with representatives of the importers took place at BG's head office. BG made it clear that it 'would not willingly share the market with an importer', and expressed disappointment over the importers' action since 'in strongly supporting the merchants in the past (BG) had always felt that (it) could rely on the collective efforts of merchants to help frustrate imports'. At this meeting BG made the points that 'the merchants in Northern Ireland "buying Spanish" gives great encouragement to others in the mainlands, both Iberian sales personnel and English merchants', 'BG had a responsibility to its employees to "defend" the UK market', 'BG would not willingly share the market with an importer', and 'it would be a brave decision by someone else taking over (the agency for Spanish plasterboard) and whoever did so must expect a similar response from BG'.
- (96) A further meeting took place in Belfast on 15 July 1985. BG's position was that if the importers cancelled a second shipment which they had arranged, and confirmed no further intention to import, BG would end the rebates to loyal merchants and establish a quantity rebate framed in such a way that the importers would qualify, but based on criteria to satisfy competition legislation. It was agreed that this rebate scheme would be kept confidential and only those entitled would be informed. The rebate was to be used to 'enhance

profitability and not ... in price competition with other merchants'. Also, if an arrangement could be made to end imports, BG would 'look favorably at some sort of adjustment on a goodwill basis at a later date'.

(97) An agenda note for the July 1985 meeting of BPS's executive committee reported that a group of merchants had imported a shipment of plasterboard through Belfast and 'we have met this with a discount for loyal customers. This has had the effect of bringing the group of merchants to the table to discuss with us and it would appear that they are now prepared to abandon imports following our discussions'.

(98) On 7 August 1985, BG implemented the quantity rebate referred to above, by a letter to [...] merchants in Northern Ireland having a turnover in BG products of at least £ [...] per year, confirming a [...] rebate on all purchases, provided the merchants concerned helped to promote BG products and 'we (BG) get exclusivity of supply in respect of all your gypsum product requirements'. BG stated 'for our part we will strictly interpret the criteria in assessing progress in the coming months and in particular, loyalty of supply and the commitment to stocking and servicing a full range of our products', and stated that the rebate was not to be used for price competition with other merchants. This rebate was terminated at the end of 1985 when BG formed the view that it was being used by recipients in price competition with other merchants.

(99) On 21 August 1985, it was reported that Iberian had sold to [...] the shipment of Spanish plasterboard which had been cancelled by the [...] merchants. BG was not unduly concerned as [...] was expected not to place the board on the open market but to use it in its production of laminated panels.

(100) BG agreed at a meeting on 12 September 1985 with the merchants who had imported to pay them retrospectively three-quarters of the rebates which had been reserved for loyal merchants up to the time they agreed to cancel further imports, and the same rebates as loyal merchants thereafter, but for [...] than the loyal merchants. This was 'in consideration of the cancellation of imports.

(101) The situation regarding imports by [...] was reviewed by BG's marketing department on 28 January 1986. [...] was essentially importing for

its own use though a small amount was being sold on the market. There was general agreement amongst merchants that this small quantity was not causing any problems. [...] had exclusivity for Northern Ireland but had no commitment to buy minimum quantities. Consequently, if BG stopped [...] importing, Iberian would be free to appoint another importer. The preferred alternative was therefore to seek an arrangement with [...] whereby the latter would limit imports to the quantities required for its own use and if necessary BG could find a means to help [...] finance the high stocks resulting from less frequent shipments. This would enable BG to control imports of plasterboard and prevent them from reaching the open market in particular. It would prevent Iberian supplying [...] which was already importing cement into Ireland and which was a potential importer of plasterboard.

(102) An agenda note for the BPB executive committee meeting of April 1986 notes: 'We are continuing negotiations with [...] in order to prevent any of this board finding its way onto the open market'.

(103) In the event, [...] declared that it was not prepared to come to such an arrangement with BG, and continued to sell part of its imports to small merchants in Northern Ireland.

II. LEGAL ASSESSMENT

A. Article 86

(104) By virtue of Article 86 of the EEC Treaty, any abuse by one or more undertakings of a dominant position within the common market or in a substantial part thereof is prohibited as incompatible with the common market in so far as it may affect trade between Member States.

B. Relevant market

(105) For the purposes of establishing that a dominant position exists under Article 86 of the EEC Treaty, it is necessary to define the relevant market. This is the area of business in which the economic power of an undertaking *vis-à-vis* its competitors and customers is to be assessed.

(a) Relevant product

(106) This case concerns the business conduct of BPB, as a supplier of plasterboard, and its effects on competition and trade in the plasterboard market, in

particular *vis-à-vis* competing suppliers of plasterboard. *A priori*, the relevant product should therefore be regarded as plasterboard.

- (107) BPB have argued that the relevant market should be defined to include wet plastering *in situ*. It claims that wet plastering is a cost effective alternative to dry lining with manufactured plasterboard and so in effect exerts a competitive pressure on BPB's plasterboard business, limiting BPB's market power.
- (108) In the present case, any competitive from other products on the market power of BPB in the conduct of its plasterboard operations can adequately be taken into account when considering whether a dominant position exists.
- (109) Plasterboard should be taken to include both standard board and special board with enhanced fire resistance, whether or not such board is supplied as part of a composite product including other materials.

(b) *The geographical markets*

- (110) The geographical areas in which the market power of BPB is to be assessed for the purposes of the present proceedings are Great Britain and the island of Ireland. These are the areas in which the market power of BPB is relatively homogeneous and distinct from that in other parts of the Community.
- (111) In view of the costs of shipping plasterboard and the advantages of placing production facilities close to markets, it is not economically feasible to supply the markets in Britain or Ireland on a large scale and for prolonged periods from abroad. Importers also face the difficulties which have been identified in meeting merchants' requirements for regular supplies of plasterboard and in providing the wide range of products which can readily be supplied by a local producer. In view of these considerations, the extent of competitive pressure from potential importers restricting the market power of BPB in Great Britain is limited.
- (112) The Irish and British markets are also distinct from one another on account of the factors indicated above. As the only producer in those markets, BPB does not normally supply one from the other and it would not be economic for plasterboard imported into either market to be re-exported to the other.
- (113) Great Britain and the island of Ireland are both significant parts of the common market.

C. Dominant position

- (114) A dominant position has been defined by the Court of Justice as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers (Judgment in Case 85/76 *Hoffmann-La Roche v. Commission*⁽¹⁾ at point 38).
- (115) The issue of dominance must be considered in relation to the period to which this decision relates, namely June 1985 to August 1986. In considering the issue of dominance or market power, it is necessary to consider not only the position of BPB in the market but also its technological and financial resources and the competitive position of its rivals.
- (116) In 1985 and 1986, BPB's share of the plasterboard market in Great Britain was between 98 and 96 % and in the island of Ireland between about 100 and 92 %. As BG has pointed out, BPB enjoys substantial economies in producing on a large scale in integrated industrial complexes, extracting gypsum and producing plaster then plasterboard. BPB has very extensive technical and financial resources. As the sole producer in the relevant geographical markets it alone benefited from the economies which flow from the placing of plasterboard production close to its markets.
- (117) BG's market power has been underlined by the very small market shares of its competitors. Its position has been strengthened by the dependence of merchants and users on BG for many plasterboard supplies in view of the wide range of plasterboard products which are supplied by BG but not by its competitors, architects' specifications requiring BG products by name and the advantages for BG's customers of grouping all plasterboard purchases with a single supplier.
- (118) The data available regarding the relative use of wet plastering and plasterboard lining in Great Britain indicate that plasterboard accounts for some 60 % of the two taken together. The 40 % attributable to wet plastering could not be given the same weight as that which would be given to a 40 % share which might be held by other suppliers of plasterboard, for in many applications of plasterboard lining and wet plastering their intersubstitutability is limited.

⁽¹⁾ [1979] ECR 461.

The structure of supply of wet plastering, characterized by a very large number of small plastering contractors, must be distinguished from BPB's near-monopoly in the supply of manufactured plasterboard. Also, the scope for any substantial increase in wet plastering is restricted by the long period required to train skilled plasterers. Finally, the ability of BPB to influence the relative costs of dry lining and wet plastering is reinforced by its very strong position in the supplying of at least 50 % of plaster used in the wet plastering market.

- (119) For the reasons stated above, the Commission concludes that any competitive pressure exerted by wet plastering upon the market power of BPB in relation to the plasterboard market has not been significant. The available evidence shows that any competitive pressure by wet plastering has not been regarded by BG itself as restricting its commercial freedom or its market power in the plasterboard market. As the Court has ruled in its Judgment in Case 322/81 — *Nederlandsche Banden Industrie-Michelin* ⁽¹⁾ it is not a precondition for a finding that a dominant position exists in the case of a given product that there should be a complete absence of competition from other partially interchangeable products as long as such competition does not affect the undertaking's ability to influence appreciably the conditions in which that competition may be exerted.
- (120) The impact of potential competition on the market position of BPB has been limited in particular by the cost of establishing new plasterboard production and sales and technical support networks. In view of the strength of BPB's market position and its policy of maintaining capacity to meet the domestic demand for plasterboard at all times, it could expect to maintain a dominant position for a considerable period in the face of market entry by competitors on any realistic scale. The position of BPB is reinforced by the need for a new producer to incur the yet greater financial risk of developing gypsum mines in Britain or Ireland, or to accept the cost disadvantage of importing gypsum.
- (121) BPB therefore enjoyed during the relevant period a dominant position in the supply of plasterboard in Great Britain and the island of Ireland.

D. Abuse of dominant position

- (122) As the Court of Justice has noted in several cases, conduct which undermines the objectives of Article

3 (f) of the EEC Treaty by endangering the structure of competition may constitute an abuse of a dominant position. The Court has condemned exclusionary behaviour which hinders existing competition or the development of new competition. Practices designed to block the access of competitors to customers by tying them to the dominant supplier have been particularly identified as abuses in leading cases (Judgments in Case 40/73 *Suiker Unie v. Commission* ⁽²⁾, Case 85/76 *Hoffmann-La Roche v. Commission* and Case 322/81 *Nederlandsche Banden Industrie-Michelin*).

(a) Exclusive supply arrangements

- (123) As a response to competition, BG adopted a policy of rewarding the 'loyalty' of customers who would obtain all their plasterboard requirements from BG. To do this, it began in July 1985 to offer regular payments to selected merchants in Great Britain who undertook to purchase plasterboard exclusively from BG.
- (124) The offer of promotional payments to individually selected merchants rather than in the framework of a general scheme based on objective criteria served to further reinforce a close trading relationship between BG and the recipients, strengthening the ties between BG and these customers, and the exclusionary nature of the scheme.
- (125) The first merchant to receive payments from BG linked to exclusive purchase from BG, namely [...], was a very large merchant chain which had until then remained loyal to BG in the face of competition from Lafarge and Iberian but which was under pressure from branches to review this policy. These arrangements ensured that it would continue to remain an exclusive BG customer. Thereafter, BG began concluding exclusive supply arrangements with merchants who were or had been customers of Lafarge or Iberian.
- (126) In the particular case of Iberian, a stated objective of BG's policy was either to deter Iberian in the event that it would accept the resulting loss of sales, or to weaken Iberian by making it more difficult and costly for it to distribute its products if it sought to maintain its sales. By barring Iberian's

⁽¹⁾ [1983] ECR 3465.

⁽²⁾ [1975] ECR 1663.

access to large merchant chains with high distribution power over a wide area, BG made it more difficult for Iberian to establish an albeit small position in the market. As reports came in that Iberian had turned to new customers, these too were offered promotional payments in return for exclusive supply by BG. This meant that Iberian had constantly to devote resources to establishing new customers to replace those which were tied to BG. By taking Iberian's larger customers, BG obliged it to seek an increasing number of smaller customers in order to recover the lost sales.

- (127) During the administrative procedure, BG argued that the payments made to merchants were genuinely intended by BG to be used by recipients for the purposes of sales promotion. BG has denied therefore that the sole purpose of the scheme was to gain exclusivity from the merchants concerned and frustrate imports of plasterboard, as the Commission had suggested in the Statement of Objections. The Commission accepts these arguments. It concludes that in making these payments, BG pursued two concurrent objectives. The Commission does not accept that exclusivity was merely a part of BG's strategy of stimulating enhanced promotional efforts by merchants, by inducing them to concentrate on the plasterboard products of BG. It is abundantly clear from BG's internal documents that exclusivity or 'loyalty' was an aim in itself, and that its purpose was to prevent the merchants concerned from purchasing and selling imported plasterboard.

- (128) BG has also argued that there is no evidence of causality to link the payments to those merchants who had been handling imported plasterboard with their decisions to revert exclusively to BG. It has pointed out that in the case of [...] field reports suggested afterwards that although no reasons had been given in that merchant's circular instructing branches to discontinue stocking Iberian board, it appeared that a dock strike in Spain had delayed supplies. Possible other alternative explanations of decisions by merchants to cease handling imported board are cited by BG, such as unreliable or erratic supplies by importers, superior service from BG or a preference for British supplies. It is undoubtedly the case that many factors may have influenced the minds of merchants in deciding whether or not to stock imported plasterboard. Nevertheless it has been shown that several merchants who had been

stocking imported plasterboard issued instructions to their branches to cease doing so at the moment they accepted promotional payments from BG. The evidence from BG internal papers also indicates that a purpose of BG in implementing that scheme was to win back customers from importers. The Commission is therefore justified in concluding that in those cases at least, the payments by BG were an immediate cause of merchants' decisions to cease trading in imported plasterboard.

- (129) In any event, the exclusivity arrangements meant that the merchants tied themselves to BG for the future. The future loyalty of large chains was important to BG not only in itself, but also because it reduced the propensity of other merchants to sell imported plasterboard due to knock-on effects of price competition: wherever a merchant was engaging in price competition selling imported plasterboard, there was pressure on other merchants in the vicinity to sell imported plasterboard themselves. In many instances, price competition from a merchant selling Lafarge board led to another selling Iberian board, and vice versa. A large merchant chain could introduce competition to BG plasterboard over a wide area.

Whether or not recipients had previously been handling imported plasterboard and intended or not to continue doing so, the tying of those merchants to BG amounted to an abuse of BG's dominant position.

- (130) The payments to merchants were being pursued when the Commission commenced its investigations in August 1986. BG then began to terminate the scheme in accordance with plans it had been formulating.

(b) *Super Schedule A discounts*

- (131) From August 1984 to April 1987, BG operated a scheme of discounts for merchants buying in large loads, in a limited geographical area, the counties of Hampshire and Dorset, where BG was facing particular price competition from Lafarge. Though initially designed, at least in part, as a test exercise to gain experience in the delivery of larger loads than previously, the scheme was subsequently maintained as a competitive measure. Only a part of the price reduction by BG was offset by the cost savings which were actually made. Another part of the price reduction corresponded to additional savings which might have been made had the

scheme been operated nationally. This part may therefore be regarded as objectively justified during the initial experimental phase.

(132) In any event, the part of the price reduction which was not objectively justified, whether in the initial phase or later, amounted to a small price reduction. Furthermore, the offer was open to all customers albeit in a fairly limited geographical area. In the area, BPB was facing competition from relatively lower zone prices charged by Lafarge or low prices charged by Lafarge to certain large customers.

(133) There has been no suggestion that the Super Schedule A prices were in themselves predatory, nor that they were part of any scheme of systematic alignment. There was a single price reduction to a level broadly equivalent to or slightly below those of Lafarge until April 1985, when Lafarge increased its prices.

(134) On the basis of the matters stated above and the arguments presented by BG during the procedure on these points, the Commission concludes that BG's geographically selective Super Schedule A prices in Hampshire and Dorset did not constitute an abuse of BG's dominant position.

(c) The offer of Irish board at reduced prices

(135) The purpose of the offer introduced in September 1985 was initially to reward loyal merchants in the South West of England for their support in the face of competition from imported plasterboard, and to assist them in meeting that competition. If however the available quantities should not be taken up, it was envisaged to extend the scheme to other merchants in the area. BG papers show that in at least one case, a merchant was made aware that the scheme was intended primarily for loyal merchants.

(136) In the event the scheme met with practically no interest on the part of the loyal merchants and it is established that after some three weeks, the scheme was being offered to some non-loyal merchants as well, though apparently still on a selective basis.

(137) More attractive terms offered to [...] merchants who were or had agreed to become loyal in December 1985, led [...] of them to take up the offer, but they lost interest when these special terms were discontinued in January and February 1986.

(138) As a matter of principle, a scheme operated by a dominant supplier granting a reward to customers for past loyalty is liable to constitute an abuse of a dominant position. Such a scheme tends to reinforce the future loyalty of recipients, and to influence the conduct of others who have not been loyal but who may become aware of the scheme indirectly or at a later date. However, BG appears to have anticipated that the Irish board offer might not be of interest to merchants, and that the small quantity of [...] loads per week that was being offered might not be taken up.

(139) It is not established that the more favourable terms granted to three merchants were themselves offered as a reward for past loyalty of [...] or for the decision which had been taken by [...] to purchase only from BG. Nor is it clear to what extent those more favourable terms may have influenced a subsequent decision by [...] to accept promotional payments and buy only from BG. The more favourable terms cannot therefore be regarded as liable to influence the future loyalty of those who received them.

(140) For the reasons stated above, no abuse of a dominant position is established in respect of the offer of Irish plasterboard at reduced prices.

(d) Priority delivery of plaster

(141) The essence of the scheme operated in August 1985 was that customers who were not trading in imported plasterboard were to be treated more favourably as regards supplies of plaster at a time of temporary plaster shortage.

(142) It was not BG's intention to maintain normal plaster deliveries for all loyal plasterboard customers at the expense of the others. The result would have been to virtually cut off supplies to the latter who would then inevitably have been alienated entirely from BG. In effect the policy was that extended delivery periods would in principle apply to all customers. However, if this caused difficulties for loyal plasterboard customers, BG would give them priority deliveries, if necessary at the expense of non-loyal customers. Conversely, no effort would be made to resolve problems encountered by non-loyal customers as a result of extended delivery periods. BG has confirmed in a letter which it submitted during the procedure, that it is the policy of BG to give any priority orders during such times of temporary shortage to loyal BG customers.

(143) BG has emphasized that plaster does not keep and that merchants do not therefore hold large stocks of plaster. Although merchants might have the possibility of obtaining supplies of plaster by turning to other suppliers when BG is on extended delivery, this would be inconvenient for several reasons. Although plasters from different suppliers are largely substitutable over a period, plasterers are reluctant to change frequently or for short periods, for each plaster has setting and working characteristics to which plasterers need to become accustomed. So, apart from the inconvenience of seeking urgent alternative supplies from another source for part of their needs, merchants would be faced with the possibility that their customers would not want the alternative product. In addition, at a time of shortage, other suppliers may be allocating orders on the basis of normal purchases by their own customers.

(144) During the procedure, BG argued that it was quite normal commercial practice that in times of shortage it should favour those customers with which it enjoyed a close and mutually advantageous commercial relationship.

In fact, the only criterion for eligibility for priority plaster deliveries was whether the customers appeared on a list of merchants who were trading in imported plasterboard. No regard was paid to whether he had been a good customer of BG in any other sense. In particular there was no reference to whether those customers had been effective or successful in selling or promoting BG's plaster, or whether, indeed, they had concentrated on the sale of BG plaster rather than on that of its several competitors in the plaster market. In any selection of BG's customers for the allocation of priority deliveries at a time of plaster shortage, these factors might have been relevant.

(145) It is established that in some cases 'non-loyal' plasterboard customers were individually informed by BG that any priority deliveries of plaster would be reserved for loyal customers. This policy was also set out in press interview by a BG representative.

(146) BG's policy with respect to priority deliveries of plaster at times of extended delivery was liable to discourage BG customers from buying imported plasterboard by indicating to them that BG, a supplier on which they relied for certain supplies, regarded them as second class customers. These effects were liable to be ongoing as merchants

could expect similar treatment during any future period of extended delivery.

Therefore the scheme essentially reserved an advantage for a certain class of customer, rather than significantly penalizing non-members of that class. Nevertheless, the adoption and implementation of a policy of reserving priority orders of plaster for customers who were not stockists of imported plasterboard was an abuse of BG's dominant position in the supply of plasterboard, for the criterion for the selection of those merchants who were eligible for priority supplies of plaster was not objectively justified, but designed only to reward merchants dealing exclusively in BG plasterboard while treating less favourably those dealing in imports. Consequently, the arrangements were liable to affect the future behaviour of BG customers by encouraging them to sell only BG plasterboard.

(147) BG has argued that in most if not all cases, it would not be necessary to delay an order to a non-loyal merchant in order to put through a priority order and that, in any event, the maximum delay could only have been one day. This is accepted. Nevertheless, BG does not deny that priority orders were reserved for loyal merchants and denied to those who stocked imported plasterboard.

(e) Measures to exclude imports in Northern Ireland

(148) In June 1985 BG withdrew from the merchants in Northern Ireland, who it learned intended to import Spanish plasterboard, a [...] % rebate on plasterboard. This was intended to penalize the merchants who intended to import and to discourage them from doing so. Immediately afterwards additional rebates of [...] % on the plasterboard sizes to be imported and [...] % on all building plasters were offered to all merchants, on condition that they would purchase exclusively from BG and not deal in imported gypsum material. These discounts were intended to further penalize the importers and bar their access to other merchants for the distribution of the imported plasterboard. These measures not only made it difficult for imported plasterboard to enter and compete in the market but also put pressure on the merchants to cease importing altogether. This pressure was increased by the clear indications given to the importers that BG did not intend to give up a part of the market, any by other inducements to cease importing, such as the offer to establish a confidential quantity rebate for which they would qualify, and to make a goodwill payment at a later date if

imports were brought to an end. BG was successful in inducing the merchants concerned to stop importing and to agree not to import in the future.

(149) All the measures by BG cited above constituted abuses of a dominant position, in that they were intended to and did indeed succeed in bringing to an end imports of Spanish plasterboard by the merchants involved.

(150) The rebates to merchants on plasterboard sizes to be imported and on plaster, conditional on merchants purchasing all gypsum products, and especially plasterboard, exclusively from BG, were abuses in their own right.

(151) The rebate on all gypsum products granted to large merchants in Northern Ireland from August to December 1985, on condition that BG should have exclusivity of supply of plasterboard, was also an abuse of BPB's dominant position.

(152) The granting of the rebates referred to in paragraphs 150 and 151 on building plasters in June and August 1985, on conditions which included merchants not dealing in imported plasterboard, reinforced the exclusive ties between BG and merchants, for a merchant handling imported plasterboard would lose not only a rebate on plasterboard, but also on building plasters. BG papers show that these rebates did indeed have a particularly strong effect on customer loyalty.

E. Effect on inter-State trade

(153) BG abused its dominant position in Great Britain by measures tying customers for the supply of plasterboard, or otherwise unjustifiably inducing them not to trade in imported plasterboard. BG being the only domestic producer and its only competitors being importers, such measures were liable substantially to affect imports from other Member States, especially from France and, from 1 January 1986, the date of its accession to the Community, Spain. BG has argued that the measures to which the Commission objects were not liable to affect inter-State trade. It points out that Spain acceded to the Community on 1 January 1986, and claims that these measures were motivated exclusively by the activities of Iberian.

(154) However, the tying arrangements with merchants had the effect of excluding both Lafarge and Iberian from trading with them. Also, it was clearly foreseeable that the scheme would have an impact on both importers in other ways: BG was well aware of the knock-on effects whereby competitive activity by merchants selling one importer's plasterboard led others to react with the other importer's product, so the elimination of outlets for either importer was liable to affect the position of the other in an immediate way. Finally, the exclusivity payments were made to some merchants who already were or had been customers of Lafarge. After Spain joined the Community on 1 January 1986, BG continued to apply and extend the scheme of payments tying merchants.

(155) As for the denial of priority deliveries of plaster, this applied to merchants trading in Lafarge plasterboard, as well as to those dealing with Iberian.

(156) BG has put forward two general arguments to the effect that the competitive position of importers was weak, and that Lafarge was voluntarily limiting its activities in Great Britain. Neither of these arguments is such as to affect the conclusion that there was inter-State trade, and that the measures taken were liable to affect it. Where inter-State trade is already limited by other factors, action which is liable to restrict it further may yet fall within the sphere of the Treaty competition rules. This must particularly be the case where the elimination of such trade will lead to the reinforcement of a near-monopoly in a Member State. In the present case it was important to safeguard inter-State trade not only in itself as a source of actual competition to BG in the plasterboard market, but also as a possible prelude to the establishment of new production facilities in Great Britain.

(157) Apart from the direct effects which BG's actions were liable to have on the importation of plasterboard from France, those actions were also liable to eliminate or at least seriously weaken Iberian as a competitor of BG on the British market and to reinforce the dominant position of BG on that market, in particular its position of strength *vis-à-vis* Lafarge and other potential importers from Member States.

- (158) Similarly, the elimination of competition from the consortium of merchants importing Spanish plasterboard into Northern Ireland was liable to lead to the reinstatement of BG's monopoly and its market power *vis-à-vis* potential importers from Member States. These were by no means theoretical, for there had indeed been imports of Lafarge plasterboard into Northern Ireland in the recent past.

The exclusive purchase arrangements with merchants specifically excluded them from handling any imported plasterboard. This applied therefore not only to plasterboard imported from Spain into Northern Ireland but also to Epysa plasterboard in free circulation in Ireland and to any plasterboard which might be imported from any other Member State.

Finally, the measures taken to prevent imports of Spanish plasterboard into Northern Ireland were liable to have a direct effect on inter-State trade since the only other supplier of plasterboard in Northern Ireland was BG, and all plasterboard supplied by BG in Northern Ireland was produced in and imported from Ireland. The anti-competitive elimination by BG of imports into Northern Ireland from Spain was liable to distort trade flows within the Community by giving rise to a current of trade which would not have existed had the abuses not taken place.

- (159) BG claims that the elimination of the imports by the four merchants against whom BG acted could have no incidence on inter-State trade since another undertaking, [...], subsequently began to import Spanish plasterboard into Northern Ireland. This is not relevant however. The actions of BG to eliminate imports must be judged on their own merits as liable to affect inter-State trade. The fact that BG later tolerated some imports of Spanish plasterboard for tactical reasons and because the importer was a user selling only small quantities on the open market does not affect the assessment of its earlier actions to eliminate imports to which it took objection.

III. FINES

- (160) Under Article 15 (2) of Regulation No 17, the Commission may by decision impose on undertakings

fines of from ECU 1 000 to 1 million, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where either intentionally or negligently they infringe Articles 85 (1) or 86 of the EEC Treaty.

- (161) The Commission considers that fines should be imposed. In fixing the level of the fine regard shall be had to the gravity and duration of the abuses, taking into consideration also the aggregate turnover of BPB and its turnover in the plasterboard sector in Great Britain and Northern Ireland.

- (162) The Commission considers that the scheme tying selected merchants in Great Britain exclusively to BG for the purchase of plasterboard products constituted a serious abuse of BG's dominant position. This abuse was all the more serious in view of two particular aspects of the scheme. Firstly, most of the payments form a pattern in which BG progressively offered the scheme to large merchants which had become customers of Iberian. This was designed to deter and weaken Iberian as a competitor by taking customers away from it and increasing its marketing and distribution costs. Secondly, BG made payments to the merchants concerned in consideration of those exclusive purchase ties. The fact that these payments were to be used in a particular way, namely as contributions to merchants' promotional expenses, detracts only marginally from the reprehensible nature of such payments.

The fact that the payments might have been made in response to requests from large merchants for recognition of their buying power does not affect this assessment. It was not necessary that such recognition should be linked to exclusivity of purchase.

- (163) BG has also suggested, without submitting any evidence of this, that certain merchants may have taken the initiative of offering to revert to buying from BG exclusively in return for some form of rebate. However, it is established that from its inception the payments under the scheme were designed as a reward for merchants who would buy exclusively from BG.

- (164) BG began to implement the scheme in July 1985. It was brought to an end following the investigations by the Commission in August 1986.

- (165) The Commission considers that abuses in Northern Ireland of BPB's dominant position in the island of Ireland should also attract a fine.
- (166) BG has argued that its concern in taking the actions which it did was to eliminate a source of competition which it regarded as being unfair, on the grounds that the importing merchants would have achieved an unjustified advantage over other merchants, and which it considered to be a serious threat to BG sales in view of the strong market position of the merchants involved. In particular, BG states that it was concerned that the importers would sell imported plasterboard at appeal prices, and that this would damage the stable relationships which existed among builders' merchants and between them and BG in relation to the plasterboard market. In fact the information available to BG suggested that the imports would be profitable only if the importers sold at prices close to those of BG, so that the importers would not have greater scope for selling plasterboard at appeal prices by virtue of the imports. None of these considerations can be regarded as justifying the actions to eliminate that competition.
- (167) BG also states that it declined to enter into a price fixing and market sharing agreement with the importers. No criticism is made of BG in that regard.
- (168) Finally, BG has suggested that Epysa may have been in breach of its price undertaking to the Commission of 26 March 1985. It was part of the agreement with the merchants who gave up importing that they should provide BG with a copy of their invoice from Epysa and, in view of the subsequent cooperation of the merchants with BG, it must be aware of Epysa's export price. In any event it has made no complaint under the Community anti-dumping rules with respect to a possible breach of the undertaking in Ireland.
- (169) The Commission considers that in this instance, no fine should be imposed with respect to the reservation of priority deliveries of plaster to loyal plasterboard customers in August 1985, in view of the limited direct consequences which this measure had in practice and in the absence of conclusive evidence as to the extent of its likely longer term indirect effects.
- (170) The Commission considers that the abuses in relation to which a fine is to be imposed were intentional. In Great Britain, BG deliberately set out, through the measures it took, to tie customers to itself. In Northern Ireland, BG's action was specifically designed to bring imports by the [...] merchants to an end and to tie merchants to BG in the face of the competition from imports.
- (171) In the course of the proceedings BG has made a 'cross complaint' stating that Epysa had a greater production capacity than the amount it could sell in Spain, and that it was therefore exporting large quantities in particular to the United Kingdom. It was claimed that Epysa's export prices are substantially below its domestic prices. The facts alleged by BG disclose no breach of Article 85 or 86 of the Treaty with respect to Epysa exports to Great Britain or the island of Ireland after Spain's accession to the Community. Neither has any complaint been made under the anti-dumping rules with respect to exports of Spanish plasterboard to Great Britain.
- (172) The fact that the competitor of a dominant supplier may obtain and sell plasterboard at low prices cannot justify abusive measures by the dominant supplier in meeting such competition.
- (173) Nevertheless, in setting the fine, the Commission takes into account that when the exclusive purchase arrangements in Great Britain were implemented, Spain was not a Member of the European Economic Community and that the scheme continued only for seven months after Spain's accession. The scheme was devised in part as a response to imports from Spain. It likewise takes into account that in Northern Ireland, the particular measures taken were directed at Spanish imports during a period when Spain was not a Member State. The elimination of imports direct from Spain at a time when Spain was not a Member State, would not and did not in itself amount to a direct effect on inter-State trade in the present case prior to 1 January 1986, there being no re-exports of Spanish plasterboard from the United Kingdom to other Member States.
- (174) The Commission also takes into consideration as regards the imports from Spain while Spain was not a Member State that the export prices of Epysa plasterboard were clearly considerably lower than its domestic prices in Spain,
- HAS ADOPTED THE FOLLOWING DECISION:
- Article 1*
- Between July 1985 and August 1986 British Gypsum Ltd infringed Article 86 of the EEC Treaty by abusing its dominant position in the supply of plasterboard in Great

Britain through a scheme of payments to builders' merchants who agreed to purchase plasterboard exclusively from British Gypsum Ltd.

Article 2

In July and August 1985 British Gypsum Ltd infringed Article 86 of the EEC Treaty by implementing a policy of favouring customers who were not trading in imported plasterboard in the provision of priority orders for the supply of building plasters at a time of extended delivery for that product which constituted an abuse of its dominant position in the supply of plasterboard in Great Britain.

Article 3

BPB Industries plc, through its subsidiary British Gypsum Ltd, infringed Article 86 of the EEC Treaty by abusing its dominant position in the supply of plasterboard in Ireland and Northern Ireland:

- in June and July 1985 by successfully applying pressure on and thereby procuring the agreement of a consortium of importers to renounce importing plasterboard into Northern Ireland,
- by a series of rebates on BG products supplied to builders' merchants in Northern Ireland between June and December 1985 conditional on their not handling any imported plasterboard.

Article 4

The following fines are imposed:

- on British Gypsum Ltd, a fine of ECU 3 million in respect of the infringements of Article 86 of the EEC Treaty referred to in Article 1,
- on BPB Industries plc, a fine of ECU 150 000 in respect of the infringements of Article 86 of the EEC Treaty referred to in Article 3.

Article 5

The fines shall be paid into:

- (a) Account No 59000204, Commission of the European Communities (for payment in ecus), Lloyds Bank plc,

The Manager, Payments Section, Overseas Centre, PO box 63, 38a Paradise Street, UK-Birmingham BI 2AB; or

- (b) Account No 108.63.41, Commission of the European Communities (for payment in pounds sterling), Lloyds Bank plc, Overseas Department, PO box 19, 6 Eastcheap, UK-London EC39 3AB

within three months from the date of notification of this Decision. After the expiry of that period interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision is adopted plus 3,5 percentage points, i.e. 7,5 %.

Should payments be made in pounds sterling the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 6

This Decision is addressed to:

BPB Industries plc,
Langley Park House,
Uxbridge Road,
UK-Slough SL3 6DU,
and

British Gypsum Ltd,
Ruddington Hall,
Loughborough Road,
Ruddington,
UK-Nottingham NG11 6LX.

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

Done at Brussels, 5 December 1988.

For the Commission

Peter SUTHERLAND

Member of the Commission