COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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Fines on Cartels

In this issue there is a brief report of the case involving the Graphite Electrodes cartel. The Commission annexed to its Statement on the case a Table, reproduced below, showing the ten highest fines imposed on cartels. It is a reminder of the severity of the penalties likely to follow collective price-fixing and market sharing.

Within the figures showing the "Total Amount" of the fine, there are the different amounts of fine imposed on the individual corporations forming the cartel. These vary widely in most cases, particularly since the adoption of the so-called Leniency Notice, under which members of the cartel who cooperate most readily with the Commission are granted greater leniency. In the Graphite Electrodes case, it was the first time that the Commission had granted a substantial reduction of a fine (70%) under the terms of the Notice. Showa Denko benefited from this reduction, having been the first company to co-operate with, and provide decisive evidence of the cartel to, the Commission.

The ten largest cartel fines
(Those marked with an asterisk were reduced by Court judgments)

Year	Case	Total amount (in €)
1998	TACA	272,940,000
2001	Graphite Electrodes	218,800,000
1994	Carton*	139,280,000
1994	Ciment*	113,377,000
2000	Amino acids	109,990,000
1999	Seamless steel tubes	99,000,000
1998	Preinsulated pipes	92,210,000
1994	Poutrelles*	79,549,000
1986	Polypropylene*	54,613,000
1998	British Sugar*	48,800,000

Source: Commission Statement IP/01/1010, of 18 July, 2001; the Notice is on http://europa.eu.int/comm/competition/antitrust/legislation/96c207_en.html

National Courts: Commission Statement

Subject: National courts
Private enforcement
Civil proceedings

Industry: All industries

Source: Commission Document SPEECH/01/258, being the text of a Speech by Mr. Mario Monti, Commissioner for Competition Policy, Commission of the European Communities, entitled "Effective Private Enforcement of EC Antitrust Law", delivered at the Sixth EU Competition Law and Policy Workshop, held in Florence, on 1-2 June 2001

(Note. The text reproduced below is a slightly edited version of the speech: it concentrates on the important effects which are expected to flow from the proposed Council Regulation on Competition Policy. By far the greatest effect, in the present context, will be to stimulate the enforcement of competition policy by means of civil proceedings in the Member States' national courts. In Europe this concept is far less developed than it has been for many years in the United States, where civil actions, with their powerful remedy of triple damages, have been an important factor in shaping anti-trust laws. How far the proposed Regulation will encourage a similar development in national jurisdictions, in which civil remedies for "breach of statutory duty" may not be known, is uncertain: the Regulation will not directly harmonise national laws in this field. It may, however, be reasonably expected that indirect harmonisation will follow.)

The case for more private enforcement

As you are aware, the Commission has proposed a major reform of the way the Community competition rules are applied. One important objective of the reform is to pave the way for more effective private enforcement of the EC competition rules. Obviously, we do not expect crowds of lawyers to flock in front of the court buildings in order to file lawsuits on the day the new Council Regulation enters into force. However, it is our aim that companies and individuals should increasingly feel encouraged to make use of private action before national courts to defend the subjective rights conferred on them by the EC competition rules.

The intentions behind this aspect of the reform are threefold. First, the combined enforcement action by the Commission, the national competition authorities and the national courts will strengthen the impact of the rules as such. The competition rules are there to ensure that consumers benefit from lower prices and better products as a result of effective competition in markets. Effective remedies must be available to stop infringements and to ensure that parties harmed by a violation obtain compensation. Consumers should also have more

access to remedial action in the form of private enforcement to protect their rights and to obtain damages in compensation for losses suffered.

Second, the reform, by fostering *decentralised* application, should bring the EC competition rules closer to citizens and undertakings throughout the Internal Market. For a future enlarged Community, with 27 or 28 Member States, it is not a desirable or even a viable concept that the application of the EC competition rules should largely be reserved to administrations acting as public enforcers. Companies or individuals harmed by an infringement of the EC competition rules should, as a general rule, be able to seek redress in the locally competent civil or commercial court, possibly before a locally competent specialised court or specialised chamber of a court. The Commission, for its part, should focus on the functions it is best placed to carry out due to its central position. This includes the development of Community competition policy through the legislative framework as well as through individual decisions that can serve as precedents. This also includes a function as a resource centre for the national courts as foreseen in Article 15 of the proposed Regulation.

Third, the reform should enable us to make the most of the complementary functions of public and private enforcement of the competition rules. Public enforcers are particularly well equipped to investigate serious, typically secret infringements, making use of their investigative powers. In addition, they can be well placed to bring cases in areas where the application of the rules is not yet entirely clarified (and where it is therefore unlikely for private parties to take the risk of litigating), thereby contributing to further clarification of the rules through precedent.

National courts on the other hand are particularly well placed to solve contractual conflicts between the parties to an agreement. So far, this function of the national courts has been hampered by the Commission's monopoly on the application of Article 81(3), as the courts were often obliged to suspend proceedings in accordance with the *Delimitis* case law of the Court of Justice. In addition, national courts have the power to grant damages to a party that is the victim of an infringement in compensation for the losses it has suffered. Action before national courts in this respect should increase.

A range of elements must come together to make private enforcement more effective. The Commission has proposed to give national courts the power to apply Article 81 as a whole, thereby abolishing the current division of jurisdiction under which the national courts can only apply Article 81(1) whereas the Commission has exclusive power to apply Article 81(3). The reform of the implementing rules for Articles 81 and 82, as proposed by the Commission, is a basic condition for national courts to play their *full* role in the application of the competition rules as they have done for a long time in other areas of Community law.

The abolition of the Commission's monopoly to apply Article 81(3), however fundamental it is, may not by itself suffice to boost private enforcement of the competition rules in Europe. The Commission is proposing a range of other

elements in the text of the draft Regulation or in the wider framework of the overall reform effort.

Facilitating the application of Article 81(3) by national judges

The discussion of the role of national judges after the reform has so far largely focussed on the question, whether judges will be able to apply Article 81(3). I do not want to linger on this aspect today, but would like to recall three points. Article 81(3) is a legal rule which must be applied when its four conditions are fulfilled. The application of these conditions can require economic analysis and balancing of interests. However, the provision is not fundamentally different in nature from other rules applied by judges. The Commission is therefore confident that they will not in general face insurmountable problems in this respect.

The proposed new Regulation maintains the instrument of block exemption regulations. They retain their constitutive nature and must be applied by national courts if their conditions are fulfilled, subject to control by the Court of Justice. This is an important element to give guidance to companies and distinguishes the European system from US anti-trust law.

In addition to the block exemption regulations, the Commission has promised to continue working on further elements to provide guidance to companies and judges, such as guidelines and Notices, such as the *De minimis* Notice. The Commission has in particular committed itself to producing guidelines on the methodology for the application of Article 81(3) to provide all national courts in the Community with an analytical framework.

Private enforcement raises further questions

When dealing with a case requiring the application of the EC competition rules, however, the national courts are not only confronted with the task of interpreting Article 81(3) in a legally correct and coherent manner. They also face a range of questions related to the facts of the case or situated at the borderline between fact-finding and legal analysis. This aspect takes on particular importance with regard to claims for damages. In this field, expansion of private enforcement is particularly desirable in order to ensure effective remedies for parties harmed by infringements. At the same time, there is a general impression that there can be problems under national law and procedures with regard to proving the infringement and the causal link between the alleged infringement and the damage suffered as well as with regard to the determination of the extent of the damage to be compensated. Arguably, in the light of this complexity, additional elements must come together in order to instil real life into the judges' power to apply Articles 81 and 82.

Elements in the Regulation

The proposed Regulation essentially contains two very specific elements addressing this borderline area of EC competition law and civil procedures: the rule on burden of proof and the rule on cooperation with national courts.

First, the proposed Regulation expressly maintains the repartition of the burden of proof for the two different parts of Article 81. The party alleging an infringement has to demonstrate that the conditions of the prohibition rule in Article 81(1) are fulfilled. The party wanting to invoke the exception laid down in Article 81(3) has to demonstrate that the conditions of that provision are met.

Second, the proposal provides for a framework for the Commission (and the national competition authorities) to interact with national courts. The proposed Article 15 formalises the current practice of providing opinions to national courts if they so request. This instrument can be useful in the new system. The time has come where more cooperation between courts and administrations is required as a result of the complexity of certain matters to be decided by courts. Administrations can help by providing certain factual information in their possession or by giving expert opinions to judges, always subject to legal challenge.

This instrument is not conceived as a substitute for the preliminary reference procedure of Article 234 of the Treaty. Whereas references to the Court of Justice concern questions of legal interpretation, national courts may, in particular, want to address themselves to the Commission with questions on economic issues, such as questions relating to market definition. Article 15 can therefore typically be of help in the borderline area between facts and law.

The *amicus curiae* proposal

The Commission also envisages that it and the national competition authorities should have the power to make written or oral submissions as *amicus curiae* before national courts. In the case of the Commission this power would be limited to cases presenting a Community public interest. Such an interest would in particular exist in cases raising important issues of coherence as regards competition policy. The Commission would not intervene on behalf of one of the parties but would present its opinion in the interest of a coherent application of the law.

The potential contribution by judges

In fact it appears that the procedural rules for civil courts, though highly complex, are a flexible tool. Judges generally have a large margin of appreciation as to how they conduct the proceedings in a case. They can adapt the course of the procedures to the varying subjects that come before them. Questions to be explored include to what extent and in what ways civil courts can, on the basis of the principles governing their procedures, take account of the specific requirements of cases involving the application of the EC competition rules. The toolbox of national courts presents a potential to tackle the apparent problems, in particular with regard to claims for damages. National courts should make full use of the tools available to them in order to give effect to the competition rules. When they find themselves blocked from effectively applying the EC competition rules due to aspects of their national procedures, national courts should look

carefully into the existing case law of the Court of Justice for guidance; and they should not hesitate to request preliminary rulings from the Court on issues they find unresolved. The answers by the Court of Justice can provide Community-wide solutions for such questions.

National judges also increasingly look outside the confines of their own Member State. Cooperation between judges across borders is an important tool for the collection of evidence. An increase in such cooperation and exchange of ideas may also provide judges with opportunities to be inspired by solutions found elsewhere.

In summary, I believe that national judges have some tools to contribute to more effective private enforcement of the EC competition rules. In-depth research of the factors at work in the different national systems can pave the way for a gradual development of solutions by the courts of the Member States. We should bear in mind that, the system of private enforcement in the United States,in the form of claims for damages, has developed only gradually.

The possible need for Community legislation on civil procedures

It is a matter for consideration whether EC legislation on specific issues at the interface between EC competition law, the law of torts and civil court procedures could help to enhance the effectiveness of private enforcement. This is a delicate question to deal with. The Commission's proposals for reform already introduce substantial changes. We should not try to achieve too much at the same time if we want to obtain real progress in reasonable time. This is not to exclude, at a later stage, an exploration of this course of action.

The possible need for criminal sanctions for infringements

This discussion is an expression of the growing awareness of the harm caused to consumers by violations of the competition rules. However, at this stage, the introduction of criminal sanctions is not the only way forward to make enforcement of the EC competition rules more efficient. Criminal sanctions involve a large range of questions. Where they could help to solve certain specific problems they also risk creating others.

More efficient enforcement in the EC at this stage can best be achieved by persevering in the course that the Commission has already started. First, the reform of the implementing rules will permit the Commission, as well as the national enforcers, to concentrate more on the prosecution of serious infringements. Together with amended investigation powers, this will increase the risk of detection for companies that infringe the law. Second, there is a potential for further adapting fines on companies at European as well as at national level to reflect better the harm done by violations of the competition rules. Third, the increasing risk of private claims for damages should contribute to the deterrent effect of the competition rules. These elements taken together will make an impact on companies in real terms. They will also show that the Commission is serious about combating violations which damage consumers. ■

PRICE-FIXING (GRAPHITE ELECTRODES): THE SGL CARBON CASE

Subject: Price-fixing
Market sharing

Industry: Graphite electrodes
(Implications for most industries)

Parties: SGL Carbon AG (and other members of the cartel, listed below)

Source: Commission Statement IP/01/1010, dated 18 July 2001

(Note. This case shows that classic cartels are still alive in the world: their aims, in price-fixing and market sharing, are typical. If the full report of the case reveals points of special legal interest, they will be discussed in a future issue. Meanwhile, the two main points of interest are the hefty fines imposed and the descriptions of the "Top Guy" meetings.)

The Commission has fined Germany's SGL Carbon AG, UCAR International of the United States and six other companies a total of €218.8m for fixing the price and sharing the market for graphite electrodes, which are ceramic-moulded columns of graphite used primarily in the production of steel in electric furnaces. The Commission's decision comes after a thorough investigation, which established that the eight producers, which together account for virtually all production world-wide, operated a secret cartel during most of the 1990s, resulting in considerably higher prices than if the companies had competed against each other.

Following an investigation, which started in 1997, the Commission has established that SGL Carbon AG (Germany), UCAR International Inc. (USA), Tokai Carbon Co. Ltd. (Japan), Showa Denko K.K. (Japan), VAW Aluminium AG (Germany), SEC Corporation (Japan), Nippon Carbon Co. Ltd. (Japan) and The Carbide Graphite Group Inc. (USA) participated in a worldwide cartel between 1992 and 1998 through which they fixed the price and shared out the market for graphite electrodes. These are ceramic-moulded columns of graphite used primarily in the recycling of scrap steel into new steel in electric arc furnaces, also referred to as 'mini-mills'. The electric arc process accounts for some 35% of steel production in the European Union. The market at stake in 1998 was worth €420m in the European Economic Area.

The cartel started in 1992 at the instigation of SGL and UCAR, which together supply more than two thirds of European demand, and continued until 1998, despite the fact that competition authorities in the United States, Canada and the EU had begun investigations. The companies held regular meetings, some at chief executive level (dubbed "Top guy" meetings), to agree concerted price increases usually triggered by the "home producer" or market leader and then followed in other parts of the world. The Commission has evidence of the secret

meetings, often held in Switzerland, and of the illegal agreements which was provided by some of the companies involved under Commission rules which provide for full or partial immunity from fines for companies that supply information on cartels. The companies were well aware that they were infringing anti-trust law as they took great pains to conceal meetings hotel and travel expenses were paid in cash with no explicit reference to those meetings in expense claims; to avoid keeping any written evidence of the meetings and agreements; and, when the documents existed, to use code names to refer to the cartel participants, such as "BMW" for SGL, "Pinot" for UCAR and "Cold" for the group of Japanese companies.

In the period in which the cartel operated, prices of graphite electrodes increased 50 percent. The concerted price increases became less regular as the companies became aware of the anti-trust investigations. The Commission characterised the companies' behaviour as a serious infringement of the EC competition rules and adopted a decision imposing fines totalling €218.8m. The following is a list of the individual fines in € millions: SGL Carbon, 80.2; UCAR International, 50.4; Tokai Carbon, 24.5; Showa Denko, 17.4; VAW Aluminium, 11.6; SEC, 12.2; Nippon Carbon, 12.2; Carbide Graphite, 10.3.

The Commission takes into account the gravity of antitrust violations, their duration and the existence, if any, of aggravating or mitigating circumstances to calculate fines. It also bears in mind the companies' share of the market concerned and their overall size. The calculation of the fines is not made by reference to the companies' turnover rather according to the Commission's guidelines for setting fines of 1998; but the final figure cannot be higher than 10% of a company's annual sales.

SGL and UCAR were the driving forces behind the cartel. They initiated the contacts in 1991, developed the whole plan to set up a cartel and organised the first "Top Guy" meeting in May 1992 at which they adopted a "common position" vis-a-vis the other producers; hence the highest fines. Most of the cartel members committed an infringement of long duration (more than five years). Aggravating circumstances were taken into account for several of them (role of ringleader, continuation of the infringement after the Commission started its investigation and attempts to obstruct the Commission's investigation). The Commission's case started in 1997 when it carried out "surprise" investigations.

At the beginning of 1998, Showa Denko co-operated with the Commission under the terms of the Leniency Notice. This is the first time that the Commission has granted a substantial reduction of a fine (70%) under the terms of the Leniency Notice. Showa Denko benefited from this reduction, having been the first company to co-operate and provide decisive evidence of the cartel to the Commission. UCAR also co-operated with the Commission at an early stage of the investigation. The Commission therefore granted a reduction of 40%. In the US, the major parties to the cartel pleaded guilty and paid substantial fines, including $110 million for UCAR and $135 million for SGL. Two former executives of the largest US producer, UCAR, were jailed for several months. ■

ACQUISITIONS (AEROSPACE): THE GE / HONEYWELL CASE

Subject: Acquisitions
Prohibitions

Industry: Aerospace, avionics, aircraft engines and components

Parties: General Electric Company
Honeywell Inc

Source: Commission Statements IP/01/939, dated 3 July 2001, and IP/01/855, dated 18 June 2001

(Note. Significant features of this case are, first, the fact that it is one of the relatively rare cases in which a proposed acquisition or merger has been prohibited outright; second, that it is a case involving two American corporations; third, that it is only the second case in which a proposal exclusively involving American firms has been prohibited; fourth, that the United States and European authorities disagreed on the merits of the proposal; and, fifth, that the Commission felt it necessary to issue a statement, only two weeks before the decision was made, denying that the decision would be politically motivated. The statement was somewhat disingenuous: any political consultant to the companies concerned would have been likely to advise them that the merger would be politically unacceptable. From the point of view of the United States, and indeed of any trading blocks or countries outside the European Union, this case may prove to be a dangerous precedent.)

The Commission has decided to prohibit the proposed acquisition by General Electric Co. of Honeywell Inc. This follows an in-depth investigation in the markets for aero-engines, avionics and other aircraft components and systems. In adopting this decision, the Commission concluded that the merger would create or strengthen dominant positions on several markets and that the remedies proposed by GE were insufficient to resolve the competition concerns resulting from the proposed acquisition of Honeywell.

According to the Commission, the merger between GE and Honeywell, as it was notified, would have severely reduced competition in the aerospace industry and resulted ultimately in higher prices for customers, particularly airlines. However, there were ways of eliminating these concerns and allowing the merger to proceed; but the companies were not able to agree on a solution which would have met the Commission's competition concerns.

Mr Monti, the Commissioner responsible for Competition Policy said, in relation to the co-operation with the US antitrust authorities, that the Commission and the United States Department of Justice had worked in close co-operation during this investigation. It was unfortunate that, in the end, we reached different conclusions, but each authority had to perform its own assessment and the risk of

dissenting views, although regrettable, could never be totally excluded. This did not mean that one authority was doing a technical analysis and the other pursuing a political goal, as some might pretend, but simply that we might interpret facts differently and forecast the effects of an operation in different ways. The GE/Honeywell proposal was a rare case in which the transatlantic competition authorities had disagreed. Bilateral co-operation needed to be strengthened in the future to try to reduce this risk.

GE and Honeywell notified their merger agreement for regulatory clearance in Europe on 5 February this year. On March 1, the Commission started an in-depth investigation which demonstrated that GE alone already had a dominant position in the markets for jet engines for large commercial and large regional aircraft. Its strong market position, its financial strength and its vertical integration into aircraft leasing were among the factors which led to the finding of GE's dominance in these markets. The investigation also showed that Honeywell was the leading supplier of avionics and non-avionics products, as well as of engines for corporate jets and of engine starters, which are a key input in the manufacture of engines.

The combination of the two companies' activities would have resulted in the creation of dominant positions in the markets for the supply of avionics, non-avionics and corporate jet engines, as well as to the strengthening of GE's existing dominant positions in jet engines for large commercial and large regional jets. The dominance would have been created or strengthened as a result of horizontal overlaps in some markets as well as through the extension of GE's financial power and vertical integration to Honeywell activities and of the combination of their respective complementary products. Such integration would enable the merged entity to leverage the respective market power of the two companies into the products of one another. This would have the effect of foreclosing competitors, thereby eliminating competition in these markets, ultimately affecting adversely product quality, service and consumers' prices.

On 14 June, GE proposed a number of undertakings intended to address these concerns which were considered insufficient to remove the competition problems identified by the Commission. On 28 June, well beyond the deadline for the submission of undertakings, GE proposed a new set of remedies. This new package could not be accepted either, because it did not resolve the problems identified in a sufficiently clear way at such a very late stage in the procedure.

Given the nature of the competition concerns resulting from the proposed merger and the fact that the GE was unable to propose undertakings that would have removed all competition concerns, the Commission had no choice but prohibit the merger.

This is only the fifteenth time the Commission has blocked a merger since September 1990, when it became the clearing-house for mergers and acquisitions requiring regulatory approval in the European Economic Area; that is, the Member States of the European Union and Norway, Iceland and Liechtenstein.

It is only the second time it has prohibited a merger involving only American firms.

Prior Statement by the Commission

Two weeks before the decision was announced, the Commissioner had made a brief statement on the case. "In the last few days," he said, "the Commission's review of the proposed merger between General Electric and Honeywell has been the subject of critical comment. This criticism is not only unjustified but also hard to understand since the case has not been decided yet. I deplore attempts to misinform the public and to trigger political intervention. This is entirely out of place in an anti-trust case and has no impact on the Commission whatever. This is a matter of law and economics, not politics.

"The Commission has been reviewing mergers and acquisitions for over ten years and each time it has applied the same basic principles and the same market dominance test, namely, whether or not the market would remain sufficiently competitive so that consumers would continue to have products to choose from at competitive prices. The nationality of the companies and political considerations have played and will play no role in the examination of mergers, in this case as in all others."

Mr Monti stressed that the merger of GE and Honeywell would combine GE's strong position in the aircraft engine markets with Honeywell's similarly strong position in avionics and non-avionics such as weather turbulence detection products, collision avoidance and flight management systems and so-called black boxes. To this powerful combine, one must also add GE's leasing and financial arms, respectively GECAS the largest purchaser of aircraft, ahead of any airline -- and GE Capital. This could lead to less competition in the engine and in the aerospace sectors and result in higher prices for customers in the medium term.

The merger has raised strong concerns among suppliers and customers, i.e. airlines, on both sides of the Atlantic. Several US firms have complained and took an active role at a hearing organised by the Commission at the end of May. On the other hand, and contrary to some statements reported in the media, the large aircraft manufacturers Boeing and Airbus have not been particularly active in the proceedings.

During intensive and constructive discussions with the parties the Commission offered guidance on the identification of undertakings which could solve the competition concerns. In particular, the Commission explored commitments with the parties which would have entailed smaller divestments in the aerospace industry than originally envisaged by the parties, complemented, however, by a structural commitment to modify the commercial behaviour of GECAS, without puttting in question the control by GE. The Commission regrets that this avenue has not been pursued. ■

SUPPLY AGREEMENTS (BREWING): THE ROBERTS CASE

Subject: Supply agreements
Relevant market

Industry: Brewing

Parties: Colin and Valerie Roberts
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 5 July 2001, in Case T-25/99, (*Colin Arthur Roberts and Valerie Ann Roberts v Commission of the European Communities*)

(Note. Although there are several points of interest in this case, the judgment is long and circumstantial; and a single point has been selected for emphasis in the extract from the judgment set out below. The point concerns the relevant market in the industry in question: that is, in the British system of licensed premises. The case provides a classic example of the authorities determining the identity and extent of the relevant market and differentiating between the sectors of what may appear to be a single product or service market. The applicants in this case took the view that the outlets for alcoholic beverages constituted the relevant market; but the Commission drew a distinction, which the Court upheld, between retail shops, public houses or restaurants and clubs. The Court relied on, and went out of its way to explain, the judgments in the Delimitis and Brasserie de Haecht cases: it repeated, more than once, the principle that "beer consumption in public houses is not essentially dependent on economic considerations". Taken out of context, this is nonsense; and, even taken in context, it is an inaccurate and questionable way of expressing the position. However that may be, on this and on the many other points on which the applicants challenged the Commission's decision, the action was dismissed.)

Facts of the dispute

1. In the United Kingdom, alcoholic beverages may be sold by retail for consumption on the premises only by establishments holding a licence. There are currently three categories of licence:
- full on-licences, which authorise the sale of alcoholic beverages to customers who need not be residents or take a meal. These are granted to pubs, hotel bars and wine bars;
- restricted on-licences, which authorise the sale of alcoholic beverages subject to the requirement that the customer is a resident or takes a meal. These are granted to hotels and restaurants;
- club licences, which authorise the sale of alcoholic beverages only to customers who are members of the club in question.

2. The majority of establishments in the United Kingdom selling alcoholic beverages for consumption on the premises belong or are tied to a brewery, which is thereby assured of an outlet for the sale of its beer. There are essentially three ways in which such establishments are operated:
- the brewery owns the establishment, which is managed by one of its employees (tied managed public houses);
- the brewery owns the establishment and leases it to an operator who undertakes, besides paying rent, to comply with an obligation to buy beer produced by the brewery (tied tenanted public houses);
- the brewery does not own the establishment, but creates a tie by granting a loan on favourable terms to the owner, who in return accepts inter alia an obligation to buy that brewery's beer (loan-tied houses).

3. Since 1989 the British market in beer for consumption on the premises has undergone great changes in its structure. In that year the Monopolies and Mergers Commission produced a report on the supply of beer, containing recommendations. These were followed up by the adoption of the Supply of Beer (Tied Estate) Order 1989 (the 1989 Order) and the Supply of Beer (Loan Ties, Licensed Premises and Wholesale Prices) Order 1989. These orders were intended to limit the number of on-licensed establishments owned by or tied to a brewery.

4. Concentrations in the brewing sector in the United Kingdom led to the appearance by the mid-1990s of four breweries whose interests and geographical markets were no longer regional, as had traditionally been the case, but national. These were Scottish & Newcastle, Bass, Carlsberg-Tetley and Whitbread, which provided 78% of supplies of beer on the United Kingdom market. There remained several regional breweries, one of which is Greene King.

5. Mr and Mrs Roberts operate a pub in Bedfordshire belonging to Greene King. As tenants, they are subject to an obligation to obtain beer from Greene King.

6. They challenged in the national court the lawfulness of the beer purchasing obligation in their lease, arguing that it infringed Article 85(1) of the EC Treaty (now Article 81(1) EC).

7. In that context, on 23 May 1997, they lodged a complaint under Article 3(2) of Regulation 17 of 1992, in which they claimed that the lease used by Greene King was contrary to Article 85(1) of the Treaty.

8. On 7 November 1997 the Commission, pursuant to Article 6 of Commission Regulation 99/63/EEC on the hearings provided for in Article 19(1) and (2) of Regulation 17, sent the applicants a letter (the Article 6 letter) informing them that the information it had gathered did not justify upholding the complaint, stating the reasons for that conclusion, and fixing a time-limit within which they could submit any comments in writing.

9. By its decision of 12 November 1998 (the contested decision), it rejected the complaint on the ground that the standard lease used by Greene King did not fall

within the scope of Article 85(1) of the Treaty. In reply to the applicants' allegation, in their observations on the Article 6 letter, that there was an agreement on prices between the United Kingdom breweries, the Commission stated as an initial reaction that an assessment of the applicants' arguments did not allow the conclusion that such an agreement existed.

[Paragraphs 10 to 15: Procedure and forms of order sought by the parties]

The law

I - Applicability of Article 85(1) of the Treaty to the standard agreements concluded by Greene King

A - Definition of the relevant market

16. In point 60 of the contested decision, the Commission defined the relevant product market as that of the distribution of beer in establishments selling alcoholic beverages for consumption on the premises. It referred in particular to paragraph 16 of the judgment in Case C-234/89, *Delimitis*, where the Court of Justice made the following observations on beer supply agreements:

> The relevant market is primarily defined on the basis of the nature of the economic activity in question, in this case the sale of beer. Beer is sold through both retail channels and premises for the sale and consumption of drinks. From the consumer's point of view, the latter sector, comprising in particular public houses and restaurants, may be distinguished from the retail sector on the grounds that the sale of beer in public houses does not solely consist of the purchase of a product but is also linked with the provision of services, and that beer consumption in public houses is not essentially dependent on economic considerations. The specific nature of the public house trade is borne out by the fact that the breweries organise specific distribution systems for this sector which require special installations, and that the prices charged in that sector are generally higher than retail prices.

[Paragraphs 17 to 25: Summary of the arguments of the parties]

Findings of the Court

26. To establish whether the definition of the market adopted by the Commission in point 60 of the contested decision is correct, it should be observed, at the outset, that delimitation of the relevant market is essential in order to analyse the effects on competition of beer supply agreements with an exclusive purchasing obligation, and in particular to analyse the opportunities available to new domestic and foreign competitors to establish themselves in the market of the consumption of beer or to increase their market shares (see *Delimitis*, paragraphs 15 and 16, Case T-7/93, *Langnese-Iglo v Commission*, paragraph 60, and Case T-9/93, *Schöller v Commission*, paragraph 39).

27. The Commission's delimitation of the relevant market in the contested decision follows that used by the Court of Justice in *Delimitis*. In that case, the Court inter alia had to rule, in the context of a dispute between a tenant of licensed premises and a German brewery, on the compatibility of beer supply agreements with Article 85(1) of the Treaty. It concluded that the reference market was that for the distribution of beer in premises for the sale and consumption of drinks, which could be distinguished from the retail sector and comprised in particular public houses and restaurants (*Delimitis*, paragraph 17) and thus extended to all establishments selling alcoholic beverages for consumption on the premises.

28. The Court of Justice observed that beer is sold through both retail channels and premises for the sale and consumption of drinks. It noted that from the consumer's point of view the latter sector, comprising in particular public houses and restaurants, can be distinguished from the retail sector on the grounds that the sale of beer in public houses is not dependent essentially on economic considerations. It said that the specific nature of the public house trade is borne out by the fact that the breweries organise specific distribution systems for this sector which required special installations, and that the prices charged in the sector are generally higher than retail prices (*Delimitis*, paragraph 16).

29. The Commission was right to use that definition of the market in the present case, since the reasons which justified it in the *Delimitis* case can be applied to the present case.

30. Establishments selling alcoholic beverages for consumption on the premises share a common feature, in the United Kingdom as in Germany: from the consumer's point of view, sales in those establishments are associated with the provision of services and the consumption of beer does not depend essentially on economic considerations, and, from the breweries' point of view, distribution is organised by means of specific systems for the sector and the prices charged are generally higher than retail prices.

31. In this respect, the Commission correctly observes, in point 59 of the contested decision, that all establishments in the United Kingdom with on-licences, whether full, restricted or club licences, have the following features in common: drinks are purchased for consumption on the premises, the concept of service is important, and there is a specific distribution system common to all these establishments which includes in particular special dispense equipment for draught beer. While the Commission acknowledges that the price of beer in clubs is lower than that charged in other establishments, which it explains by the fact that clubs are not operated for profit, it states that prices in clubs are nevertheless higher than in supermarkets.

32. Those common features, which are material for the definition of the relevant market, apply without distinction to all establishments selling alcoholic beverages for consumption on the premises, notwithstanding the fact that these establishments present quite substantial differences as regards the environment in

which sales are made, the nature of the associated services, and even in certain cases the prices charged.

33. This diversity of types of establishment sharing the above characteristics and thus forming part of the relevant market is illustrated by the fact that the Court of Justice cited, as examples and expressly stating that the list was not exhaustive, public houses and restaurants (*Delimitis* judgment, paragraph 16), in other words types of establishment which differ from each other in general in terms of the environment and atmosphere, the nature of the services provided, and the prices charged for alcoholic beverages, including beer.

34. These differences, admittedly not insignificant in the consumer's perception but secondary in relation to the common features described above, are not therefore such as to invalidate the conclusion that establishments selling alcoholic beverages for consumption on the premises all belong to the same market.

35. In this respect, the arguments put forward by the applicants to show that the relevant market is represented by pubs alone, to the exclusion of other establishments with full licences and of those with restricted licences and club licences, are not founded.

36. The applicants submit, first, that the *Delimitis* judgment did no more than confirm the fact, which was not in dispute in that case, that the market of establishments selling alcoholic beverages for consumption on the premises is distinct from the retail market. It must be observed, on this point, that in the context of the *Delimitis* case - a reference for a preliminary ruling on interpretation - the defendant in the main proceedings did indeed submit that sales of beer by supermarkets and other retailers should be included in the relevant market. However, it does not follow that the Court of Justice's definition of the relevant market in that case is material only as a refutation of that argument, which was moreover not as such the subject of a question referred by the national court. The Court of Justice explained that that definition of the market was intended, in accordance with its judgment in Case 23/67, *Brasserie De Haecht*, to take into consideration the economic and legal context of the beer supply agreement (*Delimitis*, paragraph 14) and constituted the premiss of the analysis of the effects of such an agreement, taken together with other agreements of the same type, on the opportunities of national competitors or those from other Member States to gain access to the market for beer consumption (*Delimitis*, paragraph 15). Its approach was guided by a single criterion, namely the nature of the economic activity in question, in this case the sale of beer. The definition of the market thus addressed much wider considerations than ascertaining whether the relevant market also included the retail sector.

37. Second, the applicants submit that consumers distinguish between pubs and clubs, from which they deduce that clubs do not belong to the same market as pubs. They rely on the fact, mentioned by the Commission in point 59 of the contested decision, that the price of beer in clubs represented (in December 1994) 82% to 83% of that charged in pubs. They set that fact against the Commission Notice on the definition of relevant market for the purposes of Community

competition law, which states that the assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer (point 15). The Commission gives as an example of a criterion which can provide indications as to the evidence that is relevant in defining markets the effect which small, permanent changes in relative prices might have on demand substitution (point 15). The Commission observes in the Notice that the question is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a small (in the range 5% to 10%) but permanent relative price increase in the products being considered in the areas concerned. If the substitution is enough to make a price increase unprofitable because of the resulting loss of sales, the substitute products are included in the relevant market (point 17).

38. Referring to these factors, the applicants submit that the price difference between pubs and clubs, in the light of the figures provided by the Commission in point 59 of the contested decision, is of the order of 17% to 18% and that there is no indication of an increase in beer consumption in clubs as opposed to pubs. They therefore conclude that there are two distinct markets.

39. It should be noted that the fact that consumers distinguish between several kinds of establishments selling alcoholic beverages for consumption on the premises is not a ground to consider that each of those kinds of establishment constitutes a separate market, since all those establishments, both from the consumer's point of view (the purchase of beer is associated with the provision of services and the consumption of beer in those establishments does not depend essentially on economic considerations) and from the breweries' point of view (existence of specific distribution systems and higher sales prices compared to those charged in the retail sector), have features in common which mean that they must be considered as belonging to one single market.

40. The applicants, who rely on a very simple example taken from the Commission Notice on the definition of relevant market for the purposes of Community competition law, consider the question of demand substitution only by reference to the single criterion of price difference. They thus disregard a specific feature of the sale of beer, noted by the Court of Justice in the *Delimitis* judgment, namely that the consumption of beer in establishments selling it for consumption on the premises does not depend essentially on economic considerations. In this respect, the Commission rightly observes in its pleadings that the consumer's choice between those establishments is influenced primarily by their environment and atmosphere, even within the sub-category of pubs distinguished by the applicants ... ■

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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. In this case the judgment of the Court of First Instance is long and important and refers to a number of different aspects of the rules on competition. The extracts from and discussions of these aspects are therefore being divided. This month, the report sets out the background facts and concentrates on the first plea in law made by the applicants to the Court: namely, 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": paragraph 28. The judgment contains a full commentary on the nature of concerted practices and is therefore a valuable guide to practitioners in determining where the line should be drawn between concerted practices and commercial consultations. It is clear that an exchange of information may not, on its own, amount to a concerted practice; but, in the context of pricing policies, commercial exchanges of information about prices can be extremely risky. The first applicant in this case won a partial annulment of the Commission's decision. A discussion of the other pleas will appear in next month's issue.)

The Community sugar market scheme and the sugar market in the UK

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 ... 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 ... 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 39.6m ECUs on British Sugar and 7m ECUs on Tate & Lyle for infringement of Article 85(1) on the industrial and retail sugar markets and a fine of 1.8m ECUs on Napier Brown for infringement of Article 85(1) on the industrial sugar market ...

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 17 ... 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 ... and, in its second plea, it argues that the decision gives an insufficient statement of reasons on that point.

The first plea, on what constitutes an agreement or concerted practice

[Paragraphs 31 to 41: Arguments of the parties]

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 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*, while 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 facto* 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 ...

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*, 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 (Case T-12/89, *Solvay* v *Commission*, 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 ...

[To be continued in the next issue]

Commission reduces planned aid to Volkswagen

The Commission has decided that Germany may pay around 85% of the planned regional investment aid in favour of Volkswagen for the production of the future D1-model in a new car plant in Dresden. After conducting the formal investigation procedure, the Commission found that aid amounting to DM 145 million for a total investment of nearly DM 1000 million was compatible with the Community rules for State aid and the framework for aid to the motor vehicle industry in particular. A further DM 25,7 million was considered incompatible with the common market and could not be granted.

Source: Commission Statement IP/01/1016, dated 18 July 2001.