COMPETITION LAW IN THE EUROPEAN COMMUNITIES

August, 2001

Volume 24, Issue 8

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FAIRFORD PRESS

Publisher and Editor: Bryan Harris

Fairford Review : EU Reports : EU Services : Competition Law in the European Communities

58 Ashcroft Road, Cirencester GL7 1QX, UK
P O Box 323, Eliot ME 03903-0323, USA

www.fairfordpress.com

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August, 2001

Volume 24 Issue 8

COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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ISSN 0141-769X

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Car price differentials

From time to time the Commission carries out studies of car price differentials in the Member States; and it tends to draw the conclusion that, if the differentials are great, the rules on competition need to be more strongly enforced. While there is certainly some truth in this, it is only part of the story. The Commission rightly defends parallel trading; but even the Competition Commissioner is speaking only of "the *possible* obstacles to parallel trade" in this context. He speaks of "the current preparation of the future legal framework for car distribution", but does not directly link the questions of differentials and of distribution.

In its most recent report on car prices, the Commission has found that price differentials for new cars across the European Union are still substantial. The situation on 1 May 2001 shows that, despite the recent depreciation of the £ against the euro, prices in the United Kingdom are still much higher than in the euro-zone. Greece, which joined the euro-zone on 2 January 2001, as well as Finland, Spain, the Netherlands and Denmark, a non-member of the Euro-zone, are the markets where car prices before tax are generally the lowest. The analysis of the situation among the members of the euro zone reveals that Germany and, for a number of models, Austria, are the most expensive markets. In Germany, a total of 46 models out of the 81 covered by the report are more than 20% more expensive than in at least one other euro zone market (including Greece). The PSA group, the Fiat group, the VW group (Volkswagen and Seat), Ford, Opel and a number of Japanese manufacturers are pursuing a high price market strategy in Germany. On the other hand, certain German manufacturers (Audi, BMW and DaimlerChrysler) and Volvo are in general limiting price differentials within the euro zone to 15%.

The generally low pre-tax prices in Finland, Denmark and Greece are largely due to manufacturers' pricing policies, since because of high taxes on car purchase in those countries, most manufacturers fix pre-tax list prices at a low level, arguing that this is necessary to make the after-tax prices affordable. In other countries such as Germany, where no such taxes are charged, prices before tax are therefore much higher. In the United Kingdom, car prices include the additional cost of right-hand drive, and are affected by the high value of the £. All of these aspects have to be taken into account when analysing the causes for high price differentials. In other words, there are several factors, over and above pure competitiveness, which lead to material differences in car prices. Just as oil prices depend on a variety of factors, of which competitiveness is only one, so car price differentials are likely to be removed only if currencies achieve equilibrium, economies are integrated and – lefthand drive is the norm.

EXCLUSIVITY (TELEVISION RIGHTS): THE UEFA CASE

Subject: Exclusivity

Industry: Sports; Broadcasting

Parties: European Union of Football Associations (UEFA)

Source: Commission Statement IP/01/1043 and, by way of background, Commission Memorandum MEMO/01/271, both dated 20 July 2001

(Note. At first sight, it is necessary, in the transmission of sports events, for the broadcasting rights to be awarded, by auction or otherwise, on an exclusive basis; and it is significant in the present case that the Commission's investigation was not prompted by complaints from any of the various parties to the broadcasting on television of the Champions League football matches. However, the Commission publicised in the usual way - that is, in the Official Journal of the European Communities, - the notification which it had received from UEFA and found that the response to the notice in the Official Journal was both substantial and critical of the existing arrangements.)

The Commission has sent a statement of objections to the European football organisation (UEFA) challenging UEFA's current arrangements for the selling of the rights to televise the UEFA Champions League. The Commission is concerned that UEFA's commercial policy of selling all the free and pay-TV rights on an exclusive basis to a single broadcaster per territory for a period lasting several years may be incompatible with EC competition law and should be improved to ensure that European sports fans can benefit from a wider coverage of top European football events.

UEFA notified its Regulations concerning the joint selling of the commercial rights to the UEFA Champions League to the European Commission in 1999 requesting clearance under European Union competition rules. This statement of objections relates only to the UEFA Champions League TV rights.

Joint selling on an exclusive basis has a number of effects threatening affordable access to football on TV unless certain safeguards are taken. UEFA sells all the TV rights to the final stages of the UEFA Champions League on behalf of the clubs participating in the league. One effect of this is that only bigger media groups will be able to afford the acquisition of and exploitation of the bundle of rights. In turn, this leads to unsatisfied demand from those broadcasters who are unable to obtain TV rights to football. This lack of competition may also slow down the use of new technologies, because of a reluctance of the parties to embrace new ways of presenting sound and images of football.

The Commission fully endorses the specificity of sport as expressed in the declaration of the European Council in Nice in December 2000, where the Council encourages a redistribution of part of the revenue from the sales of TV rights at the appropriate levels, as beneficial to the principle of solidarity between all levels and areas of sport. However, the Commission considers that the current form of joint selling of the TV rights by UEFA has a highly anti-competitive effect by foreclosing TV markets and ultimately limiting TV coverage of those events for consumers. The Commission considers that joint selling of the TV rights as practiced by UEFA is not indispensable for guaranteeing solidarity among clubs participating in a football tournament. It should be possible to achieve solidarity without incurring anti-competitive effects.

The Commission will examine carefully any constructive proposals to render the current arrangement compatible with EC competition law and to guarantee open access to TV coverage of football. The sending of a Statement of Objections does not prejudge the final outcome of the investigation and respects the rights of the notifying party and other interested parties to be heard. UEFA has a total of three months to reply to the Commission's objections and can also request the organisation of a hearing at which it would be able to submit its arguments directly to the representatives of the national competition authorities

The UEFA Champions League: Background Note

The Champions League is a tournament organized every year by Geneva-based UEFA between the top European football clubs: 72 clubs participate from both European Union and non-EU countries. The Champions League is one of the most important sports events in Europe. It is also one of the most watched events on television, generating over 800 million Swiss francs (□530 million) in TV rights, approximately 80 percent of the Champions League's total revenues.

UEFA sells the TV rights to a single broadcaster per Member State on an exclusive basis for periods of three to four years (See table in annex). The rights are split into primary and secondary rights. UEFA imposes minimum broadcasting obligations on the TV companies that win the rights. Champions League matches are currently played on Tuesdays and Wednesdays. In big football nations the broadcaster must televise a Tuesday match live on either free TV or pay-TV and a Wednesday match live on free TV. The contract broadcaster must broadcast highlights on free TV both nights. In the smaller member associations the contract broadcaster must televise a Tuesday match live match on free TV on Tuesday if a club from that country is playing, and on Wednesday. Once the contract broadcaster has complied with its minimum broadcast obligations, it can exploit any additional rights by free TV or pay-TV.

The Commission's interest in how UEFA markets the TV rights to the Champions League was prompted by a formal notification: the Commission initiated its investigation into the joint selling by UEFA of the TV rights because UEFA notified the arrangement to the Commission on 1 February 1999 seeking a legal guarantee that the agreement did not fall in the category of agreements that

are prohibited by Article 81(1) of the EU treaty, or an exemption from EU competition rules.

Joint selling of free-TV and pay-TV rights combined with exclusivity has an important effect on the structure of the TV broadcasting markets since football is in most countries the driving force not only for the development of pay-TV services but it is also an essential programme item for free TV broadcasters. UEFA sells all the TV rights to the whole tournament in one exclusive package to one broadcaster per Member State. Because the winner gets it all, there is a fierce competition for the TV rights whose increasing value can only be afforded by large broadcasters. This may increase media concentration and hamper competition between broadcasters. If one broadcaster holds all relevant football TV rights in a Member State, it will become extremely difficult for competing broadcasters to establish themselves in that market. If different packages of rights were sold, several broadcasters would be able to compete for the rights, including smaller, regional or thematic channels.

This is not remedied by UEFA's sub-licensing policy, which is rather exclusive and allows only one other broadcaster to show the UEFA Champions League matches that the main broadcaster itself is not showing. Thus a maximum of two broadcasters per Member State can televise the UEFA Champions League to the exclusion of all other broadcasters in that Member State, who cannot even show highlights of the matches.

This does not mean that the Commission wants to ban collective selling of football rights: while joint selling arrangements clearly fall within the scope of Article 81(1), the Commission considers that in certain circumstances, joint selling may be an efficient way to organize the selling of TV rights for international sports events. However, the manner in which the TV rights are sold may not be so restrictive as to outweigh the benefits provided.

Although the Commission has not received any formal complaints from TV companies, individual clubs, sports fans or others on the current system, it has received observations from a total of 65 national authorities, associations, football clubs, broadcasters and sport rights agencies in reply to a summary of the case published in the Official Journal on 10 April 1999. Criticisms of central marketing are mainly to be found among broadcasters, sport right agencies and the national competition authorities. They contest that joint selling is necessary for the protection of the UEFA Champions League brand or for ensuring broadcasting on free-TV and argue that central marketing leads to higher prices for consumers and less football on TV and that UEFA's solidarity measures are inefficient, insufficient and conducted in a non-transparent way.

As to how the Champions League TV rights are currently re-distributed between qualifying clubs, it should be noted that, out of a total revenue of 800 million Swiss Francs, 75% goes to the clubs and 25 percent remains with UEFA to cover organizational and administrative costs as well as for solidarity payments. This leaves approximately 122 million Swiss Francs for solidarity payments, 105 million for operational costs and 47.2 million for UEFA.

The Commission fully endorses the specificity of sport as expressed in the declaration of the European Council in Nice in December 2000, where the Council encourages a redistribution of part of the revenue from the sales of TV rights at the appropriate levels, as beneficial to the principle of solidarity between all levels and areas of sport. The statement of objections sent by the Commission does not put this principle into question. The Commission is convinced that furthering competition in the broadcasting market will lead to better quality TV coverage and lower subscription fees. In joint selling arrangements there is a reluctance to give licenses to apply new technologies such as the Internet and UMTS, because broadcasters fear that it will decrease the value of their TV rights.

Annex: Parties gaining rights for last three periods auctioned

Country	Contract Broadcaster / Sub-licensee
Austria	ORF
Belgium	VRT+RTL TVI
Denmark	TV3
Finland	Nelonen + Ch.4
France	TF1/Canal+
Germany	RTL/Première
Greece	Megachannel
Ireland	TV3
Italy	RTI/Stream
Netherlands	NOS/Canal+
Portugal	RTP/Sport TV
Spain	TVE/ViaDigital
Sweden	TV3
United Kingdom	ITV/OnDigital

The German Post Office (again)

Yet again, the German Post Office (Deutsche Post AG) has fallen foul of the Commission. On 25th July, the Commission adopted a formal decision finding that Deutsche Post had abused its dominant position in the German letter market by intercepting, surcharging and delaying incoming international mail which it erroneously classified as circumvented domestic mail (so-called A-B-A remail). The abusive behaviour of Deutsche Post warranted the imposition of a fine; but, due to the legal uncertainty that prevailed at the time of the infringement, the Commission has decided to impose only a "symbolic" fine of €1,000 on DP. In 1998, the British Post Office had filed a complaint with the Commission which alleged that Deutsche Post had frequently intercepted, surcharged and delayed international mail from the UK arriving in Germany. (Source: Commission Statement IP/01/1068, dated 25 July 2001.)

PRICING POLICY (PAYMENT CARDS): THE VISA CASE

Subject: Pricing policy
Discrimination

Industry: Payment cards (debit and credit cards)

Parties: VISA International

Source: Commission Statement IP/01/1198, dated 10 August 2001

(Note. Two aspects of the Visa case are considered here. The first is the formal decision on the "no-discrimination" rule, explained below, and the rules on cross-border services; the second is the forthcoming decision on the multilateral interchange fee. A curious omission from the Commission's otherwise sensible decision on the no-discrimination rule is any mention of the interests of the consumer. Most consumers using cards find the practice of surcharging by the merchant thoroughly vexatious and would regard the benefit of the rule as greatly outweighing the slightly artificial concept - in this context - of allowing the merchant greater freedom to compete.)

The "no-discrimination" rule and the modified rules on cross-border services

After a thorough investigation, the Commission has taken a favourable view, in the light of the European Community's rules on competition, of certain provisions in the Visa International payment card scheme, which had been notified for formal clearance. (This is the first Commission anti-trust decision in the field of international payment cards.) One of these provisions is the so-called no-discrimination rule which prohibits merchants from charging customers a fee for paying with a Visa card, or offering discounts for cash payments. Although it had originally objected to this rule, the Commission has concluded that its abolition would not substantially increase competition. This conclusion has been reached in the light of the results of market surveys carried out in Sweden and in the Netherlands, where the no-discrimination rule was abolished following the intervention of national competition authorities. Those studies revealed that the abolition of the rule in those countries had not had an appreciable effect.

Apart from the no-discrimination rule, the favourable Commission decision also covers some other provisions in the Visa international rules, such as the modified Visa rules on cross-border services. Initially, the Visa rules did not allow Visa member banks to issue cards to cardholders outside their country of establishment or to sign up merchants in other Member States, except in very limited circumstances. However, Visa International has now significantly increased the possibilities for cross-border issuing and acquiring of Visa cards. Following the latest amendments, Visa International allows cross-border issuing and acquiring

without the prior establishment of a branch or subsidiary in the country concerned.

Moreover, the decision clears the "Honour All Cards Rule" in the Visa scheme, which obliges merchants to accept all valid Visa-branded cards, irrespective of the identity of the issuer, the nature of the transaction and the type of card being issued. This rule is held to promote the universal acceptance of Visa cards. The decision also clears the territorial licensing policy of Visa International and the "no acquiring without issuing rule", which is held to promote the development of the system by ensuring a large card base, thereby making the system more attractive for merchants.

In a comment on the decision, the Competition Commissioner Mario Monti said that, although the Commission considered that the no-discrimination rule restricted the freedom of merchants to pass on a component of their costs to cardholders and might be restrictive of competition, empirical evidence had shown that the abolition of the rule at stake would not have appreciably increased competition.

Multilateral interchange fee

Separately from the decision mentioned above, the Commission will also shortly publish a Notice seeking comments on its intention to adopt a favourable position on Visa's so-called inter-regional multilateral interchange fee (or MIF). The Commission had sent Visa a Statement of Objections on this; but Visa has proposed changes which involve a reduction of the level of the fees, the introduction of objective criteria to set the level of the fees, and transparency on the level and the relative percentage of the cost categories vis-à-vis merchants.

In the light of the proposed amendments, the Commission provisionally intends to take a favourable view on the modified Visa MIF in a separate decision, to be adopted later this year. Before taking a final position, the Commission will publish a notice in the Official Journal, describing the proposed changes and inviting interested third parties to provide their comments within one month. ■

German Book Prices

This case, which was the subject of an "understanding" in 2000 between the Commission and German publishers and booksellers about the system of fixed book prices, has been re-opened. The Commission considers that, contrary to the understanding, direct cross-border sales of books to final consumers via the Internet at a price other than the fixed price for Germany have been systematically regarded as a circumvention of the system; and that refusals by certain German publishers and book-wholesalers to supply Internet booksellers established outside Germany to prevent direct cross-border sales of books to consumers at a price other than the fixed price for Germany were based on illegal collusion. (Source: Commission Statement IP/01/1035, dated 19 July 2001.)

ABUSE OF DOMINANT POSITION (TYRES): THE MICHELIN CASE

Subject: Abuse of dominant position
Rebates
Tying agreements
Market entry
Fines

Industry: Tyres (for heavy vehicles)
(Implications for other industries)

Parties: La Manufacture Française de Pneumatiques Michelin (Michelin)

Source: Commission Statement IP/01/873, dated 20 June 2001

(Note. There is an almost old-fashioned ring about this case, partly because, in general, abuses of a dominant position are becoming increasingly uncommon and partly because, as far as Michelin is concerned, it is a throwback to the early 1980s, when the earlier Michelin case was decided. The present case illustrates the classic method of foreclosing the market by means of special incentives to dealers; it is a reminder that incentives, such as rebates and bonuses, are not necessarily unlawful but can be a weapon in the hands of a company with a dominant position on the market. The fine imposed by the Commission was relatively heavy, in part because of the repetition of the "offence"; but it would have been higher still if the company had been less cooperative in the course of the investigation. For a discussion of the principles which the Commission must observe when calculating a fine, and in particular the weight to be attached to the question of cooperation, see the judgment of the Court of First Instance in the Tate and Lyle case in this issue, particularly paragraphs 157 to 164; in the latter paragraph, the earlier Michelin case is cited by the Court.)

The Commission has decided to impose a fine of €19.76 million on the French tyre maker Michelin for abusing its dominant position in replacement tyres for heavy vehicles in France during most of the 90s. After a careful and lengthy investigation, the Commission has come to the conclusion that Michelin's complex system of quantitative rebates, bonuses and other commercial practices illegally tied dealers and foreclosed the French market to other tyre manufacturers. The infringement is all the more serious in that this is the second time that Michelin has engaged in similar anti-competitive behaviour in Europe.

In the Commission's view, dominant companies need to be careful not to engage in practices which exclude other companies from the market. Rebates and bonuses are normal commercial practices; but, as the Court of Justice has confirmed, some types are illegal when they are granted by a company in a dominant position and have an exclusionary effect.

In May 1996 the Commission started an investigation on its own initiative into the commercial practices of la Manufacture Française de Pneumatiques Michelin (Michelin) amid suspicions that Europe's largest tyre manufacturer had violated European Union competition law. About a year later (June 1997), Commission officials carried out inspections at Michelin's premises in France, which provided evidence that the company was abusing its dominant position in the French market for retread and new replacement tyres for heavy vehicles. The tyre market can be divided into two sectors, the original and the replacement equipment markets. Replacement tyres can be new or retread, that is. given a new tread if the casing is in sound condition.

The Commission has established that Michelin operated a complex system of quantitative rebates, bonuses and commercial agreements, which constitute a loyalty-inducing and unfair system in relation to its dealers. Michelin's commercial policy for both the retread and the new replacement tyre market had the effect between 1990 and 1998of keeping dealers closely dependent and preventing them from choosing their suppliers freely. This policy, which artificially barred competitors' access to the market, was suspended by Michelin in January 1999.

Article 82 of the EC Treaty prohibits abuses of dominant positions either individually or collectively in the European common market or in a substantial part of it insofar as it may affect trade between Member States. According to publicly available information, Michelin has a market share exceeding 50% of the market for new replacement tyres for heavy vehicles in France. As regards the French retread market, its share is even higher. None of its competitors is comparable in size. It can, therefore, be considered that Michelin holds a dominant position in France.

In 1981, the Commission found Michelin guilty of the same anti-competitive behaviour in the Netherlands. The Court of Justice ruled in the first Michelin decision and consistently in more recent cases, that quantity rebates with exclusionary effects are illegal when granted by a company in a dominant position for more than three months.

In setting the amount of the fine, the Commission took into account the fact that the infringement was of a serious nature, that it went on for a considerable number of years and that it had an appreciable effect on the European market. Moreover, this is the second time that Michelin has violated EC competition law: this is an aggravating circumstance. On the other hand, Michelin co-operated with the Commission's investigation and put an end to the infringement before the Statement of Objections was sent to the company. This counted as a mitigating circumstance in calculating the final amount. Michelin has two months to pay the fine or to appeal to the European Court of First Instance. ■

The Court case reported in this issue is taken from the website of the Court of Justice of the European Communities. The contents of this website are freely available. Reports on the website are subject to editing and revision.

MARKET SHARING (AIRLINES): THE SAS / MAERSK CASE

Subject: Market sharing
Cooperation agreements
Non-competition clauses
Fines

Industry: Airlines
(Implications for other industries)

Parties: SAS (Scandinavian Airlines System)
Maersk Air A/S

Source: Commission Statement IP/01/1009, dated 18 July 2001

(Note. Here are two more substantial fines to add to the fine imposed on Michelin. In the present case, the parties notified a cooperation agreement to the Commission. As a rule, the Commission tends to look kindly on cooperation agreements; but this time it considered, rightly as it turned out, that there was more unseen cooperation behind the scenes than there was in the notification itself. In fact, the astonishing evidence emerged that senior executives decided that "the parts of the documents that infringed Article 85(1) would have to be put in escrow in the offices of the lawyers from both sides". The unseen cooperation involved deals by which SAS gained largely exclusive control of a major air route, in exchange for withdrawing from routes in which Maersk had a primary interest.)

The Commission has decided to fine Scandinavian airlines SAS and Maersk Air €39.375 million and €13.125 million respectively for operating a secret agreement which led to the monopolisation by SAS of the Copenhagen-Stockholm route. This was to the detriment of over one million passengers who use that major route every year. In addition, it led to the sharing out of other routes to and from Denmark.

SAS (Scandinavian Airlines System) is a consortium partly owned by the Swedish, Danish and Norwegian states. Maersk Air A/S is a Danish company owned by the A.P. Møller group. Together, they are the two main airlines operating flights to and from Denmark, the country most concerned by the investigation. The two companies concluded a cooperation agreement in October 1998 which they notified to the European Commission for regulatory approval. The notification, however, focused on code-sharing provisions, under which SAS could market Maersk Air's flights as SAS flights, and the extension of SAS's frequent flyer programme to Maersk's clients.

The airlines carefully omitted what amounts to being a broad market-sharing agreement, the most visible part of which led to the withdrawal by Maersk Air from the Copenhagen-Stockholm and SAS's exit from the Copenhagen-Venice

and Frankfurt-Billund routes. Billund is Denmark's second airport in the western province of Jutland. Suspecting that the cooperation agreement was of a greater restrictive scope and restrictive character, the Commission carried out inspections at the companies' headquarters in June 2000, where it gathered evidence that SAS and Maersk Air had agreed to an overall non-competition clause, according to which Maersk Air would not launch any new international routes from Copenhagen without approval from SAS. Conversely, the parties agreed that SAS would not operate on Maersk Air's routes out of Jutland's Billund. The parties also agreed to respect the share-out of the domestic routes.

In addition to the overall non-competition clause, SAS and Maersk Air agreed specifically that Maersk Air would cease competing with SAS on the Copenhagen-Stockholm route as from 28 March 1999, when the overall cooperation agreement came into force. This is a major route in Scandinavia and a big intra-European route with over one million passengers a year and as many as twenty daily flights in each direction.

As compensation for Maersk Air's withdrawal from the Copenhagen - Stockholm route, SAS stopped operating between Copenhagen and Venice at the end of March 1999 and Maersk Air started operations on the route at the same moment. SAS stopped flying on the Billund-Frankfurt route in January 1999, leaving Maersk Air as the only airline on the route. Until then, SAS and Maersk Air had been competing on this route.

This secret agreement between SAS and Maersk Air is a serious violation of the European Community's competition law and damaging for Scandinavian passengers who were left with a reduced choice, or no choice at all, and potentially higher prices. Before the agreement, the Copenhagen-Stockholm route was operated by SAS, Maersk Air and Finnair. Maersk's withdrawal from the route caused the exit of Finnair, as the two airlines previously had a code-sharing agreement. Currently, SAS has close to 100% of the traffic between the Danish and the Swedish capitals.

Commenting on the case, the Competition Commissioner Mario Monti said that this was a clear case of two airlines sharing markets illegally to the detriment of passengers and that the Commission was determined to ensure that the liberalisation achieved in European air transport in the last decade should not be undermined by anti-competitive agreements. He hoped that the fines imposed on SAS and Maersk Air would serve as a deterrent to the two airlines concerned and to others.

The antitrust violation at stake is particularly serious because of its nature, the size of the relevant geographic market and the actual impact on the market. The companies were also fully aware that the agreement was illegal as they deliberately tried to conceal it. A meeting of the project managers' group of 26 June 1998 was "ordered", in a written record, "to maintain strict confidentiality and not to keep documents in the office", while another record of a meeting of the same managers' group two months later stated that "The parts of the documents

that infringe art.85(1)...(will have) to be put in escrow in the offices of the lawyers from *both sides*".
The Commission established that the infringement lasted between September 5, 1998, which is the date of one of the documents that recorded the parties' agreement, and 15 February 2001, when the parties regained their freedom to compete following the receipt of the Commission's statement of objections.

To establish the amount of the fines, the Commission took into account, among other elements, the difference in size between the two airlines, the fact that the agreement in effect extended the market power of SAS, the need to set the fines at a level which ensured that they had a sufficiently deterrent effect, and the degree to which the parties cooperated with the Commission after the on-site *inspections*. ■

Price differentials for cars (see Comment on page 176):

Small segments A and B:	1/5/2001	1/11/2000	1/5/2000
Opel Corsa	37.4%	24.6%	14.3%
Ford Fiesta	16.5%	20.5%	20.1%
Renault Clio*	31.3%	23.0%	24.0%
Peugeot 106*	23.5%	11.4%	14.3%
VW Polo	28.0%	29.1%	26.8%
Medium segment C:	1/5/2001	1/11/2000	1/5/2000
VW Golf	33.1%	32.9%	30.1%
Opel Astra	51.6%	27.6%	28.7%
Ford Focus	18.6%	18.1%	14.5%
Renault Mégane*	25.8%	18.5%	17.6%
Peugeot 306*	24.2%	18.9%	14.6%
Large segments D, E and F:	1/5/2001	1/11/2000	1/5/2000
BMW 318I	13.4%	13.9%	14.1%
Audi A 4	13.7%	21.0%	15.5%
Ford Mondeo	22.2%	29.9%	29.8%
Opel Vectra	48.5%	25.2%	23.6%
VW Passat	22.3%	22.1%	25.2%
Source: Commission Statement IP/01/1051, dated 23 July 2001			

ANCILLARY RESTRAINTS

The Commission has adopted a new Notice on restrictions directly related and necessary to concentrations ("ancillary restraints"), replacing a previous notice of 1990. Under the new policy, the Commission will no longer assess whether any restrictions entered into by parties in the context of a merger, such as non-competition clauses or purchase and supply obligations, are "ancillary", in which case they would automatically benefit from the effect of the clearance decision. Instead, companies and their lawyers will have to assess whether any such restraints can be covered by the merger decision or by a relevant block exemption or whether they might fall under article 81. The Notice provides guidance to the legal and business communities, based on past Commission practice and experience in this field. It is also in line with the ongoing modernisation of the European Community's competition policy.

The new Notice deals with the treatment of restrictions directly related and necessary to the implementation of concentrations, which are more commonly referred to as "ancillary restraints". These are contractual agreements which companies frequently enter into in the context of mergers and include clauses such as service and distribution agreements (to be treated as supply agreements), non-solicitation and confidentiality clauses (to be treated as non-competition clauses), and licences of trademarks, business names, design rights, copyrights and similar rights.

The duration of non-competition clauses which are to be considered "ancillary" has been limited to two years for cases involving the protection of goodwill only, and to three years for cases involving the protection of both know-how and goodwill. The duration of non-competition clauses in the case of joint ventures has been limited to five years in general and may, in any event, not exceed the lifetime of the joint venture in order to be considered « ancillary ». Durations which exceed three years need to be duly justified, based on the particular circumstances of the case.

Clauses which cannot be considered « ancillary » are not per se illegal. They are just not automatically covered by a merger decision of the Commission. Nevertheless, they can be justified under Article 81 of the Treaty or fall within the scope of a block exemption regulation. The Commission has never been under a legal obligation to assess ancillary restraints in its decisions under the Merger Regulation. Any such statements in past merger decisions have been of a purely declaratory nature, without having a legally binding effect on the parties or on national courts.

Source: Commission Statement IP/01/908, dated 27 June 2001

CONCERTED PRACTICES (SUGAR) THE TATE & LYLE CASE

Subject: Concerted practices
Information exchanges
Pricing policy
Fines
Agriculture

Industry: Sugar
(Implications for other industries)

Parties: Tate & Lyle plc
British Sugar plc
Napier Brown & Co. Ltd
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 12 July 2001, in Joined Cases T-202/98, T-204/98 and T-207/98 (*Tate & Lyle plc*, applicant in Case T-202/98, *British Sugar plc*, applicant in Case T-204/98, *Napier Brown & Co. Ltd*, applicant in Case T-207/98, v *Commission of the European Communities*)

(Note. This is a continuation of the report, started in our last issue, on a case having some importance for the clarification of a number of issues both in relation to the substance, on which the applicants had each of their pleas dismissed, and in relation to the Commission's practice and policy on imposing fines, in which the principal applicant scored a substantial success. Essentially, this second part of the judgment deals with the following issues:

- *the object or effect of a restriction of competition;*
- *the possible impact of restrictions of competition on trade between Member States;*
- *the proportionality of fines, having regard to the structure of the market;*
- *the principle of equal treatment in the imposition of fines;*
- *the question whether the acts complained of were not intentional;*
- *the deterrent effect of fines; and*
- *the reduction of fines where the parties cooperate with the Commission.*

It was on this last point that the applicant succeeded in persuading the Court that the Commission had not properly followed its own practice, as laid down in the Guidelines on Cooperation and Fines.)

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

[Paragraphs 69 and 70: Arguments of the parties]

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*, paragraph 89; Case T-152/89, *ILRO v Commission*, 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

[Paragraphs 75 to 77: Arguments of the parties]

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*, paragraph 5; Joined Cases 209/78 to 215/78 and 218/78, *Van Landewyck and Others v Commission*, 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*, paragraph 143; Joined Cases T-213/95 and T-18/96, *SCK and FNK v Commission*, paragraph 175; Joined Cases T-24/93 to T-26/93 and T-28/93, *Compagnie Maritime Belge Transports and Others v Commission*, 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*, 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*, 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*, 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.

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

[Paragraphs 87 to 97: Arguments of the parties]

Findings of the Court

98. Under Article 15(2) of Regulation No 17, the Commission may impose fines of from €1,000 000 to €1m, 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*, 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*, 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*, 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*, paragraph 59; Case T-352/94, *Mo och Domsjö v Commission*, paragraph 268, confirmed on appeal in Case C-283/98P, *Mo och Domsjö v Commission*, 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*, 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 the infringement 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

[Paragraphs 116 and 117: Arguments of the parties]

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 that the actions complained of were committed unintentionally

[Paragraphs 122 to 126: Arguments of the parties]

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*, paragraph 45; *Belasco*, paragraph 41; Case T-141/89, *Tréfileurope v Commission*, paragraph 176; Case T-310/94, *Gruber + Weber v Commission*, 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 thefact 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 account to be taken of the deterrent effect of fines

[Paragraphs 130 to 132: Arguments of the parties]

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

[Paragraphs 137 and 138: Arguments of the parties]

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

[Paragraphs 141 and 142: Arguments of the parties]

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*, 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*, 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

[Paragraphs 150 to 156: Arguments of the Parties]

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*, 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 € pursuant to Article 2(1) of Council Regulation EC/1103/97, to €5.6m.

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.

The Court's Ruling

The Court 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. ■

Correction: The page number shown in the July 2001 issue for the Volkswagen (State Aid) Case should have been 175, not 106.