II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 December 1989

relating to a proceeding under Article 85 of the EEC Treaty

(IV/32.414 — Sugar beet)

(Only the French and Dutch texts are authentic)

(90/45/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 Article 3 (1) thereof,

Having regard to the Commission's Decision of 22 November 1988 to initiate proceedings in this case,

Having given the 'Confédération des Betteraviers Belges', 'La Société Générale des Fabricants de Sucre de Belgique' and the 'Raffinerie Tirlemontoise SA' the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and to Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (2),

Having heard the 'Confédération des Betteraviers Belges', the 'Société Générale des Fabricants de Sucre de Belgique' and the 'Raffinerie Tirlemontoise SA', in accordance with Article 19 (2) of Regulation No 17 and with Regulation No 99/63/EEC,

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions,

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No 127, 20. 8. 1963, p. 2268/63.

Whereas :

I. THE FACTS

A. The sugar beet market

1. *The product*

(1) This proceeding relates to the production and marketing of sugar beet, which is listed under HS code 1212 91 and which, in the Community, is grown almost exclusively for the manufacture of sugar.

(2) The sugar yield of sugar beet depends firstly on its sucrose content, which varies from harvest to harvest, and, secondly, on the refining techniques used and on the quality of the equipment. From one tonne of sugar beet having a sugar content of 16° (average rate for sugar beet grown in Europe), sugar refineries established in the Community obtain between 125 and 150 kilograms of sugar.

(3) After beet has been dug up, its sugar content tends to decrease over time. This is why sugar refineries are always sited in the beet-growing regions, so as to reduce the time lost before processing and transport costs. In general, beet is grown at distances not exceeding about 100 or at the very most 200 kilometres from the sugar refinery in which it is processed.

(4) Sugar beet is normally sown in March and April. Harvesting takes place between 1 October and the end of November, and beet deliveries to the sugar refineries end by mid December at the latest.

2. *Production and growing areas*

(5) In 1987, the Community produced some 100 million tonnes of sugar beet. Because of differences in weather conditions, the tonnage produced may vary from year to year, from 85 to 105 million tonnes. In addition, in the longer term the quantity of beet produced in the Community depends on the sugar prices set by the Council under the common agricultural policy and on the trend of sugar prices on the world market. Thus, production in the 12 States now making up the Community rose from an average of 70 million tonnes in the period 1970 to 1975 to a little over 100 million tonnes in the early 1980s, with production currently tending to fall back below 100 million tonnes.

(6) The main beet-producing States in the Community are, in descending order, France (between 25 and 30 million tonnes), the Federal Republic of Germany (some 20 million tonnes), Italy (10 million tonnes), the United Kingdom and Spain (between 8 and 10 million tonnes) and the Netherlands and Belgium (between 6 and 8 million tonnes).

(7) From 1975 to 1987, beet production figures in Belgium were as follows:

Year	Quantity
1975	4 706 000 tonnes
1976	5 310 000 tonnes
1977	5 031 000 tonnes
1978	4 807 000 tonnes
1979	5 654 000 tonnes
1980	6 462 000 tonnes
1981	5 876 000 tonnes
1982	7 619 000 tonnes
1983	8 406 000 tonnes
1984	5 734 000 tonnes
1985	6 276 000 tonnes
1986	6 373 000 tonnes
1987	6 259 000 tonnes

Source: Eurostat-Cronos, statistics for the BLEU.

These figures show a slow but steady increase from 1975/76 (around 5 million tonnes) to 1982/83 (7 to 8 million tonnes) followed by a period of stagnation or decline during the last four marketing years.

(8) Sugar beet is grown in Belgium in the regions situated to the west of the Sambre-Meuse trench, i.e. Hainaut, Flanders and Hesbaye. These regions form part of a huge growing area which includes a large part of the plains of northern France and the three abovementioned Belgian regions and which continues towards the Netherlands along the narrow coastal strip which borders the North Sea. This area comprises a large number of French sugar refineries and all of the Belgian sugar refineries. Up to the end of 1988, seven Belgian sugar refineries out of a total of 14 were situated very close to the French frontier at distances varying between only five and 25 kilometres. In 1989, two of them were closed. Another Belgian sugar refinery is situated less than five kilometres from the Dutch frontier.

3. *Intra EEC trade*

(9) The fact that the sugar yield of beet is affected by handling operations and by the period of time they have to wait before processing and that, in most cases, the sugar refineries are situated within or close to the growing areas explains why beet is not usually transported over long distances and why, consequently, international trade in beet is relatively small.

(10) Nevertheless, the particular characteristics attaching to the product and to its use do not prevent sugar refineries, particularly where there is a shortage of local products, from being supplied with beet harvested in far distant regions. This has happened on several occasions in the Community, notably in 1975 when, following a low harvest in Belgium, French beet was supplied to Belgium by the trainload for refining.

(11) Apart from such exceptional instances, intra Community trade in sugar beet involves mainly those Member States which have growing areas that are close or adjacent to the frontiers of another Member State. This is the case with France and Belgium, Belgium and the Netherlands and the Netherlands and Germany.

(12) The following table shows the amounts of sugar beet traded in within the Community in 1985, 1986 and 1987:

Intra Community trade in sugar beet

(in tonnes)

Orig./dest.		Belgo-Luxembourg Economic Union	Denmark	Federal Republic of Germany	Greece	Spain	France	Ireland	Italy	Netherlands	Portugal	United Kingdom
Belgo-Luxembourg Economic Union	1985	—	—	—	—	—	8	—	—	15 278	—	—
	1986	—	—	—	—	—	8	—	—	26 559	—	—
	1987	—	—	—	—	—	9	—	—	23 814	—	—
Federal Republic of Germany	1985	14	—	—	—	—	—	—	—	79 221	—	—
	1986	3	—	—	—	—	—	—	—	71 936	—	—
	1987	75	25	—	—	—	—	—	—	52 450	—	—
France	1985	58 096	—	196	—	—	—	—	—	352	—	—
	1986	31 032	—	548	—	—	—	—	—	45	—	—
	1987	27 859	—	403	—	—	—	—	—	60	—	—
Netherlands	1985	19 200	30	63	—	—	—	—	—	—	—	—
	1986	—	—	—	—	—	—	—	—	—	—	—
	1987	17 179	39	337	—	—	94	—	—	—	—	—

Source : Eurostat (external trade statistics).

B. Community rules

(13) Given the particular characteristics associated with beet growing and its virtually exclusive use for the manufacture of sugar, the achievement of the objectives of the common agricultural policy (Article 39 of the EEC Treaty) in respect of sugar beet producers was sought from the 1960s onwards by means of the common organization of the market in sugar. Such common organization of the market was introduced on 1 July 1968 through Council Regulation No 1009/67/EEC [1]. That Regulation was amended and superseded in 1974 by Council Regulation (EEC) No 3330/74 [2], which was in its turn superseded on 30 June 1981 by Council Regulation (EEC) No 1785/81 [3], as last amended by Regulation (EEC) No 1069/89 [4], which is currently the basic Regulation governing the common organization of the markets in the sugar sector.

(14) The guiding principle underlying the mechanisms set up by the common organization of the market is to provide beet growers with price and marketing guarantees in respect of quantities which reflect and are linked to sugar consumption requirements and to the Community's scope for exporting sugar. This link is achieved by establishing a system of guaranteed prices for sugar production quotas and, at an earlier stage in the production chain, by a system governing beet supply contracts, which also involves compliance with guaranteed minimum prices for quantities of beet in line with the sugar quotas.

1. *The sugar quotas*

(15) So as to limit to certain quantities the scope for sugar manufacturers to charge a guaranteed minimum price fixed by the Community authorities (intervention price), Articles 23 and 24 of Regulation (EEC) No 1785/81 allocate to each Member State basic quantities A and B which are then allocated between all of the sugar-producting undertakings of the Member State concerned and thus become production quotas A and B allocated to each sugar manufacturer. The B quota represents a percentage of the A quota and may vary between 10 % and 35 %, depending on the countries and undertakings concerned. The sum of the A and B quotas of an undertaking is also called maximum quota.

(16) In respect of the part of its sugar production included in its A quota, each undertaking is assured of collecting at least 98 % of the intervention price. In respect of the quantities produced which exceed the A quota without exceeding the B quota, the sugar manufacturer is also guaranteed the intervention price, but must on such quantities pay a production levy which reduces accordingly the amount of his guarantee. Sugar produced in excess of the maximum quota (C sugar) does not enjoy any price guarantee and must in addition be marketed on the world market at the undertaking's own expense.

(17) For Belgium, basic quantities A and B for the production of white sugar were fixed in 1981 at 680 000 tonnes and 146 000 tonnes respectively.

(1) OJ No 308, 18. 12. 1967, p. 1.
(2) OJ No L 359, 31. 12. 1974, p. 1.
(3) OJ No L 177, 1. 7. 1981, p. 4.
(4) OJ No L 114, 27. 4. 1989, p. 1.

These quantities were allocated between the 10 sugar-producing undertakings in Belgium (for the quotas for each undertaking, see point 46).

2. *Minimum prices and conditions governing purchase and delivery of beet*

(18) The Community rules provide that a basic price for beet is to be fixed each year together with a minimum price for A beet (equal to 98 % of the basic price for beet) and a minimum price for B beet (normally equal to 68 % of the basic price for beet) (1). When they purchase beet, sugar manufacturers must pay at least:

— the minimum price for A beet (2) in the case of beet processed into A sugar,

— the minimum price for B beet in the case of beet processed into B sugar.

For this purpose, Article 30 of the basic Regulation stipulates that, in the delivery contract, the manufacturer must — unless a derogation is provided for in an inter-trade agreement approved by the Member State concerned — differentiate between beet intended for the production of A sugar and beet intended for the production of B sugar.

(19) In addition, the delivery contracts and the inter-trade agreements concluded between associations of beet growers and sugar manufacturers must comply with the outline provisions laid down by Council Regulation (EEC) No 206/68 (3). The outline provisions lay down certain detailed rules of application for the minimum prices for A and B beet and other conditions governing the purchase, delivery, and acceptance of beet and the payment for beet.

(20) Commission Regulation (EEC) No 1516/74 (4) provides that each Member State is to carry out regular checks on the conformity of inter-trade agreements with the relevant Community provisions and that the results of the checks shall at the Commission's request be communicated to it before 30 June each year.

C. The Belgian inter-trade agreements

(21) In Belgium, the inter-trade agreements provided for in Article 7 of the basic Regulation were concluded and implemented by the Confédération des Betteraviers Belges (CBB) and by the Société Générale des Fabricants de Sucre de Belgique (SGFSB). The agreements remained broadly indentical up to December 1985, when a significant change took place in the content of the guarantees granted to the suppliers.

1. *Belgien inter-trade agreements before 1985*

(22) Pursuant to the Community rules on inter-trade agreements within the sugar sector, the CBB and the SGFSB concluded agreements in 1968 laying down the general conditions governing the purchase and acceptance of beet in Belgium. The agreements were regrouped in the form of conventions signed on 4 October 1975 and 9 June 1981 which were valid for successive five-year periods covering, respectively, the marketing years 1975/76 to 1979/80 and 1981/82 to 1985/86.

(23) The guarantee system for beet growers under the two new conventions or agreements was the same (undertaking by the sugar refineries to purchase at a single average price all the harvests of their traditional suppliers) and remained unchanged until the end of 1985. In particular, the agreements provided that:

(a) the manufacturers undertook to purchase all the beet harvested in Belgium;

(b) all of the traditional growers/suppliers of the Belgian sugar refineries were allocated between the various factories, and any change in the allocation of this clientele could be carried out only with the agreement of the CBB;

(c) all of the harvest of the growers forming part of the clientele allocated to a sugar refinery was paid for at a single price equal to the average of the prices for A, B and C beet weighted by the quantities of sugar actually produced by the undertaking within the various parts of its quota (A sugar, B sugar and possibly C sugar).

In addition, the second agreement signed on 9 June 1981 provided that 'beet... harvested in Belgium is intended on a priority basis for Belgian sugar production within the maximum EEC quota...'.

(24) The effects of these two agreements on the volume of beet supply differ depending on whether they are looked at from the point of view of the growers considered individually or from the point of view of the beet growers as a whole.

For each of the growers, assured of collecting the average price whatever the size of his harvest, the system acted as an incentive to increase beet production, with the decrease in the average price resulting from the overall surplus in supply being more than offset by the increase in individual production. The system thus had the effect of tending to produce a gradual increase in national sugar production.

(1) A beet and B beet means all beet processed respectively into A sugar and B sugar.
(2) The minimum prices may be adjusted by price increases or reductions to allow for deviations from the standard quality.
(3) OJ No L 47, 23. 2. 1968, p. 1.
(4) OJ No L 163, 19. 6. 1974, p. 21.

By contrast, looking in overall terms at beet growers as a group, any excess sugar production that could not be sold at a profitable price on the world market resulted, through the weighting of prices, in a fall in average incomes for growers as a whole. The system thus also had the effect of creating a divergence of interests between growers who tended to increase their production and those who remained at their usual level of production.

(25) As from 1984/85, the tendency towards a continuous increase in Belgian sugar production combined with the persistence of a very low level of sugar prices on the world market led the CBB to propose a change in purchasing terms so as to stem the trend towards overproduction and the resulting decline in average revenue for beet suppliers. Following negotiations, the CBB and the SGFSB established new purchasing conditions set out in the 'agreement on the setting of individual quotas based on a system of mixed prices within maximum quotas', which was signed between the two parties on 23 December 1985.

(26) On 17 March 1987 the two abovementioned trade associations adopted new conditions governing purchase and acceptance covering a period of five years, stipulating (Article 2 of the general conditions) that the agreement on the setting of individual quotas formed an integral part of them.

2. *Belgian inter-trade agreements after 1985*

(a) The agreement of 23 December 1985 on the setting of individual quotas

(27) This agreement, concluded by the CBB and the SGFSB for a period of three years, laid down the following rules on the conditions governing purchase :

(i) **Individual rights**

(28) As from the marketing year 1986/87, manufacturers must conclude individual beet purchase and delivery contracts with each grower with a view to the production of their maximum quota. For this purpose, each sugar undertaking will determine the quantity of beet which it desires to contract with a view to the production of its maximum quota and will allocate such quantity between its traditional growers (or suppliers) who will thus become holders of quantitative delivery rights.

(29) Following the 1986/87 marketing year, the delivery rights thus allocated to the various growers (or suppliers) concerned can be readjusted according to the following basic rule :

Basic rule governing the adjustment of rights: each winter in which an undertaking's average production for the last three marketing years is below its maximum quota, half of the delivery shortfalls of the growers (calculated by the difference between the supply right allocated during the last marketing year and the average of the supplies carried out during the last three marketing years) are allocated to the traditional growers (or suppliers) in proportion to the average of their deliveries during the last three marketing years. The factory committee [1], in agreement with the coordinating committee [2], can allocate a portion of such available quantities to solve special cases.

(30) This basic rule may be waived by agreement between the factory committee and the coordinating committee concerned.

(31) During the marketing year, any beet which holders of delivery rights deliver over and above their individual delivery rights but which is necessary to the undertaking to enable it to reach its maximum quota is deemed in respect of the current marketing year to be beet coming within the maximum quota delivery rights and is allocated between the holders of such rights.

(ii) **Maximum quota beet prices**

(32) Beet delivered by growers under their contracts is covered by a mixed price (A + B) established on the basis of the final proportion of A and B beet delivered to the factory under the contracts.

(33) Beet delivered on a non-contract basis which is necessary to allow the maximum quota to be reached qualifies for the price of B beet alone to the extent that the A quota is reached with beet delivered under contract.

(iii) **Purchasing commitment and price of surplus beet**

(34) The manufacturers undertake to accept all the beet produced in Belgium as long as such acceptance does not infringe Community rules.

(35) Any beet which is delivered over and above the delivery rights and which is not necessary to the undertaking to enable it to reach its maximum quota is surplus beet sold only at the price of C beet.

(b) The general conditions governing purchase and acceptance

(36) These conditions, which were concluded on 17 March 1987 by the CBB and the SGFSB for a five year period (marketing years 1987/88 to 1992/93), provide that the parties concerned must comply with the following rules :

(37) (i) Beet harvested in Belgium is intended on a priority basis for Belgian sugar production within the framework of the maximum quota (Article 1).

[1] The factory committee is made up of the representatives of the growers supplying a given factory.
[2] The coordinating committee is made up of representatives of the growers in each of Belgium's three beet-growing regions.

(38) (ii) Within the limit of the period for which it was concluded (3 years), the national agreement setting individual quotas of 23 December 1985 forms an integral part of the general conditions governing purchase and acceptance of 17 March 1987, it being understood that beet which is delivered within the maximum quota under individual purchasing contracts concluded before 1 May and which is produced on the contractor's own holding will be deemed to be beet produced within the maximum quota (Article 2).

(39) (iii) Changes in the allocation of the clientele of the factories may be carried out only after consultations between the growers and manufacturers concerned and agreement by the CBB and SGFSB with due regard to the delivery rights of the growers (Article 4).

(40) The general conditions then lay down a series of rules concerning:

— duration of acceptance periods and the spread of deliveries,

— calculation of quality increases and reductions on the basis of the sugar content of the beet,

— conditions governing pulp recovery,

— calculation of transport costs,

— conditions governing payment.

(41) On 3 December 1987, in response to a request for information sent by the Commission, the Raffinerie Tirlemontoise informed the Commission that, by Ministerial Decree of 14 October 1987, the State Secretary for Agriculture had, in accordance with Regulation (EEC) No 1516/74, approved the Belgian inter-trade agreements signed on 23 December 1985 and 17 March 1987.

3. *Inter-trade associations and undertakings concerned*

(42) (a) *The CBB:*

The Confédération des Betteraviers Belges comprises all the beet growers established in Belgium that supply their beet harvest to the Belgian sugar refineries. At present, its membership is around 20 000. The CBB includes amongst its membership growers who deliver to Belgian sugar refineries beet harvested outside Belgium. Such growers, which currently do not number more than about 100, generally grow their beet on land situated close to the Belgian frontier.

The CBB looks after the trade interests of its members at national level and is thus empowered to sign inter-trade agreements with the representatives of the sugar manufacturers.

(43) At regional level, the CBB is broken down into three coordinating committees, which comprise the growers established in each of the three Belgian beet growing regions:

— the Hainaut coordinating committee,

— the Flanders coordinating committee,

— the Hesbaye coordinating committee.

These committees are in particular responsible for drawing up, in agreement with the sugar refineries concerned, and for monitoring a fair allocation of the clientele constituted by the growers between the various sugar refineries established in the region.

(44) (b) *The SGFSB:*

The Société Générale des Fabricants de Sucre de Belgique is made up of the ten sugar undertakings established in Belgium. Since 1988, this number has fallen to nine, the Sucrerie-Raffinerie de Donstiennes having been taken over by the Raffinerie Tirlemontoise.

(45) While the Raffinerie Tirlemontoise owns five beet sugar producing factories (four since the end of 1988), the nine other undertakings each own only one factory. In addition, the production capacities of the factories vary, with the result that sugar production quotas vary widely from undertaking to undertaking.

(46) The following list shows the sugar undertakings which were members of the SGFSB and their maximum sugar quotas up to 1988 (as from 1989, the Sucrerie Raffinerie de Donstiennes was taken over by the Raffinerie Tirlemontoise and its quotas added to those of the Raffinerie Tirlemontoise):

(tonnes)

Belgian sugar undertakings	A quota	B quota	Maximum quota
Raffinerie Tirlemontoise	365 155,9	87 432,9	452 488,8
Suikerfabrieken van Vlaanderen	59 752	10 991	70 743
Suikerfabriek van Veurne	51 482,9	7 454,8	58 937,7
Raffinerie Notre-Dame	38 874,2	9 445,6	48 319,9
Fabrique de sucre de Frasnes-les-Buissenal	37 299,7	5 081,3	42 301
Sucrerie d'Escanaffles	33 858,8	4 844,7	38 703,5
Sucrerie Naveau	29 544,2	6 655,1	36 199,3
Sucrerie-Raff. de Donstiennes	23 769,7	6 689,1	30 458,8
SA Warcoing	21 876,5	3 995,5	25 872
Sucrerie Couplet	18 386,1	3 410	21 796,1
Total	680 000	146 000	826 000

(c) *The Raffinerie Tirlemontoise (R.T.)*

(47) R.T. produces around 70 % of Belgian sugar production. Up to 1987, R.T. had five beet processing factories equipped with modern and efficient plant, which were situated at :

— Tirlemont (beet processing capacity : 8 500 tonnes/day)

— Wanze (capacity : 17 500 tonnes/day)

— Genappe (capacity : 12 500 tonnes/day)

— Brugelette (capacity : 7 000 tonnes/day)

— Quévy (capacity : 4 500 tonnes/day).

In 1988, R.T. closed its Quévy factory and thus currently produces its beet sugar in the other four abovementioned factories.

(48) Each year, R.T. processes between 3 and 3,3 million tonnes of beet, allowing it to produce 450 000 to 500 000 tonnes of white sugar.

(49) R.T.'s shares of the Belgian sugar market are some [...] (1) in the case of sugar for human consumption and [...] in the case of sugar intended for industry. Its turnover amounts to Bfrs [...]. R.T. has large majority holdings in the capital of two other Belgian sugar undertakings, Suikerfabriek van Veurne (67,96 %) and Raffinerie Notre-Dame (93,34 %).

(50) In addition, R.T. owns subsidiaries in the sugar products industry, namely Suikers G. Lebbe SA (liquid and candy sugar, caramel), Candico SA (candy sugar, brown sugar, cane sugar), Neuhaus-Mondose SA (chocolates), and important interests in other sectors of the food industry and biotechnology industry.

(51) R.T. has had a majority holding in SA des Sucreries Réunies de Quévy-Péronnes (SRQP) since 1956. It increased its holding in 1971 and in 1981, when its share in the capital amounted to 68 %.

In 1987, following new share acquisitions, its holding exceeded 99 %, and, on 27 June 1988, R.T. purchased the remaining shares in the company. It thus acquired full ownership of SRQP, which thus became merely R.T.'s Quévy plant. At the end of 1988, R.T. terminated the Quévy plant's beet processing activities.

(52) In 1988, R.T. purchased Sucrerie-Raffinerie de Donstiennes and terminated its sugar producing activities as well. The quota allocated to Sucrerie de Donstiennes was incorporated into that of R.T., which then reallocated it between its four operative factories.

(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.

4. *Application of the inter-trade agreements concluded in 1985 and 1987*

(a) *The allocation of the quotas between growers*

(53) After 23 December 1985, the Belgian sugar undertakings, acting in accordance with the rule laid down by the agreement setting individual quotas (see paragraph 28 above), allocated the beet quantities necessary for the production of their maximum quota between their usual suppliers. The allocation was carried out amongst all the suppliers in proportion to the annual average of their deliveries over the previous six years, except for R.T., which carried out the allocation only between its supplying growers established in Belgium, excluding its supplying growers in the Bavay-Maubeuge region. For each of the undertakings, the allocation was carried out as follows :

(54) (i) Seven undertakings which had usually been supplied only by growers established in Belgium allocated all of their maximum quota requirements between such Belgian growers. The seven undertakings in question were the following : Notre-Dame, Frasnes-les-Buissenal, Escanaffles, Naveau, Donstiennes, Warcoing and Couplet.

(55) (ii) Two undertakings, Suikerfabrieken van Vlaanderen and Suikerfabriek van Veurne, which had traditionally been supplied by growers established mainly in Belgium, but also by growers established outside Belgium, allocated between such Belgian and non-Belgian growers the beet quantities they required to produce their maximum quotas. Specifically, the shares allocated were as follows :

— in the case of Suikerfabrieken van Vlanderen, out of a total in excess of 500 000 tonnes of beet :

  — 97 % for the growers operating in Belgium,

  — 2,5 % for the growers operating in the Netherlands,

  — 0,5 % for the growers operating in France ;

— in the case of Suikerfabriek van Veurne, out of a total of some 400 000 tonnes of beet :

  — 98 % for the growers operating in Belgium,

  — 2 % for the growers operating in France.

(56) (iii) One undertaking, R.T., which had consistently been supplied by Belgian growers, but also for some 10 years, by growers established in France in the Bavay-Maubeuge region, allocated its maximum quota only between its Belgian growers.

(b) *Adjustment of individual rights*

(57) As regards the rules concerning changes in the initial allocation of rights, as a result of continual delivery shortfalls for certain growers, the basic rule

mentioned above in points 28 to 31 was maintained in the case of the sugar refineries in the Hesbaye region (plus Quévy and Brugelette), i.e. in the case of the R.T., Notre Dame, Naveau and Donstiennes sugar undertakings. No redistribution of delivery rights has taken place in that region since the initial allocation carried out in 1986. In addition, according to the information obtained by the Commission in examining the case, it appears that the possibility of allocating some of the rights made available by any shortfalls in order to solve special cases covers essentially only growers who have had to cope with particular difficulties or who have been placed at a disadvantage under a previous allocation.

(58) The beet-growing regions of Flanders and Hainaut have, by contrast, adopted less rigid rules allowing more frequent changes to be made in the allocation of growers' individual rights and some rights to be reallocated to new growers. Accordingly, three sugar refineries established in these regions (Frasnes-les-Buissenal, van Veurne and van Vlaanderen) were able to redistribute rights in 1987, and four sugar refineries (the above three plus Warcoing) carried out a redistribution at the beginning of 1988.

D. Purchases of French beet by R.T.

1. *Conclusion of delivery contracts with French growers*

(59) During the 1970s, and in particular in the period 1975 to 1978, beet production in Belgium was generally insufficient to allow Belgian sugar undertakings to produce all of the maximum sugar quotas allocated to them. So as to increase its production, R.T. began in 1975 to broaden its beet supply sources. For this purpose, it offered delivery contracts for its Quévy plant to French growers established in the Bavay-Maubeuge region, i.e. not far from the Quévy refinery (the Quévy refinery is only 5 kilometres from the French frontier).

(60) The first contracts were concluded in 1975, 1976 and 1977, then their number increased rapidly in 1978 and continued to increase up to 1981. In 1981, more than 80 French growers had delivery contracts with SA des Sucreries Réunies de Quévy-Péronnes, (SRQP), a R.T. subsidiary, and together supplied between 30 000 and 45 000 tonnes of beet to it.

2. *The contracts between SRQP and the French growers*

(61) The main provisions of the contracts were as follows :

(a) SRQP undertakes to process all the beet supplied by the grower and the grower undertakes to supply all the best harvested (Article 1).

(b) The conditions governing purchase and acceptance of beet are identical to the conditions applied to Belgian growers, such conditions being defined, firstly, by the general conditions agreed or to be agreed between the Confédération des Betteraviers Belges and the Fabricants de sucre de Belgique and, secondly, by Quévy's own usage (Article 2).

(c) It is stipulated that the importation of such beet must not in any way affect the price of beet paid to Quévy's current suppliers ; in return, the same price is guaranteed to the new supplying growers (Article 3).

(d) The contract is concluded for an idefinite period. The grower may terminate it after each marketing year without having to justify his decision to the sugar refinery.

The contract may not be broken by SRQP unless the French and/or Belgian governments or a supranational Community authority prevent the free movement of beet by embargo measures and/or the closure of frontiers (Article 4).

(e) Lastly, Article 5 of the contract specifies for each marketing year the number of hectares sewn with beet by the grower for delivery after harvest to SRQP.

3. *The change of attitude by R.T.*

(62) As from 1982/83, Belgian beet production, which had grown steadily over a period of seven or eight years, began to be sufficient to meet the needs of the Belgian sugar industry, and in particular of R.T. In addition, the reduction in the B quotas of the sugar manufacturers that took place in July 1981 as part of the Community's sugar policy (R.T.'s B quota fell from 100 417,9 tonnes to 87 432,9 tonnes) and the concomitant fall in sugar prices on the world market meant that certain undertakings with a surplus of C sugar were concerned to reduce their production levels.

(63) This was the case with R.T., which sought to reduce its purchases. In order to do so, R.T. was faced with the alternative of integrating into the Belgian system deliveries from the growers in the Bavay-Maubeuge region (allowing such deliveries to be taken into account in calculating the average purchase price of beet and thus exerting a downward influence on the level of the average purchase price) or of ending French deliveries by terminating the contracts concluded with the Bavay-Maubeuge growers. The first alternative, which involved allocating to the French growers part of R.T.'s quota (A+B) traditionally supplied by Belgian growers, came up against the constant and systematic refusal of the CBB to share within the Hesbaye region (which normally had a beet surplus) guaranteed outlets which it felt should be reserved for Belgian growers. In the face of this refusal by the CBB to integrate the Bavay-Maubeuge growers into the Belgian quota allocation system, R.T., taking account of the CBB's position, finally opted for the solution of terminating the contracts.

(64) This new position adopted by R.T. in the light of the CBB's refusal to integrate the Bavay-Maubeuge growers into the Belgian quota system is clearly expressed in a letter dated 1 July 1985 sent by the President of the CBB to the French Confédération générale des planteurs de betteraves (CGB) in which it is stated:

> 'We have the honour to draw your attention to the problem of the processing of French beet at Quévy following the change in attitude of the majority shareholder of the Quévy refinery. As has been pointed out to you, this change in attitude means that French beet would no longer in future be accepted since it is not covered by a quota of its own. You are familiar with the CBB's view that the Belgian quota should be used solely for Belgian growers.'

(65) Similarly, in a memo dated 14 October 1985 setting out the problem of French beet at Quévy and annexed to a letter dated 15 October 1985 sent by the Director of the CBB to the Director of the CBB, it is stated under the heading 'Decision of the SRQP board':

> 'At the beginning of 1985, the majority group (R.T.) imposed on the board a decision to stop importing French beet as from 1985. To the extent that propects for a solution may exist in the framework of the new Community regulation on sugar, R.T. could accept a provisional solution for 1986. However, it appears to be determined to call a halt, whatever the cost, to the financial haemorrhage resulting from the importation of beet without any quota.'

4. *Termination of the contracts between R. T. and the French growers*

(66) On 16 September 1985, SRQP sent a letter to the contractors in the Bavay-Maubeuge region informing them that, as a result of financial losses brought about by the purchasing of French beet, it could no longer in future accept and pay for such beet as previously and that consequently proposals would be made in the weeks ahead to settle the delivery of beet during the 1986 marketing year.

(67) The proposals, set out in letters dated 28 January and 14 February 1986, consisted in the termination of the initial contracts and in a commitment limited to two years to purchase a quantity of beet reduced to 29 % of the average deliveries during the previous six years. A contract incorporating these provisions was submitted to the 78 French gowers concerned in March 1986. A total of 48 growers agreed to sign it.

(68) On 9 and 11 April, the thirty others who refused to sign and raised objections received letters terminating their contracts and, under threat of not accepting delivery of beet during the current marketing year, imposing on them of purchasing contract for quantities still reduced to 29 % of the reference production data, but valid for only one marketing year. These thirty growers finally signed the contracts proposed for one marketing year, but made clear their express reservations as to their validity and the compatibility of the terminations of the previous contracts with Community law.

E. Procedure and new facts

(69) Following the signature of the provisional contracts valid for one marketing year, the 30 abovementioned growers brought an action in July 1986 before the Tribunal de 1ère Instance in Mons (Belgium) and, in August 1986, made an application pursuant to Article 3 of Regulation No 17 asking the Commission to find that there had been infringement of the competition rules laid down in the EEC Treaty.

(70) While their complaint was being examined by the Commission, the thirty growers continued in 1987, 1988 and 1989 to plant beet and to ask R.T. to accept their beet harvests.

(71) In November 1988, the Commission sent a statement of objections to the CBB, the SGFSB and R.T., following which negotiations began between the CBB and R.T. on the one hand and the thirty complainants on the other. The negotiations produced an arrangement, signed and communicated to the Commission on 14 June 1989, under which the CBB and R.T. undertook as from the 1989 marketing year to restore to the thirty growers concerned delivery rights for supplies to R.T., the amount of which (12 818 tonnes) was established in accordance with the same rules as those applied to national growers in the allocation of individual quotas. In return, the 30 Bavay-Maubeuge growers withdrew their complaints from the Commission and the Mons Tribunal.

(72) In addition, on 8 November 1989, the CBB sent the Commission a new version of the inter-trade agreements concluded between the SGFSB and the CBB for the 1986/87 to 1990/91 marketing years containing an amendment (agreed on 14 February 1989) to the general conditions governing purchase and acceptance and an adjustment (agreed on 29 September 1989) to the national agreement on the setting of quotas for beet production. The new version of the inter-trade agreements no longer contains any clauses giving priority to supplies of beet grown in Belgium.

II. LEGAL ASSESSMENT

E. Article 85 (1)

(73) Article 85 (1) of the EEC Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

(74) The agreement of 23 December 1985 setting individual quotas and the general conditions governing purchase of 17 March 1987, hereinafter referred to as the inter-trade agreements, were agreements concluded by trade associations, in their own name and also on behalf of their members. They were therefore agreements between undertakings within the meaning of Article 85 of the EEC Treaty.

(75) The agreements entailed the following obligations for the Belgian sugar undertakings:

(a) The obligation to give priority to beet grown in Belgium in supplies intended for sugar production within the maximum quotas of each undertaking. This priority clause also existed in the previous inter-trade agreement signed in 1981.

(b) The obligation to allocate, in the form of quotas given to their supplying growers, the beet supplies necessary for the production of their maximum quota.

Such allocation actually took place in the case of each sugar undertaking at the beginning of 1986. It was carried out in proportion to the average of each grower's deliveries over the last six years, but the growers established in the Bavay-Maubeuge region, including those which had regularly supplied R.T. for several years, were excluded from the allocation.

(c) The obligation for the manufacturers having sugar refineries in the Hesbaye region (including Quévy and Brugelette) to reallocate only to traditional supplying growers the rights made available by any delivery shortfalls and calculated in accordance with the rules governing the adjustment of rights annexed to the agreement on the setting of individual quotas.

(76) As regards this latter obligation concerning the reallocation of available rights and applicable to sugar refineries in the Hesbaye region (including Quévy and Brugelette), the Commission reserved its assessment of the compatibility of such a clause with the competition rules laid down in the Treaty.

(77) The legal assessment regarding compatibility with the provisions of Article 85 will thus relate to the clause granting priority to beet grown in Belgium and the exclusion of the Bavay-Maubeuge growers in allocating R.T.'s maximum quota.

1. *The clause giving priority to beet grown in Belgium*

(78) The requirement under the inter-trade agreements that beet deliveries required for the production of the undertakings' maximum quotas should be reserved on a priority basis for beet growers established in Belgium had as its object the limiting of supplies from growers operating outside Belgium. The purpose of the clause was to accept beet from abroad only to the extent that such quantities not produced in Belgium were necessary to achieve the Belgian sugar quotas. The requirement therefore had the object of restricting the sources of supply of sugar manufacturers and accordingly limited access to the Belgian market for growers established outside Belgium.

(79) This restriction was particularly significant since, firstly, it affected not only a number of Dutch growers, but all the French growers in the 'Nord' department of France operating between Maubeuge and Dunkirk alongside the Belgo-French border and able to deliver to the Belgian sugar refineries near the frontier under optimum conditions of cost-effectiveness and, secondly, it affected more directly those growers which were already traditionally supplying all or part of their harvest to Belgian sugar refineries.

(80) The requirement that the Belgian sugar undertakings accept supplies to their sugar refineries on a priority basis from Belgian growers had a direct effect on intra-Community trade in beet, since its object was to exclude beet grown in the other Member States from supplies to the Belgian sugar industry or, at least, to restrict any supplies from other Member States to quantities amounting at the most to any shortfalls in Belgian beet production in relation to the maximum Belgian quota.

(81) Since part of Dutch beet production (beet harvested in the south-west of the Netherlands) and a much larger volume of beet harvested in the 'Nord' department of France could respectively be supplied under good conditions of cost-effectiveness to the Belgian sugar refinery situated near the Dutch frontier and to the other Belgian sugar refineries situated near the French frontier, the inter-trade agreements in question must be deemed to have been likely to have had an appreciable effect on trade between Membes States.

(82) Furthermore, since the product involved is not normally transported over long distances and is thus, by its nature and by custom, little exposed to competition from producers established far away, the fact of imposing restrictions on trade in one of the Community countries best placed (because of the location of the growing areas) to allow trade nevertheless to take place and to reach a not inconsiderable level made the resulting effect on trade all the more appreciable.

2. *The exclusion of the Bavay-Maubeuge growers in allocating R.T.'s maximum quota*

(83) The exclusion, in allocating R.T.'s quota, of the Bavay-Maubeuge growers who used to supply R.T. on a regular basis was the result of an agreement between R.T. and the CBB based on the principle of the priority given to national growers.

(84) This joint desire to exclude the Bavay-Maubeuge growers in allocating R.T.'s quota was reflected in particular in the letter of 1 July 1985 (referred to in point 64 above) from the President of the CBB in which it is stated, firstly, that R.T. will no longer in future accept French beet supplied to Quévy since such beet is not covered by its own quota and, secondly, that the CBB's position is that 'the Belgian quota should be used solely for Belgian growers'. The exclusion of the Bavay-Maubeuge growers was finally embodied in the exclusive allocation of R.T.'s quota to national growers alone and in the termination of the Bavay-Maubeuge growers' supply contracts.

(85) The exclusion of the Bavay-Maubeuge growers who used to supply R.T. on a regular basis from the allocation of R.T.'s quota constituted a restriction of competition which, by bringing about the termination of supplies to R.T. from the Bavay-Maubeuge region, directly affected trade between Member States.

(86) The effect on trade between Member States was substantial, since, as a result of the exclusion, the volume of French beet imported into Belgium fell from 58 000 tonnes in 1985 to 31 000 tonnes in 1986 and 28 000 tonnes in 1987, i.e. a fall of more than 50 % between 1985 and 1987. In terms of the Community as a whole, the contraction in the relevant trade between France and Belgium was equivalent to 17 % of the total volume of beet traded within the Community in 1985 and to 24 % of Community trade in 1987.

(87) The abovementioned restrictions of competition which were liable to have a significant effect on trade between Member States could be lawful only where, pursuant to Article 2 of Council Regulation No 26 [1], Article 85 (1) of the EEC Treaty does not apply to them (see point B below), or where, under Article 85 (3), they are exempt from the ban laid down in Article 85 (1) (see point C below).

B. Article 2 of Regulation No 26

(88) This proceeding relates to trade in agricultural products listed in Annex II of the EEC Treaty. Such products are covered by Articles 1 and 2 of Regulation No 26; Article 1 provides that Articles 85 to 90 of the EEC Treaty apply to agreements and decisions relating to such products, while Article 2 provides for exceptions to the application of Article 85 of the Treaty to agreements and decisions relating to such products. Article 2 (1) of Regulation No 26 states that Article 85 (1) of the EEC Treaty shall not apply to agreements, decisions and practices which form an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty.

(89) Since the entry into force, on 1 July 1968, of the common organization of markets in the sugar sector in place of the national market organizations which had previously existed in the sector, there are no longer any such national market organizations within the EEC, and therefore the agreements in question cannot form part of them.

(90) As regards the second exception provided for in Article 2 of Regulation No 26, it should be noted, as is stipulated in the third recital of the Regulation, that such exception is intended to apply only insofar as the application of Article 85 (1) of the Treaty would jeopardize attainment of the objectives of the common agricultural policy in the sector concerned. However, there is no such risk in this instance, since the necessary means of attaining the objectives set out in Article 39 of the EEC Treaty have been provided for in the regulations establishing the common organization of the markets in the sector concerned. Such regulations, and in particular those relating to inter-trade agreements, do not make provision for sugar undertakings to accept all or part of their beet supplies only from national growers.

(91) In any case, the clauses giving priority to supplies of beet grown in Belgium and the exclusion of the Bavay-Maubeuge growers were contrary to the principle of an open agricultural market and also to the principle of non-discrimination laid down in

[1] OJ No 30, 20. 4. 1962, p. 993/62.

Article 40 of the Treaty, all the more so since such discrimination has the effect of disrupting well established trade flows. Such restrictions could not therefore be deemed to be necessary for attainment of the objectives set out in Article 39 of the EEC Treaty.

(92) In this connection, the parties to whom the Commission's statement of objections was addressed argued in their defence that it is in line with the logic of the system established by Community rules to deem the maximum sugar production quota of each Member State to be reserved on a priority basis to the beet growers of the relevant Member State. R.T. and the CBB argue that the real objective of the Community rules is to protect beet growers, with the allocation of sugar quotas being merely an instrument for achieving such protection. It follows, according to R.T. and the CBB, that, where under Community legislation a sugar quota is allocated to a Member State, the true objective pursued is to allow growers in the Member State concerned to sell to the sugar refineries of the Member State concerned the quantities of beet necessary to produce such quota. It would thus be contrary to this objective to allow sugar manufacturers in a Member State to obtain their supplies of beet from growers in another Member State when sufficient supplies were available on their national market. R.T. and the CBB draw the conclusion from this that the priority given to national suppliers, although not expressly provided for in the regulations governing the common organization of the markets, is necessary in order to protect the interests of beet growers and thus in order to attain the objectives set out in Article 39 of the Treaty.

(93) In the first place, the argument advanced by the parties concerned cannot be accepted, since attainment of the objectives set out in Article 39, and in particular the stabilization of beet growers' sales and income, are attained, within the framework of the common organization of the sugar markets, by means of the setting of sugar quotas and minimum prices without any need to grant national growers priority in supplies. The setting of minimum prices applicable to a limited volume of production enables the objective of stabilizing the relevant growers' sales and income to be achieved. The role of the quotas is merely to set a limit to the level of the guarantees granted to the relevant growers in the Community. The quotas are not intended to establish national compartmentalization between beet suppliers, such compartmentalization not being necessary in order to achieve the intended objectives, and, consequently, they cannot justify such restrictive measures.

(94) Furthermore, because of the impact of transport costs and the fact that the sugar content of beet is affected by the length of the period during which it is stored before being processed, it is normally in sugar manufacturers' interests to obtain their supplies in the growing areas closest to them, and it is therefore only if there is a local shortage that they will have an incentive to enter into contracts with more distant growers who might be established in order, adjacent Member States. Consequently, the risk referred to by R.T., namely of large-scale supplies coming from other Member States at the expense of sales by local growers, does not exist. It is not therefore necessary, in ensuring the stabilization of the relevant growers' sales, to grant national growers priority in sales.

(95) In addition, the fact of granting national growers priority status in agricultural supplies, and in particular the exclusion of the Bavay-Maubeuge suppliers, is completely contrary to Article 40 of the EEC Treaty, the second subparagraph of paragraph 3 of which stipulates that 'the common organization shall be limited to pursuit of the objectives set out in Article 39 and shall exclude any discrimination between producers or consumers within the Community'. The above restrictions are also contrary to the principle of an open agricultural market.

(96) For all these reasons, measures which, by obstructing the free movement of goods within the Community, were wholly contrary to one of the fundamental principles of the Treaty, cannot in any way be deemed to be necessary for attainment of the objectives set out in Article 39 of the EEC Treaty.

(97) The fact that, in accordance with the provisions of Regulation (EEC) No 1516/74, the Belgian authorities approved, by Ministerial Decree of 14 October 1987, the inter-trade agreements in question cannot in any way be taken to mean that the agreements comply with the provisions of Regulation No 26 or with the competition rules laid down in the EEC Treaty. As stipulated in Article 2 (2) of Regulation No 26, from which Regulation (EEC) No 1516/74 in conjunction with Regulations No 1009/67/EEC and (EEC) No 206/68 do not in any way derogate, the Commission has sole power to determine by decision which agreements, decisions and practices fulfil the conditions specified in Article 2 (1) of Regulation No 26.

C. Article 85 (3)

(98) Article 85 (3) of the EEC Treaty states that Article 85 (1) may be declared inapplicable in the case of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing

consumers a fair share of the resulting benefit, and which do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(99) The inter-trade agreements in question were not notified to the Commission. However, even if, since they are agreements concluded between associations of undertakings from a single Member State, the lack of notification does not, pursuant to Article 4 (2) of Regulation No 17, stand in the way of application of Article 85 (3), the fact remains that the agreements do not fulfil the conditions required for application of Article 85 (3). Even if one takes the view that the Belgian sugar manufacturers' granting of priority to national suppliers could contribute to improving Belgian beet production or, at least, to maintaining it at a high level, it must also be borne in mind that, since such benefits can be obtained only by means of restrictions imposed on other beet suppliers established outside Belgium, such other suppliers necessarily incur disadvantages in their production which exactly offset the advantages achieved in Belgium. Consequently, in terms of all the beet growers who are economically in a position to supply the Belgian sugar refineries concerned, the restrictions in question created no advantages for production.

(100) Nor can such restrictions be deemed to have contributed to improving distribution by stabilizing markets and by avoiding any disorganization that would result if manufacturers had complete freedom to enter into contracts with growers established in the various Member States of the Community. As shown above, the nature of the product means that it is in the manufacturers' interests to obtain their supplies in the growing areas situated closest to them, and it is therefore only if there is a shortage of local products that they will have an incentive to enter into contracts with growers who are further away, possibly operating in other, adjacent Member States.

(101) It is evident therefore that the restrictions cannot be deemed to have contributed to improving in overall terms the production or distribution of beet in the Community or to promoting technical or economic progress. Since this basic condition for the application of Article 85 (3) was not met, the agreements and their implementation were not eligible for exemption under Article 85 (3).

D. Article 3 of Regulation No 17

(102) Under Article 3 of Regulation No 17, the Commission may by decision find that there is infringement of Article 85 of the EEC Treaty and require the undertakings or associations of undertakings concerned to bring such infringement to an end.

(103) In view of the points set out above, the Commission considers that there are grounds for finding that the clause contained in the inter-trade agreements concluded between the CBB and the SGFSB on 9 June 1981, 23 December 1985 and 17 March 1987 which granted priority to beet grown in Belgium for supplies intended for Belgian sugar production within the framework of the maximum quotas and which was ended on 29 September 1989 constituted an infringement of the competition rules laid down in the Treaty.

(104) As regards the exclusion of the Bavay-Maubeuge suppliers, the arrangement concluded between, on the one hand, R.T. and the CBB and, on the other, the thirty complainants, as a result of which the flow of beet supplies that had existed previously between the Bavay-Maubeuge growers and R.T.'s sugar refineries was re-established at a substantial level, may be deemed to have brought to an end the persistent discriminatory effects created by such exclusion.

(105) However, since the parties in question disputed that their conduct had infringed Community law, the Commission considers that, in order to prevent the same or similar infringements from being committed in future, it is necessary to clarify the legal situation, which is governed both by Community agricultural regulations and by the competition law laid down by the EEC Treaty. It is therefore necessary to find by formal decision that the exclusion from 1985 to June 1989 of the thirty Bavay-Maubeuge growers regularly supplying R.T. constituted an infringement of the Community competition rules,

HAS ADOPTED THIS DECISION:

Article 1

The clause contained in the inter-trade agreements concluded between the CBB and the SGFSB on 9 June 1981, 23 December 1985 and 17 March 1987 which granted priority to beet grown in Belgium for supplies intended for sugar production by Belgian sugar manufac-

turers within their maximum quotas and which was ended on 29 September 1989 constituted an infringement of Article 85 (1) of the EEC Treaty.

Article 2

The exclusion of the Bavay-Maubeuge growers who had been regularly supplying R.T. for several years in allocating deliveries to R.T. for production within its maximum quota, an exclusion which was implemented on the basis of an agreement concluded in 1985 between the CBB and R.T. and whose effects persisted up to June 1989, constituted an infringement of Article 85 (1) of the EEC Treaty.

Article 3

This Decision is addressed to the Confédération des Betteraviers Belges, the Société Générale des Fabricants de Sucre de Belgique and the Raffinerie Tirlemontoise SA.

Done at Brussels, 19 December 1989.

For the Commission

Leon BRITTAN

Vice-President