JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
12 July 2001 *

In Joined Cases T-202/98, T-204/98 and T-207/98,

Tate & Lyle plc, established in London (United Kingdom), represented by R. Fowler QC and A.L. Morris, solicitors, with an address for service in Luxembourg,

applicant in Case T-202/98,

British Sugar plc, established in Peterborough (United Kingdom), represented by T. Sharpe QC and D. Jowell, barristers, and L.R. Lindsay and A. Nourry, solicitors, with an address for service in Luxembourg,

applicant in Case T-204/98,

Napier Brown & Co. Ltd, established in London, represented by D. Guy, solicitor, and S. Sheppard, barrister, with an address for service in Luxembourg,

applicant in Case T-207/98,

* Language of the case: English.

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

defendant,

APPLICATION for annulment of Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case IV/F-3/33.708 — British Sugar plc, Case IV/F-3/33.709 — Tate & Lyle plc, Case IV/F-3/33.710 — Napier Brown & Company Ltd, Case IV/F-3/33.711 — James Budgett Sugars Ltd) (OJ 1999 L 76, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: P. Mengozzi, President, V. Tiili and R.M. Moura Ramos, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 29 November 2000,

gives the following

Judgment

The Community sugar market scheme and the situation of the sugar market in Great Britain

1 The Community sugar market scheme is designed to support and protect the production of sugar within the Community. It comprises a minimum price at which a Community producer may always sell his sugar to the public authorities and a threshold price at which sugar not subject to quotas may be imported from non-member countries.

2 Support for Community production through guaranteed prices is, however, limited to national production quotas (A and B quotas) allocated by the Council to each Member State, which then divides them amongst its producers. Quota B sugar is subject to a higher production levy than quota A sugar. Sugar produced in excess of the A and B quotas is termed 'C sugar' and cannot be sold within the European Community unless it has first been stored for 12 months. With the exception of C sugar, exports outside the Community enjoy export refunds. The fact that sale with a refund is normally more advantageous than sale into the intervention system enables Community excesses to be disposed of outside the Community.

3 British Sugar is the only British processor of sugar beet, and the entire British beet sugar quota of some 1 144 000 tonnes is allocated to it. Tate & Lyle buys

cane sugar in African, Caribbean and Pacific (ACP) countries, which it then processes.

4 The sugar market in Great Britain is oligopolistic by nature. By reason of the Community sugar scheme, however, Tate & Lyle suffers from a structural disadvantage by comparison with British Sugar and it is undisputed that the latter dominates the market in Great Britain. Together, British Sugar and Tate & Lyle produce a volume of sugar approximately equal to the total demand for sugar in Great Britain.

5 A further factor which influences competition on the sugar market in Great Britain is the existence of sugar merchants. The merchants carry on business in two ways, either on their own account, namely by purchasing sugar in bulk from British Sugar, Tate & Lyle or importers and reselling it, or on behalf of others, namely by taking responsibility for the processing of orders, the invoicing of customers on behalf of the principal, and the collection of payments. In the case of trading on behalf of others, the negotiations on price and the conditions for delivery of sugar take place directly between British Sugar or Tate & Lyle and the final customer, even though the merchants are nearly always aware of the prices agreed.

Background to the dispute

6 Between 1984 and 1986, British Sugar carried on a price war which led to abnormally low prices on the industrial and retail sugar markets. In 1986, Napier Brown, which is a sugar merchant, renewed the complaint which it had originally lodged with the Commission in 1980, complaining that British Sugar had abused

its dominant position, contrary to Article 86 of the EC Treaty (now Article 82 EC).

7 On 8 July 1986, the Commission sent a statement of objections to British Sugar accompanied by provisional measures aimed at putting an end to the infringement of Article 86 of the Treaty. On 5 August 1986, British Sugar offered the Commission undertakings as to its future conduct ('the undertakings'), which the Commission accepted by letter of 7 August 1986.

8 The proceeding which had begun following the complaint by Napier Brown was closed by Commission Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty (Case No IV/30.178 Napier Brown — British Sugar) (OJ 1988 L 284, p. 41), which found that there had been an infringement of Article 86 of the Treaty by British Sugar and imposed a fine upon it.

9 Meanwhile, on 20 June 1986, a meeting had taken place between representatives of British Sugar and Tate & Lyle, at which British Sugar announced the end of the price war on the United Kingdom industrial and retail sugar markets.

10 That meeting was followed, up to and including 13 June 1990, by 18 other meetings concerning the price of industrial sugar, at which representatives from Napier Brown and James Budgett Sugars, the leading sugar merchants in the United Kingdom ('the Merchants'), were also present. At those meetings, British Sugar gave information to all the participants concerning its future prices. At one of those meetings, British Sugar also distributed to the other participants a table of its prices for industrial sugar in relation to purchase volumes.

11 In addition, up to and including 9 May 1990, Tate & Lyle and British Sugar met on eight occasions to discuss retail sugar prices. British Sugar gave its price tables to Tate & Lyle on three occasions, once five days before and once two days before their official release into circulation.

12 On 4 May 1992, following two letters from Tate & Lyle to the United Kingdom Office of Fair Trading, dated 16 July and 29 August 1990 and copied to the Commission, the latter initiated a proceeding against British Sugar, Tate & Lyle, Napier Brown, James Budgett Sugars and a number of sugar producers in continental Europe, sending them a statement of objections on 12 June 1992, alleging infringement of Article 85(1) of the EC Treaty (now Article 81(1) EC) and Article 86 of the Treaty.

13 On 18 August 1995, the Commission sent British Sugar, Tate & Lyle, James Budgett Sugars and Napier Brown a second statement of objections, which was more limited in content than that of 12 June 1992 in that it referred only to infringement of Article 85(1) of the Treaty.

14 On 14 October 1998, the Commission adopted Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case IV/F-3/33.708 — British Sugar plc, Case IV/F-3/33.709 — Tate & Lyle plc, Case IV/F-3/33.710 — Napier Brown & Company Ltd, Case IV/F-3/33.711 — James Budgett Sugars Ltd) (OJ 1999 L 76, p. 1; 'the contested decision'). In that decision, addressed to British Sugar, Tate & Lyle, James Budgett Sugars and Napier Brown, the Commission held that the latter had infringed Article 85(1) of the Treaty and, by Article 3 of the decision, imposed, *inter alia*, fines of 39.6 million ecus on British Sugar and 7 million ecus on Tate & Lyle for infringement of Article 85(1) on the industrial and retail sugar markets and a fine of 1.8 million ecus on Napier Brown for infringement of Article 85(1) on the industrial sugar market.

Procedure

15 By application lodged at the Registry of the Court of First Instance on 18 December 1998, Tate & Lyle brought the action registered under case number T-202/98.

16 By application lodged at the Registry of the Court of First Instance on 21 December 1998, British Sugar brought the action registered under case number T-204/98.

17 By a separate document, lodged at the Court Registry on 25 January 1999, British Sugar made an interim application seeking, first, suspension of the operation of Article 4 of the contested decision, laying down detailed rules for payment of the fine imposed, and, second, that all necessary provisional measures concerning the conditions for payment of that fine be pronounced.

18 By order of the President of the Court of First Instance of 11 October 2000, following withdrawal by British Sugar, the application of the latter for interim relief was removed from the Court Register in accordance with Article 99 of the Rules of Procedure of the Court of First Instance. Costs in relation to those proceedings have been reserved.

19 By application lodged at the Registry of the Court of First Instance on 23 December 1998, Napier Brown brought the action registered under case number T-207/98.

20 By order of 20 July 2000, the Court of First Instance (Fourth Chamber) decided to join the three cases for the purposes of the oral procedure and the judgment.

21 The parties presented oral argument and replied to the questions of the Court of First Instance at the hearing on 29 November 2000.

Forms of order sought

22 In Case T-202/98, the applicant claims that the Court should:

— annul Article 3 of the contested decision in so far as it concerns the applicant;

— order the Commission to pay the costs.

23 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

24 In Case T-204/98, the applicant claims that the Court should:

— annul the contested decision in its entirety, or, in the alternative, in part;

— in the event of the contested decision being maintained in whole or in part, annul Articles 3 and 4 or reduce the amount of the fine;

— order the Commission to pay the costs.

25 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

26 In Case T-207/98, the applicant claims that the Court should:

— annul the contested decision in so far as it concerns the applicant;

— annul the fine imposed upon it by the decision or reduce the amount;

— order the Commission to pay the costs;

— order the Commission to repay to the applicant the costs incurred in providing a guarantee for the payment of the fine.

27 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

Preliminary observations

28 The applicants in Cases T-204/98 and T-207/98 base their principal claim for annulment of the contested decision on three pleas in law. First, they maintain

that the Commission made obvious errors of fact and law in holding that the practices complained of constituted an agreement or concerted practice, and, in particular, an error in the determination of what constitutes an agreement or concerted practice and an error in the definition of the anti-competitive purpose of the facts complained of. Second, they consider that the Commission has failed to prove an anti-competitive effect following those facts. Third, the applicant in Case T-204/98 maintains that the Commission made an obvious error of law in analysing the condition concerning the effect of the conduct of the participants in the disputed meetings on trade between Member States.

29 In support of their alternative claim for annulment in relation to the amount of the fine imposed upon them, British Sugar and Napier Brown raise several pleas in law. In particular, they dispute the calculation of those fines, claiming, first, that the contested decision infringes the principle of proportionality in applying the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines') and, second, that it did not take account of the structure of the market and the economic context of the conduct complained of. The applicant in Case T-204/98 adds that the Commission committed an infringement of essential procedural requirements by failing to consider the whole of the arguments of the participants in the disputed meetings, particularly, as regards its differential treatment in relation to Tate & Lyle, the unintentional nature of the infringement, the lack of any further need for deterrence, and its cooperation with the Commission during the procedure. Finally, the two applicants maintain that the Commission's delay in adopting the contested decision caused an increase in the level of their fines.

30 The applicant in Case T-202/98 challenges only the part of the decision concerning the calculation of the fine. In its first plea, it argues that the contested decision misapplies the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the notice on cooperation') and, in its second plea, it argues that the decision gives an insufficient statement of reasons on that point.

The pleas in law submitted in support of the principal claim for annulment of the contested decision in Cases T-204/98 and T-207/98

The first plea, alleging errors of fact and law in the determination of what constitutes an agreement or concerted practice

— Arguments of the parties

31 British Sugar and Napier Brown claim that the contested decision is the consequence of an incorrect analysis by the Commission concerning both the structure of the market and the facts which took place between 1986 and 1990.

32 First, a correct assessment of the facts by the Commission would have shown that the participants in the disputed meetings did not act in a coordinated manner on the sugar market in Great Britain. That market was special inasmuch as, on the one hand, its very nature obliged other producers to follow the price policy pursued by British Sugar. In addition, the country's island status, by increasing transport costs, allowed English producers to benefit from a low level of imports. Thus the characteristics of that market naturally limited competition between the undertakings present within it. Moreover, the Court of Justice recognised in its judgment in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie* v *Commission* [1975] ECR 1663 ('*Suiker Unie*') that the sugar industry in the Community is strongly regulated and that the Community sugar scheme leaves only a residual area of application for the competition rules. Finally, the Commission's statement in recital 72 of the contested decision, to the

effect that the participants in the disputed meetings agreed to increase prices and to refrain from increasing their market shares by lowering prices, is, the applicants submit, belied by the fact that British Sugar's market share is determined by its A and B quotas.

33 Second, British Sugar and Napier Brown argue that the disputed meetings took place in order to apply the undertakings which British Sugar had given to the Commission and to reassure the merchants and Tate & Lyle that British Sugar would no longer engage in an aggressive pricing policy.

34 Third, British Sugar and Napier Brown argue that they did not implement any agreement or concerted practice within the meaning of Article 85(1) of the Treaty, since their market behaviour was not influenced by the information obtained during those meetings. British Sugar, the price leader, merely made unilateral declarations as to its future pricing policy. Moreover, that information was already known in the market since, in addition to the market's natural transparency, British Sugar had informally notified its customers of the alterations in its prices, in a systematic manner, before the disputed meetings took place. Thus, Tate & Lyle were aware of British Sugar's prices before their 'official' market release, but not before the latter's customers were informed of them. In so far as the Merchants were concerned by certain contracts made by British Sugar, they were informed of the latter's prices before the disputed meetings were held.

35 According to British Sugar and Napier Brown, the fact that information is supplied unilaterally by one undertaking to another is insufficient to constitute an infringement of Article 85(1) of the Treaty. For a concerted practice to be established, the Commission would have to prove that an exchange of information took place between the undertakings in question, concerning, in this case, their future pricing policy.

36 Napier Brown makes the further argument that its participation in the meetings should be distinguished from that of the sugar producers. It points out in that respect that it is not only a competitor but also a customer of the two British producers. In its capacity as a customer, it was concerned by the pricing policy of the producers in the same way as any other customer. Rather than assessing the justifications provided individually by each participant at the disputed meetings, the Commission examined those justifications as a whole, deducing that, since the participants did not provide plausible explanations for the joint presence of the producers and merchants at those meetings, it could act as it did. Napier Brown further argues that the evidence assembled by the Commission shows that the intention of the Merchants was to compete with the producers as far as possible.

37 The Commission acknowledges that the market is highly specific, but nevertheless replies that price competition is still possible between the minimum price offered by the Community sugar scheme and the prices decided upon by British Sugar. Tate & Lyle and the Merchants were price followers, that is to say they were obliged to reduce their prices if British Sugar reduced theirs, but they were not obliged to follow British Sugar if the latter raised its prices. In the event, Tate & Lyle and the Merchants decided not to compete with British Sugar on price, even though that would have been possible, and preferred to follow a strategy of collaboration leading to prices being increased.

38 As regards the undertakings, the Commission replies that an interpretation of the latter cannot in any event go so far as to include the bilateral meetings between British Sugar and Tate & Lyle to which the Merchants were not invited. Moreover, the first meetings took place in June 1986, whereas the undertakings were submitted to the Commission for the first time in August of that year.

39 The Commission maintains that, even if the information concerning British Sugar's future intentions on price had been capable of being known by the

participants in the market under consideration, the fact remains that the participants in the disputed meetings received information more rapidly and more reliably than if they had been forced to survey the market themselves. The result was that, when they had to fix their own prices, they were influenced by the prices announced by British Sugar.

40 Moreover, the Commission argues that an exchange of information is not an indispensable component of an infringement under Article 85(1) of the Treaty in a case such as the present. The Commission considers that a trader ceases to determine his policy in an independent manner if he attends regular meetings at which he is informed of the prices which his main competitor is seeking to obtain in circumstances where he cannot fail to take account of that information.

41 Specifically in relation to Napier Brown, the Commission emphasises that the latter acknowledges that the contested decision provides evidence of a concerted practice between British Sugar and Tate & Lyle. Where an undertaking attends a meeting which is anti-competitive in character, it shares the responsibility for the result of the meeting unless it demonstrates that it had indicated to its competitors that it was attending those meetings in a different spirit from their own (Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907).

— Findings of the Court

42 It should be noted at the outset that British Sugar does not deny having taken part, between 1986 and 1990, in bilateral meetings with Tate & Lyle and multilateral meetings with the Merchants. Napier Brown also acknowledges its

participation in the multilateral meetings. British Sugar and Napier Brown also recognise that those meetings gave rise to a notification of prices from British Sugar to the other participants, even though they dispute the Commission's interpretation of that notification.

43 The question to be examined therefore is only whether such meetings had an anti-competitive purpose.

44 In that respect, as to the nature of the Community sugar market, it should be noted that, contrary to what British Sugar and Napier Brown maintain, the Court of Justice in *Suiker Unie*, whilst recognising that the Community system tends to consolidate a partitioning of national markets, stated that 'it leaves... a residual field... within the provisions of the rules of competition' (paragraph 24). Moreover, the Court states that 'the "prices" fixed or provided for by the Community system are not sale prices for dealers, users and consumers and, consequently, allow producers some freedom to determine themselves the price at which they intend to sell their products' (paragraph 21).

45 The Commission was therefore right to take the view that price competition is still possible between the minimum price offered by the Community sugar scheme and the prices decided upon by British Sugar (recitals 86 to 88 in the preamble to the contested decision).

46 Moreover, as regards the oligopolistic nature of the sugar market in Great Britain, the Commission's argument that whereas, in an oligopolistic market, it is possible for each operator to acquire *ex post* all the information necessary to understand

the commercial policy of the others, the fact remains that uncertainty as to the pricing policies which the other operators intend to practise in the future constitutes the main stimulus to competition in such a market must be accepted (recital 87 in the preamble to the contested decision).

47 British Sugar and Napier Brown also argue that the undertakings given by British Sugar to the Commission necessitated the holding of the disputed meetings, the purpose of which was perfectly legitimate in so far as they were aimed at correcting previous anti-competitive conduct.

48 It should first be noted that the undertakings provided:

'(C) British Sugar accepts the need for sugar merchants and believes that they have a useful function to perform in the UK market. British Sugar has no intention now or in the future of undertaking any pricing practice which may in any way damage the continued existence of the merchants.

British Sugar undertakes to the Commission that it will engage in normal and reasonable pricing practices which can in no way be construed as predatory. British Sugar recognises the Commission's concern that an insufficient margin between its price for industrial sugar and its price for retail sugar might be considered to be an unreasonable pricing practice.'

49 This Court takes the view that the content of those undertakings does not in any way justify the need for British Sugar to discuss its pricing intentions with its competitors, or even merely to inform them of those intentions on a regular basis. In addition, the Court accepts the Commission's observation that those undertakings could hardly justify bilateral meetings between British Sugar and Tate & Lyle, given that the undertakings concerned only unlawful conduct in relation to the Merchants.

50 Moreover, as the Commission has pointed out, British Sugar first submitted a draft set of undertakings to it in August 1986, whereas the first meeting with Tate & Lyle dated from 20 June 1986. Even if one accepts the fact that British Sugar foresaw the consequences of the investigation carried out by the Commission in its regard and that it was aware of the application for interim measures submitted by Napier Brown, British Sugar has still not been able to explain why, in submitting the draft set of undertakings to the Commission, it did not mention that it had decided to meet with its competitors in order to bring an end to the infringement previously complained of.

51 Furthermore, if the meetings were due only to the requirement to put the undertakings into effect, British Sugar's competitors would still have been able to compete with the latter by fixing their prices at a lower level than British Sugar, which was never done.

52 Finally, the argument that British Sugar had no interest in coordinating its conduct with that of its competitors because it could never increase its market share cannot be accepted. British Sugar had, in any event, an interest in selling all its production quotas on the British market, which could have been prevented by Tate & Lyle and the Merchants.

53 The Commission was therefore right to take the view that the purpose of those meetings was to restrict competition by the coordination of pricing policies.

54 Moreover, the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice.

55 The criteria of coordination and cooperation laid down by the case-law on restrictive practices, far from requiring the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market (*Suiker Unie*, paragraph 173).

56 Although it is correct to say that that requirement of independence does not deprive economic operators of the right to adapt intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (*Suiker Unie*, paragraph 174).

57 In the present case, it is undisputed that there were direct contacts between the three applicants, whereby British Sugar informed its competitors, Tate & Lyle and Napier Brown, of the conduct which it intended to adopt on the sugar market in Great Britain.

58 In Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, in which the applicant had been accused of taking part in meetings at which information was exchanged amongst competitors concerning, *inter alia*, the prices which they intended to adopt on the market, the Court of First Instance held that an undertaking, by its participation in a meeting with an anti-competitive purpose, not only pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors but could not fail to take into account, directly or indirectly, the information obtained in the course of those meetings in order to determine the policy which it intended to pursue on the market (*Rhône-Poulenc*, paragraphs 122 and 123). This Court considers that that conclusion also applies where, as in this case, the participation of one or more undertakings in meetings with an anti-competitive purpose is limited to the mere receipt of information concerning the future conduct of their market competitors.

59 British Sugar and Napier Brown maintain that the price information envisaged by British Sugar was known by the latter's customers before it was notified to the participants at the disputed meetings and that, therefore, British Sugar did not reveal to its competitors during those meetings information which they could not already gather on the market.

60 That fact, even if established, has no relevance in the circumstances of this case. First, even if British Sugar did first notify its customers, individually and on a regular basis, of the prices which it intended to charge, that fact does not imply that, at that time, those prices constituted objective market data that were readily accessible. Moreover, it is undisputed that the meetings in question preceded the release onto the market of the information that was notified at those meetings. Second, the organisation of the disputed meetings allowed the participants to become aware of that information more simply, rapidly and directly than they

would via the market. Third, as the Commission held in recital 72 in the preamble to the contested decision, the systematic participation of the applicant undertakings in the meetings in question allowed them to create a climate of mutual certainty as to their future pricing policies.

61 In the light of the above, the argument of British Sugar and Napier Brown that their meetings constituted neither an agreement nor a concerted practice under Article 85(1) of the Treaty cannot be accepted.

62 As regards Napier Brown's argument that it was not only a competitor but also a customer of the producers, it should be observed that it thereby intends to argue that its participation in the meetings was devoid of any anti-competitive spirit, given that, in its capacity as a customer, it needed to gather information on the pricing policies of its suppliers and, as a merchant, it intended in reality to engage in fierce competition with the producers.

63 In that respect, it should be noted that Napier Brown took part in meetings which had an anti-competitive purpose and that, at the very least, it gave the impression that its participation took place in the same spirit as that of its competitors.

64 In those circumstances, it is for Napier Brown to adduce evidence to show that its participation in the meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit which was different from theirs (*Solvay*, paragraph 99).

65 The arguments of Napier Brown, based on its capacity as a customer, do not constitute evidence to prove the absence of any anti-competitive spirit on its part, since it does not put forward any evidence capable of establishing that it had informed its competitors that its market conduct would be independent of the content of those meetings.

66 Moreover, even if its competitors had been informed of that, the mere fact that it received at those meetings information concerning competitors, which an independent operator preserves as business secrets, is sufficient to demonstrate that it had an anti-competitive intention (*Solvay*, paragraph 100).

67 By participating at one of those meetings, each participant knew that during the following meetings its most important competitor, the leader in the industry concerned, would reveal its future price intentions. Independently of any other reason for participating in those meetings, there was always one at least which was to eliminate in advance the uncertainty concerning the future conduct of competitors. Moreover, by merely participating in the meetings, each participant could not fail to take account, directly or indirectly, of the information obtained during those meetings in order to determine the market policy which it intended to pursue.

68 In the light of the above, the first plea in law must be dismissed.

The second plea in law, alleging that the disputed meetings had no anti-competitive effect

— Arguments of the parties

69 British Sugar and Napier Brown maintain that their participation in the disputed meetings had no effect on the prices which they charged their customers. Moreover, the increase in prices during the period concerned never exceeded 1% per annum. In their submission, that fact rules out the conclusion that such price increases were the result of a concerted practice. In addition, an analysis of prices during the period following the end of the conduct complained of, in July 1990, did not show any substantial change. That suggested that those meetings had no effect on price levels.

70 The Commission does not deny that there is insufficient evidence to demonstrate that the facts complained of had an anti-competitive effect, as a result of which it concentrates in the contested decision solely on the anti-competitive purpose of the conduct of the participants at the disputed meetings (recitals 75 and 116 to 118 of the contested decision). The case-law clearly illustrates that an agreement or concerted practice also infringes Article 85(1) of the Treaty if it has the purpose (and not necessarily the effect) of restricting competition.

— Findings of the Court

71 Article 85(1) of the Treaty prohibits all collusion between undertakings with the purpose or effect of restricting competition.

72 It is clear from case-law that, for the purposes of applying Article 85(1) of the Treaty, there is no need to take account of the concrete effects of an agreement

when it is apparent, as in this case, that it has as its object the prevention, restriction or distortion of competition within the common market (Case T-142/89 *Boël* v *Commission* [1995] ECR II-867, paragraph 89; Case T-152/89 *ILRO* v *Commission* [1995] ECR II-1197, paragraph 32).

73 Therefore, once the anti-competitive nature of the purpose of the meetings has been established, it is no longer necessary to verify whether the agreement also had any effects on the market.

74 The argument of British Sugar and Napier Brown cannot therefore be accepted.

The third plea in law, alleging erroneous assessment of the impact of the disputed meetings on trade between Member States

— Arguments of the parties

75 British Sugar maintains that the conduct of which the Commission complains had no appreciable effect on trade between Member States. In particular, it argues that the contested decision does not contain any accusation against the participants at the disputed meetings in relation to collusion on imports and exports. Nor did it have any incentive or interest in deterring imports, so long as it was able to sell its A and B quotas in Great Britain. It had, on the contrary, succeeded in averting the threat posed by imports to the realisation of its legitimate objective by a consistent policy, consisting of fixing prices in Great Britain at a level such that the profitability of sugar sales in Great Britain did not cause imports to increase.

76 More significantly, in British Sugar's submission, the Community sugar scheme creates incentives to export not to other Member States but to the world market by means of the export refund system. It follows that interpenetration of the sugar market of the European Union is not one of the aims of the sugar scheme envisaged by the common agricultural policy. As the Court of Justice observed in *Suiker Unie*, the sugar scheme is designed to partition national markets.

77 The Commission maintains that, in the contested decision, it demonstrates that the agreement and/or concerted practice were capable of affecting trade between Member States within the meaning of Article 85 of the Treaty. It was not necessary for the conduct complained of actually to have affected trade between Member States to an appreciable degree. It was sufficient to establish that the conduct was capable of having such an effect. In this case, the market is obviously susceptible to imports, since British Sugar itself chose a pricing policy designed to prevent them.

— Findings of the Court

78 It is settled case-law that, for an agreement between undertakings or a concerted practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability and on the basis of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market between the Member States (Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295, paragraph 5; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 171; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 143; Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 175; Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie Maritime Belge*

Transports and Others v *Commission* [1996] ECR II-1201, paragraph 201). Accordingly, it is not necessary that the conduct in question should in fact have substantially affected trade between Member States. It is sufficient to establish that the conduct is capable of having such an effect (Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 235).

79 Moreover, the fact that a cartel relates only to the marketing of products in a single Member State is not sufficient to exclude the possibility that trade between Member States might be affected. Since the market concerned is susceptible to imports, the members of a national price cartel can retain their market share only if they defend themselves against foreign competition (Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraphs 33 to 34).

80 In the present case, it is undisputed that the sugar market in Great Britain is susceptible to imports, notwithstanding that Community regulation of the sugar market and transport costs contribute to making them more difficult.

81 Moreover, it is apparent from the contested decision and all the evidence before the Court that one of the major preoccupations of British Sugar and Tate & Lyle was to limit imports to a level which would not threaten their ability to sell their production in the national market (recitals 16 and 17 in the preamble to the contested decision). In the first place, British Sugar itself has stated (in paragraphs 257 and 258 of its application) that, during the period in question, it knowingly adopted a policy designed to prevent imports, its priority being to sell the whole of its A and B quotas on the market in Great Britain. Second, recital 17 in the preamble to the contested decision shows that, during the period in question, Tate & Lyle had actively engaged in a policy designed to reduce the risk of a rise in the level of imports.

82 In those circumstances, the Commission was not wrong to take the view that the agreement in question, which covered almost the whole of the national territory and had been put into effect by undertakings representing about 90% of the relevant market, was capable of having an effect on trade between Member States.

83 British Sugar argues that the potential effect on the pattern of trade between Member States is not appreciable.

84 In that respect, it is accepted in case-law that the Commission is not required to demonstrate that an agreement or concerted practice has an appreciable effect on trade between Member States. All that is required by Article 85(1) of the Treaty is that anti-competitive agreements and concerted practices should be capable of having an effect on trade between Member States (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 279).

85 In view of the above, the Commission was therefore right to hold that the agreement complained of was capable of having an influence on intra-Community trade.

86 The third plea in law must therefore be dismissed in its entirety.

The pleas submitted in support of the alternative application for annulment in Cases T-204/98 and T-207/98, concerning the amount of the fine

The plea concerning the proportionality of the fines and the taking into account of the structure of the market

— Arguments of the parties

87 British Sugar and Napier Brown argue that, in fixing the amount of the fine, the Commission neither complied with the principle of proportionality nor took account of the seriousness and duration of the alleged infringements in the matter of competition, in breach of the Guidelines. The Commission also infringed Community law by not taking into consideration the legislative context of the Community sugar scheme and the economic context surrounding each alleged infringement.

88 As regards the question of infringement of the principle of proportionality, British Sugar and Napier Brown observe that, according to the Guidelines, a serious infringement is characterised by restrictions on competition rigorously applied and with a wider market impact than in the case of minor infringements. In this case, the Commission limited itself to describing the conduct of the participants in the disputed meetings which consisted in meeting periodically, but it did not identify any practice designed to restrict competition, still less restrictions on competition rigorously applied. These two applicants also emphasise that, as recital 193 in the preamble to the contested decision shows, the alleged infringement has had no actual effect or any impact on competition in the relevant market. The only factor causing the conduct complained of to be classified in the category of serious infringements was the fact that these were horizontal restrictions rather than vertical ones. In that respect, the two applicants argue, first, that the Merchants took part in the meetings in their capacity as customers of the sugar producers, and, second, that, whilst it is true

that the Guidelines state that 'minor' infringements are normally vertical restrictions, in principle a horizontal restriction which had no market impact and was limited to part of a Member State should nevertheless be classified as a minor infringement.

89 British Sugar also challenges the amount of the fine being increased due to the fact that the duration of the infringement was classified as being of 'medium' length. In particular, it argues that a 40% increase is excessive if one considers that, in the absence of market effects, the duration of the infringement has no influence on the extent of the prejudice caused to the Community objectives pursued by the competition rules of the Treaty.

90 Finally, British Sugar challenges the basic amount of the fine being increased for aggravating circumstances. In its submission, the concept of aggravating circumstances introduced by the Guidelines is not in conformity with Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), according to which circumstances of that kind should be assessed at the time of the assessment of the seriousness of the infringement.

91 Napier Brown argues that, in imposing fines, the Commission should take into consideration the individual circumstances of each undertaking concerned. In that respect, it emphasises that the Commission itself, in recital 198 in the preamble to the contested decision, expressly states that the influence of Napier Brown and James Budgett Sugars on the market in question, and thus the possibility of their exercising any power, was limited.

92 As regards the assessment of the market, British Sugar and Napier Brown state that the Court of Justice recognised in *Suiker Unie* that the Commission had not sufficiently taken into consideration the limitations on competition brought

about by the common organisation of the market in sugar (paragraphs 612 to 621). Moreover, the Court held that, because of the very limited autonomy left to economic operators by the Community sugar scheme, the conduct of those operators should not be judged with the same severity. According to British Sugar and Napier Brown, the *Suiker Unie* judgment suggests that the Commission should assess the actual effects of the anti-competitive conduct in the light of the legislative and economic context. The sugar market in Great Britain is such that any effect on the market could only be very limited. That factor should lead to a reduction rather than an aggravation of the penalty for the conduct complained of, since it limits the effects of the latter on the market and, in particular, on customers and consumers.

93 The Commission replies that Regulation No 17 authorises it to impose fines of up to 1 million ecus or 10% of the turnover of the undertaking concerned, depending on the seriousness and duration of the infringement. In the contested decision, it takes account of those two criteria to determine a basic fine, which it increases or reduces according to whether there are aggravating or extenuating circumstances.

94 It also states that the Guidelines bear no direct relation to the contested decision, which does not even mention them. In any event, the wording of the Guidelines states clearly that the latter are designed to give indications as to the approach followed by the Commission in determining the amount of fines, but that they do not provide an automatic method for calculating the fine which will be imposed in a particular case. The examples given by the Guidelines are by way of illustration only, and are prefaced by the words 'these might be', 'these will more often than not be' or 'these will generally be'.

95 The Commission argues that examples of 'very serious' infringements include 'horizontal restrictions such as price cartels and market-sharing quotas', which clearly come under Article 85(1) of the Treaty. In this case, the infringements were horizontal because the Merchants were not only customers but also competitors of British Sugar, and the relationship between British Sugar and Tate & Lyle was purely horizontal.

96 The Commission also states that it took account of the absence of any effect on the market when it described the infringements as 'serious'. Moreover, the reference in the Guidelines to infringing agreements or practices not being applied were intended to cover situations where a party withdrew from a cartel and not the case where the conduct complained of has no effect on the market.

97 Finally, the Commission submits, in *Suiker Unie* the distinction between object and effect under Article 85(1) of the Treaty did not come into play. That explained why, in that case, the Court mentioned the effects on users and consumers. In the present case, by contrast, the Commission's decision was not based on the effects on the market but limited itself to demonstrating the anti-competitive purpose of the agreement.

— Findings of the Court

98 Under Article 15(2) of Regulation No 17, the Commission may impose fines of from 1 000 euros to 1 000 000 euros, 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. In fixing the amount of the fine within those limits, that provision provides that regard shall be had both to the gravity and to the duration of the infringement.

99 According to settled case-law, the amount of a fine must be fixed at a level which takes account of the circumstances and the gravity of the infringement and, in order to fix its amount, the gravity of the infringement is to be appraised by taking into account in particular the nature of the restrictions on competition (see, in particular, Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 92).

100 It should also be remembered that the Commission's power to impose fines on undertakings which, intentionally or negligently, infringe Articles 85(1) or 86 of the Treaty is one of the means conferred on the Commission in order to enable it to carry out the task of supervision conferred on it by Community law. That task certainly includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 105).

101 It follows that, in assessing the gravity of an infringement for the purpose of fixing the amount of the fine, the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurs and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community (*Musique Diffusion française*, paragraph 106).

102 In the present case, as regards the proportionality of the fines imposed, the applicants in Cases T-204/98 and T-207/98 essentially argue that the disproportionate nature of the fines is the consequence of the classification of the infringement as 'serious'. Their argument can be summarised as being that, in the light of the Guidelines, their agreement, although of the horizontal type, should be classified as 'minor' because of the absence of substantial anti-competitive effects on the market.

103 In response to that argument, it is sufficient to note, first, that the agreement complained of should be regarded as horizontal, since the Merchants participated in it in their capacity as competitors of the producers, and, second, that it concerned the fixing of prices. Such an agreement has always been regarded as particularly harmful and is classified as 'very serious' in the Guidelines.

Moreover, as the Commission has emphasised in its pleadings, the classification of the agreement in question as 'serious', because of its limited impact on the market, already represents an attenuated classification in relation to the criteria generally applied when fixing fines in price cartel cases, which should have led the Commission to classify the agreement as very serious.

104 As regards British Sugar's complaint concerning the proportionality of raising the fine by reference to the duration of the infringement, the second subparagraph of Article 15(2) of Regulation No 17 provides that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'. Under the terms of that provision, therefore, the duration of the infringement constitutes one of the factors to be taken into account in assessing the amount of the financial penalty to be imposed on undertakings which have committed infringements of the competition rules (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 154). The Commission was therefore right, when fixing the fines to be imposed, to make an assessment of the duration of the infringement.

105 In that assessment, the Commission held that it was dealing with an infringement of medium duration and therefore applied an increase of about 40% of the amount determined in relation to the seriousness. In that respect it should be noted that, according to settled case-law, the Commission has a margin of discretion when fixing the amount of each fine and cannot be considered obliged to apply a precise mathematical formula for that purpose (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59; Case T-352/94 *Mo och Domsjö* v *Commission* [1998] II-1989, paragraph 268, confirmed on appeal in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, paragraph 45).

106 It is nevertheless for the Community judicature to review whether the amount of the fine imposed is proportionate in relation to the duration of the infringement and the other factors capable of entering into the assessment of the seriousness of

the infringement (see, to that effect, Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127). In that respect, this Court cannot share the opinion of British Sugar, according to which the Commission could raise a fine by reference to the duration of the infringement only if, and to the extent that, there is a direct relation between the duration and serious harm caused to the Community objectives referred to in the competition rules, such relation being excluded in the absence of any effects of the infringement on the market. On the contrary, the impact of the duration of the infringement on the calculation of the amount of the fine must also be assessed by reference to the other factors characterising the infringement in question (see, to that effect, *Dunlop Slazenger*, paragraph 178). In this case, the increase of 40% applied by the Commission to the amount calculated by reference to the gravity of the infringement is not disproportionate in character.

107 British Sugar's argument that the concept of aggravating circumstances appearing in the Guidelines is contrary to Article 15(2) of Regulation No 17 is also devoid of all foundation.

108 First, it is necessary to analyse the relevant provisions of the Guidelines. Point 1 A states that 'In assessing the gravity of an infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market'. Point 2, under the heading 'Aggravating circumstances', sets out a non-exhaustive list of circumstances which may lead to the basic amount, calculated by reference to the seriousness and the duration of the infringement, being raised, such as repeated infringement, refusal to cooperate, a role as instigator of the infringement, the implementation of retaliatory measures, and the need to take account of gains improperly made as a result of the infringement.

109 The provisions cited above show that assessment of the gravity of the infringement is carried out in two stages. In the first, the gravity is assessed solely by reference to factors relating to theinfringement itself, such as its nature

and its impact on the market; in the second, the assessment of the gravity is modified by reference to circumstances relating to the undertaking concerned, which, moreover, leads the Commission to take into account not only possible aggravating circumstances but also, in appropriate cases, attenuating circumstances (see point 3 of the Guidelines). Far from being contrary to the letter and the spirit of Article 15(2) of Regulation No 17, that step allows the Commission, particularly in the case of infringements involving many undertakings, to take account in its assessment of the gravity of the infringement of the different role played by each undertaking and its attitude towards the Commission during the course of the proceedings.

110 Second, concerning the proportionality of the increase applied to the fine imposed on British Sugar by reference to aggravating circumstances, it must be held that, taking account of the circumstances referred to by the Commission in paragraphs 207 to 209 of the contested decision, an increase of 75% is not to be regarded as disproportionate.

111 Finally, as regards the observations of the applicant in Case T-207/98, according to which the Commission did not make a sufficient distinction between the role of the Merchants and that of the producers, it must be noted that in recital 195 in the preamble to the contested decision the Commission clearly recognises that an obvious distinction must be made between the contributions of each participant in the infringement. That affirmation is reflected in recital 198, where the Commission fixes the fine on the Merchants in such a way as to take account of their limited role.

112 The plea by British Sugar and Tate & Lyle in relation to the allegedly disproportionate character of the fines must therefore be rejected.

113 As regards the complaint that insufficient consideration was given to the structure of the relevant market, it should be noted that, in *Suiker Unie*, the Court of

Justice considered that the legislative and economic context of the sugar market was capable of justifying less severe treatment of practices that were potentially anti-competitive. However, the Commission has correctly pointed out that the agreements that form the subject-matter of the *Suiker Unie* judgment did not concern an increase in prices but the sharing of markets in accordance with certain quotas. Moreover, the Court of Justice itself indicated in the *Suiker Unie* judgment that, in the case of a price cartel, its conclusions would have been different. It adds in that respect that 'the damage which the users and consumers suffered as a result of the conduct to which exception is taken was limited, because the Commission itself has not blamed the parties concerned for any concerted or improper increase in the prices applied and because, even though the restrictions on the freedom to choose suppliers caused by the partitioning of the market deserve censure, they are not so oppressive in the case of a product like sugar which is mainly homogenous' (paragraph 621). Since this case is precisely concerned with an agreement on prices, the Commission was right to distance itself from the conclusions of the *Suiker Unie* judgment.

114 The complaint alleging failure to consider the structure of the market surrounding the infringements must therefore also be rejected.

115 This plea in law must therefore be dismissed in its entirety.

The plea in law alleging infringement of the principle of equal treatment

— Arguments of the parties

116 British Sugar considers that the fine of 18 million ecus imposed upon it is due more to its market position than to the seriousness of the infringement. The

amount of that fine is close to the ceiling laid down for infringements in competition matters. At the same time, Tate & Lyle, even though it had a similar position on the market to British Sugar, was fined only 10 million ecus.

117 The Commission replies that British Sugar was the leader in the coordination of prices, and that, without it, there would not have been a cartel.

— Findings of the Court

118 It has been consistently held that, for there to be a breach of the principle of equal treatment, comparable situations must have been treated differently (see, for example, *Hercules Chemicals*, paragraph 295).

119 In this case, the Court finds that the differences between the situation of British Sugar and that of Tate & Lyle, to which the Commission has drawn attention, are sufficient to justify a difference in treatment between those two undertakings.

120 It is undisputed that the meetings complained of commenced and were organised on the initiative of British Sugar and it is also undisputed that, during those meetings, the latter informed its competitors of its pricing policy. Moreover, British Sugar has not put forward any evidence to contradict the evidence produced by the Commission to establish the active and principal role which British Sugar played in the cartel, having limited itself to questioning the anti-competitive nature of the latter.

121 The plea must therefore be rejected.

The plea alleging that the actions complained of were committed unintentionally

— Arguments of the parties

122 British Sugar argues that, in fixing the fine, the Commission did not take into account the absence of intent at the time when the actions complained of took place.

123 In particular, in attempting to comply with the undertakings which it had given and to ensure that its relations with the Merchants complied with Article 86 of the Treaty, British Sugar had, at the very most, inadvertently committed an infringement of Article 85(1) of the Treaty.

124 The daily contacts between buyer and seller, which those undertakings required, necessarily led to regular contacts being made between responsible persons in the various undertakings. The Merchants were major buyers of sugar for resale. It would therefore have been impossible for them not to discuss prices.

125 There was no proof that the undertakings concerned participated in meetings with knowledge that they were infringing Article 85 of the Treaty or generating

competition problems. The participants in the disputed meetings did not keep those meetings secret, and it was proved that other subjects were discussed at those meetings.

126 The Commission argues that, if the Court concludes that the meetings had the object of restricting competition, it must also conclude that the meetings were not only intended to enforce the undertakings. The Guidelines establish that the Commission may take account of the fact that a large undertaking will have legal and economic knowledge enabling it to recognise that its conduct constitutes an infringement and be aware of the consequences stemming from it under competition law.

— Findings of the Court

127 It is settled case-law that, for an infringement of the competition rules of the Treaty to be regarded as having been committed intentionally, it is not necessary for an undertaking to have been aware that it was infringing those rules. It is sufficient that it could not have been unaware that its conduct was aimed at restricting competition (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 45; *Belasco*, paragraph 41; Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 176; Case T-310/94 *Gruber + Weber* v *Commission* [1998] ECR II-1043, paragraph 259).

128 In the present case, in view of the fact that British Sugar is a large undertaking with the legal and economic knowledge necessary to enable it to recognise that its conduct constituted an infringement and to be aware of the consequences stemming from it under competition law, and in view of the fact that it had just been the subject of a Commission inquiry for infringement of Article 86 of the Treaty, it cannot claim that it acted neither negligently nor deliberately.

129 The plea must therefore be rejected.

The plea concerning the account to be taken of the deterrent effect of fines

— Arguments of the parties

130 British Sugar argues that there was no need to increase the level of the fine upon it for deterrent purposes. As from 1991, it had become a wholly-owned subsidiary of Associated British Foods plc ('ABF'). As from that time, its undertakings had been revised and strengthened. British Sugar submits annual reports to the Commission, and compliance with its undertakings falls within the personal responsibility of the Legal Director of ABF, who is a main board director.

131 Moreover, the contested decision concerns only events which took place in Great Britain. In respect of industrial sugar, the national authorities decided in 1991 to take no action under the Restrictive Trade Practices Act 1976. In relation to retail sugar, the Restrictive Practices Court regarded the memorandum drafted jointly by British Sugar and Tate & Lyle, sent to the Office of Fair Trading on 15 April 1991, as not requiring rectification. Accordingly, under the circumstances, orders were made against British Sugar and Tate & Lyle and any breach of those orders could involve fines and even imprisonment for the individuals responsible. There was therefore no need to increase the fine on British Sugar to reinforce its deterrent effect.

132 The Commission replies that a symbolic fine would have no deterrent effect on other undertakings contemplating similar action. Since, throughout its applica-

tion to the Court, British Sugar argues that its conduct was lawful and necessary to comply with competition law, it is not possible to exclude the possibility that it might intend to pursue the same actions in the future.

— Findings of the Court

133 As already stated, the Commission's power to impose fines on undertakings which, intentionally or negligently, infringe Articles 85(1) or 86 of the Treaty is one of the means conferred on the Commission in order to enable it to carry out the task of supervision conferred on it by Community law. That task certainly includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles (*Musique Diffusion française*, paragraph 105)

134 It follows that the Commission has the power to determine the level of fines with a view to reinforcing their deterrent effect where infringements of a given type, even though established as being unlawful at the outset of community competition policy, are still relatively frequent on account of the profit that certain of the undertakings concerned are able to derive from them (*Musique Diffusion française*, paragraph 108).

135 In the present case, which involves a classic type of infringement of competition law, the illegality of which has been stated by the Commission many times ever since its first interventions in competition matters, it was legitimate for the Commission to regard it as necessary to fix the amount of the fine having regard to its deterrent effect.

136 The plea must therefore be rejected.

The plea concerning cooperation during the administrative procedure

— Arguments of the parties

137 British Sugar maintains that it cooperated totally with the Commission from 1990 onwards and states that the Guidelines establish that cooperation is an attenuating circumstance. It used a large part of its resources to reply to complaints of the Commission which the latter subsequently withdrew.

138 The Commission replies that the cooperation of British Sugar did not go beyond what might be expected of an undertaking involved in a proceeding under the competition rules (recital 214 in the preamble to the contested decision).

— Findings of the Court

139 This plea must also be rejected. The documents before the Court and a reading of the contested decision show that British Sugar did no more than give information which it was obliged to supply to the Commission during a competition investigation. Moreover, in recital 214 in the preamble to the contested decision, it is stated that the fines imposed in this case were reduced by 10% on account of the fact that the parties concerned had admitted some of the facts alleged.

140 The plea must therefore be rejected.

The plea alleging prejudice arising from the Commission's delay in adopting the decision

— Arguments of the parties

141 British Sugar and Napier Brown maintain that the fact that the contested decision took place eight years after the discovery of the infringement means that they were made subject to a change of policy by the Commission on competition matters, and that it caused the Commission to increase the level of the fines imposed on the undertakings.

142 The Commission replies, first, that the applicants are wrong to maintain that the general level of fines has increased since the adoption of the Guidelines, and, second, that, regardless of the Guidelines, the Commission is entitled to increase the level of fines from one case to another, so that there can be no legitimate expectations as regards fines.

— Findings of the Court

143 It is settled case-law that the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy.

On the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (*Musique Diffusion française*, paragraph 109; Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 346).

144 Moreover, when assessing the general level of fines, the Commission is entitled to take account of the fact that clear infringements of the Community competition rules are still relatively frequent and that, accordingly, it may raise the level of fines in order to strengthen their deterrent effect (see, to that effect, Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-2111, paragraph 167).

145 Finally, when it fixes the general level of fines, the Commission may take account, *inter alia*, of the lengthy duration and obviousness of an infringement of Article 85(1) of the Treaty, which has been committed despite the warning which the Commission's previous decision-making policy should have constituted (*Stora Kopparbergs Bergslags*, paragraph 169).

146 In the matter of fines, therefore, undertakings subject to a proceeding for infringement of the competition rules cannot, as the Commission has maintained, have a legitimate expectation that it will apply a certain level of fine, provided the limit set out in Article 15(2) of Regulation No 17 has been complied with.

147 The plea must therefore be dismissed.

148 In the light of the above, Napier Brown's application that the Commission should be ordered to repay to it the expenses incurred in setting up a guarantee for the payment of the fine must also be rejected.

149 In view of all of the above, the actions in Cases T-204/98 and T-207/98 must be dismissed.

The application for annulment in Case T-202/98

The first plea in Case T-202/98, alleging misapplication of the notice on cooperation

— Arguments of the parties

150 Tate & Lyle argues that it cooperated fully with the Commission during the proceeding. On the strength of the notice on cooperation, continuous and full cooperation allows a reduction in the fine of between 75 and 100%, whereas the Commission reduced the fine by only 14 million ecus, that is to say by 50%.

151 According to Tate & Lyle, the Commission's conclusions do not do justice to the facts, which demonstrate, on the contrary, that Tate & Lyle had cooperated fully.

Not only did it explain the situation to the Commission in writing in two letters in July and August 1990, but it consistently cooperated with the Commission by replying immediately to every request for information during the whole course of the proceeding.

152 In the absence of an express statement of reasons in the contested decisions, Tate & Lyle infers that the Commission's conclusions are due to the conviction of the latter that Tate & Lyle retracted statements which it had made during the proceeding.

153 In that respect, Tate & Lyle considers that the Commission characterised as retractions what were only corrections or clarifications of the Commission's interpretation of the facts. Having brought the facts to the Commission's knowledge, Tate & Lyle was entitled to ensure that those facts were correctly understood. That could not reasonably be regarded as a lack of cooperation. In its response to the second statement of objections, Tate & Lyle did not retract any facts which had emerged earlier in the proceedings, or retract any interpretation of the facts which it had previously set out. The second response merely corrected or clarified the Commission's interpretation of the facts.

154 The Commission maintains that the notice on cooperation was published after the relevant events and that, therefore, it was applied only by analogy. The contested decision refers to the role of Tate & Lyle in the discovery of the cartel and states that the latter satisfies some of the criteria for obtaining a reduction in the fine in accordance with that notice (recitals 216 and 218 in the contested decision). For those reasons, the contested decision refers to a reduction of 50%. Nevertheless, for there to be full cooperation, an undertaking had to do more than supply information which it was obliged to give to the Commission. After bringing the cartel to light, Tate & Lyle did no more than satisfy its obligations or its commercial interests.

155 Two retractions by Tate & Lyle supported the conclusion that there was no permanent cooperation. First, recitals 82 and 83 in the preamble to the contested decision reveal a U-turn in Tate & Lyle's replies to the two statements of objections. At first, it accepted that it had entered into an arrangement with British Sugar which infringed Article 85(1) of the Treaty. Later, it stated that there was no need for such an arrangement as it was obliged in any event to follow the pricing policy of British Sugar. Essentially, between the first and the second statement of objections, Tate & Lyle sought to withdraw from its initial position and to imply that the concerted practice did not have as its object the restriction of competition.

156 Second, the Commission argues that a second retraction is revealed in recital 116 of the preamble to the contested decision. In its first letter to the Office of Fair Trading, dated 16 July 1990, Tate & Lyle admitted that there was an exchange of information on the subject of discounts to be granted to certain customers, whereas subsequently, in the memorandum of 15 April 1991 drafted jointly with British Sugar and sent to the Office of Fair Trading, it stated that no information concerning discounts granted to specific customers was supplied. Because of those changes of position, the Commission was not able to prove the existence of exchanges of information concerning discounts granted to individual customers (see recitals 116 and 193 in the contested decision).

— Findings of the Court

157 Under the terms of the notice on cooperation, undertakings which fulfil the conditions laid down in point B, (a) to (e) of the notice are to be allowed a reduction of at least 75% of the fine which would have been imposed in the absence of cooperation or exempted from the fine altogether. In particular, point B (d) establishes that, in order to benefit from the reduction provided for in point B, the undertaking concerned must have maintained continuous and complete cooperation throughout the investigation. It therefore needs to be established

whether the cooperation of Tate & Lyle can be described as continuous and complete within the meaning of point B (d) of the notice.

158 The Commission took the cooperation of Tate & Lyle into account in recitals 216 and 218 in the preamble to the contested decision. In particular, the Commission refers to the latter's role in the discovery of the cartel and acknowledges that it satisfies some of the criteria for obtaining a reduction in the fine in accordance with the notice referred to above. Recital 217 in the preamble to the contested decision states in general terms that Tate & Lyle did not cooperate with the Commission in a continuous and complete manner, while points 82, 83 and 116 of the same decision indicate the actions of the latter which the Commission regarded as retractions which prevented it from qualifying Tate & Lyle's cooperation as continuous within the meaning of point B (d) of the notice on cooperation. The Commission concludes that Tate & Lyle does not fulfil the conditions for the reduction in the fine under point B of the notice to be applied.

159 In that respect, it should be noted that, contrary to what it maintains, Tate & Lyle did in fact alter its statements during the Commission's investigations.

160 However, in relation to the first of those alterations, contained in Tate & Lyle's replies to the second statement of objections, it should be noted that Tate & Lyle limited itself to providing a different qualification of the facts, but that it neither challenged the facts previously admitted nor retracted the statement according to which the disputed meetings fell under the prohibition of the Article 85(1) of the Treaty.

161 In relation to the second alteration, concerning the circulation of information about discounts to be granted to specific customers, it should be noted that the Commission has not been able to prove that element of the infringement in the

contested decision. Although the Commission argues that it is precisely because of the retraction by Tate & Lyle that it has been unable to prove that element, the fact remains that the existence of such communications has not been demonstrated by the Commission and has not therefore been imputed to the applicants. In those circumstances, the Commission cannot impute to Tate & Lyle a lack of cooperation in relation to an element of the infringement the actual existence of which has not been established.

162 In view of the above, this Court considers that the Commission erroneously characterised the cooperation of Tate & Lyle as not being continuous and complete within the meaning of point B (d) of the notice and that, in consequence, the extent of that cooperation has not been correctly assessed in the contested decision.

163 In those circumstances, it falls to the Court, in the exercise of its power of unlimited jurisdiction, to alter the decision in relation to the amount of the fine imposed on Tate & Lyle.

164 In that respect, the Court must, within the scope of its jurisdiction in the matter, assess for itself the circumstances of the case in order to determine the amount of the fine (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 111).

165 On the one hand, having regard to the significance and the continuous and complete character of Tate & Lyle's cooperation, a reduction of 50% of the fine which would have been imposed upon it in the absence of cooperation is not sufficient. On other hand, as has been held in paragraph 160 above, even if Tate & Lyle did not make a retraction from its original statements when replying to the second statement of objections, it did nevertheless partially alter the

characterisation of the facts which it had set out previously. This Court considers that that fact, as well as the significant role which Tate & Lyle played within the cartel, does not permit the latter to be granted a reduction of more than 60%.

166 In view of all the above considerations, the Court finds it appropriate, exercising its unlimited jurisdiction under Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17, to reduce the amount of the fine, expressed in euros pursuant to Article 2(1) of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1), to 5.6 million euros.

167 There is therefore no need to examine Tate & Lyle's second plea in law, alleging an inadequate statement of reasons.

Costs

168 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants in Cases T-204/98 and T-207/98 have been unsuccessful, and the defendant has applied for costs, each of those applicants must be ordered to pay the whole of the costs relating to the action which it has brought, including those of the Commission. The applicant in Case T-204/98 is also ordered to pay the costs relating to the interim application in that case, in accordance with the form of order sought by the defendant. As the Commission has been essentially unsuccessful in Case T-202/98, it must be ordered to pay the whole of the costs in relation to that case, in accordance with the form of order sought by the applicant in that case.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Annuls Article 3 of Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case IV/F-3/33.708 — British Sugar plc, Case IV/F-3/33.709 — Tate & Lyle plc, Case IV/F-3/33.710 — Napier Brown & Company Ltd, Case IV/F-3/33.711 — James Budgett Sugars Ltd) in so far as it concerns the applicant in Case T-202/98;

2. Fixes the amount of the fine imposed on the applicant in Case T-202/98 by Article 3 of Decision 1999/210 at 5.6 million euros;

3. Orders the Commission to pay its own costs and those of the applicant in Case T-202/98;

4. Dismisses the applications in Cases T-204/98 and T-207/98;

5. Orders the applicant in Case T-204/98 to pay its own costs and those incurred by the Commission in that case, including those relating to the proceedings for interim relief;

6. Orders the applicant in Case T-207/98 to pay its own costs and those incurred by the Commission in that case.

Mengozzi Tiili Moura Ramos

Delivered in open court in Luxembourg on 12 July 2001.

H. Jung
Registrar

P. Mengozzi
President