PRICING POLICY (SUGAR): THE BRITISH SUGAR CASE

Subject: Pricing policy
Concerted practices
Fines

Industry: Sugar
(Implications for most industries)

Parties: British Sugar plc
Tate & Lyle plc
Napier Brown & Company Ltd
James Budgett Sugars Ltd

Source: Commission Decision of 14 October 1998 (just published)

(Note. On several counts, this is an interesting and instructive case. It is interesting, not least because of the type of evidence relied on by the Commission in support of its contentions that there were concerted practices between the infringers and that there was a deliberate attempt to form and act on a pricing policy inconsistent with the rules on competition.

One of several themes in the Decision is the relationship between the rules on competition and the common agricultural policy; and the Decision quotes with telling effect some passages from judgments by the Court of Justice in which the Court points out the restrictive effects of supply quotas of agricultural products. For example, in paragraph 60 of the Decision, the Court is quoted as saying: "This restriction, together with the relatively high transport costs, is likely to have a not inconsiderable effect on one of the essential elements in competition, namely the supply, and consequently on the volume and pattern of trade between Member States."

The Commission was not, however, prepared to accept the exigencies of the common agricultural policy as an excuse or justification for restrictive commercial practices. Both in paragraph 185, which is not quoted here, and in paragraph 203, which is, the Commission goes out of its way to stress what the Court of Justice, in the Suiker Unie judgment, described as the "residual area of competition". The Court had said that, notwithstanding these restrictions, in practice a residual field of competition was left and that this field was subject to the Community competition rules. In this connection, the Court expressly mentioned price competition because the prices set by the Community system were not sales prices for dealers, users and consumers, and consequently allowed producers some freedom to determine their sales prices. The Court also pointed to evidence of tough negotiations taking place in relation to sales prices.

Fines were imposed on all four parties to the case, the heaviest being a fine of

39.6m ECUs on British Sugar.)

Introduction and Procedure

(1) This Decision is concerned with the coordination by the two sugar manufacturers in Great Britain, British Sugar plc (hereinafter referred to as British Sugar) and Tate & Lyle plc (hereinafter Tate & Lyle), and two sugar merchants, Napier Brown & Company Ltd (hereinafter Napier Brown) and James Budgett Sugars Ltd (hereinafter James Budgett) of their pricing policy for industrial white granulated sugar in Great Britain. It is also concerned with the coordination by the two sugar manufacturers of their pricing policy for retail white granulated sugar in Great Britain. The period during which the infringement took place (herein after the relevant period) was between 20 June 1986 and 2 July 1990 with respect to British Sugar and Tate & Lyle, and between late 1986 and 2 July 1990 with respect to Napier Brown and James Budgett.

(2) The starting point of the Commission's procedure in this case, and of a parallel procedure by the UK Office of Fair Trading (OFT), is with two self-incriminating letters which Tate & Lyle wrote to the OFT on 16 July 1990 and on 29 August 1990. On 4 May 1992, the Commission initiated proceedings against the four abovementioned parties, as well as against other European sugar producers, and on 12 June 1992 the Commission sent a statement of objections to all of them. This initial statement of objections concerned several instances of anti-competitive conduct relating to the sugar trade in the United Kingdom and infringing Articles 85(1) and 86 of the Treaty. In the light of the parties' written replies and the submissions made at the oral hearing in relation to the initial statement of objections, the Commission decided to re-direct its case and to concentrate on the infringement that could be sustained with the high degree of proof required by the case-law of the Court of Justice of the European Communities. Accordingly, on 18 August 1995, a revised statement of objections, replacing the initial one, was sent to the parties. this Decision takes into consideration the parties' written replies to the revised statement of objections, their submissions made at the oral hearing on 18 and 19 April 1996 and thereafter, as well as the parties' replies to the initial statement of objections and their submissions at the oral hearing following that initial statement of objections, in so far as they remain relevant in relation to the allegations made in the revised statement of objections...

The relevant product market

(59) The relevant product market is white granulated sugar. This market is further subdivided into two sub-markets of sugar for sale to retail clients (retail sugar) and sugar for sale to industrial clients (industrial sugar). Speciality sugars and liquid sugars, being used for different purposes than white granulated sugar, do not meet the same needs and are not therefore part of the relevant product market because they are not substitutable from the customer's point of view. Industrially produced sugar substitutes such as saccharin, cyclamates or aspartame only compete with natural sugar for limited uses, e.g. as diet

products, and thus do not form part of the same relevant product market as white granulated sugar.

The relevant geographical market

(60) The sugar scheme of the common agricultural policy allocates a specific sugar quota to each Member State. This national sugar quota is divided between beet-processing companies in each Member State. During the relevant period and ever since, British Sugar has been the sole processor of sugar beet in the United Kingdom and has received the entire UK A/B sugar quota. The Court of Justice has recognised that the common organisation of the sugar market has a significant influence on the production and sales of sugar in the Community, and that it contributes to consolidating a partitioning of national markets: "It is beyond doubt that, as the aforementioned system of national quotas stopped production moving gradually to areas particularly suitable for the cultivation of sugar beet and, in addition prevented any large increase in production, it cut down the quantities which producers can sell in the common market". "This restriction, together with the relatively high transport costs, is likely to have a not inconsiderable effect on one of the essential elements in competition, namely the supply, and consequently on the volume and pattern of trade between Member States." "Whatever criticism may be made of a system, which is designed to consolidate a partitioning of national markets by means of national quotas, the effects of which will be examined later, the fact remains that it leaves in practice a residual field of competition, that field comes within the provisions of the rules of competition".

Agreement and/or concerted practice between undertakings

(66) From the case-law of the Court of Justice of the European Communities and the Court of First Instance, it may be seen that an agreement within the meaning of Article 85(1) can be said to exist when the parties have reached a consensus, even in broad terms, as to the lines of their mutual action, or abstention from action, in the market. It may involve joint decision-making and commitment to a common scheme. It suffices that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way. The agreement does not have to be made formally or in writing, and no express sanctions or enforcement measures need be involved.

(67) A concerted practice within the meaning of Article 85(1), on the other hand, does not require that the participants should have reached an agreement in terms as to what each should precisely do or not do in the market. The object of the Treaty in creating the concept of concerted practice in addition to that of agreement was to forestall the possibility of undertakings evading the prohibition of Article 85(1) by a form of coordination which, without having reached the stage where an agreement in the sense described above has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. In the ICI judgment, the Court of Justice went on to say

that a concerted practice might arise inter alia out of coordination by the participants. although parallel behaviour may not by itself constitute a concerted practice, it may nonetheless amount to strong evidence of such a practice if it has led to conditions of competition which do not correspond to the normal conditions of the market, regard being had to the nature of the products, the size and number of the undertakings, and the volume of the said market. The Court of Justice said that this was especially the case if the parallel conduct was such as to enable those concerned to attempt to stabilise prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers.

(68) In its judgment of 16 December 1975, the Court of Justice held that the criteria of coordination and cooperation laid down by the case-law of the Court, which in no way required the working out of an actual plan, had to be understood in the light of the concept inherent in the provisions of the Treaty relating to competition: each economic operator must determine independently the commercial policy which he intends to adopt in the common market. This requirement of independence did not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, but it did strictly preclude any direct or indirect contact between them the object or effect whereof was 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 had decided to adopt or contemplated adopting on the market.

(69) Thus conduct may fall under Article 85(1) as a concerted practice where the parties have not agreed or decided in advance among themselves what each will do in the market, but knowingly adopt or adhere to some collusive device which encourages or facilitates the coordination of their commercial behaviour.

(70) The Court of First Instance in various judgments made it clear that it was not necessary, particularly in the case of a complex infringement of considerable duration, for the Commission to characterise it as exclusively an agreement or concerted practice, or to split it up into separate infringements. Indeed, it might not even be feasible or realistic to make any such distinctions, as the infringement as a whole might present characteristics of both types of prohibited conduct, while considered in isolation some of its manifestations could more accurately be described as one rather than the other. In particular, it would be artificial to subdivide continuous conduct, having one and the same overall objective, into several discrete infringements. The Court of First Instance in its judgments therefore endorsed the Commission's dual characterisation of the single infringement as an agreement and a concerted practice, and stated that this had to be understood, not as requiring, simultaneously and cumulatively, proof that each of the factual elements contained in the continuous conduct presented the constituent elements both

of an agreement and of a concerted practice, but rather as referring to a complex whole which comprised a number of factual elements some of which in isolation would be characterised as agreements whereas others would be considered concerted practices.

(71) The Commission is of the opinion that the above described facts evidence a complex infringement of considerable duration in which British Sugar, Tate & Lyle, Napier Brown and James Budgett participated, and which during the relevant period involved elements which in isolation could be characterised as agreements as well as elements which could be categorised as concerted practices. Even if one does not accept that some, or indeed any, of these elements could be characterised as agreements (184), all the elements of the complex infringement not constituting agreements would at least fall into the category of concerted practices. However, it would be artificial to subdivide this complex conduct of considerable duration into separate infringements, since it was a continuing common scheme which, taken as a whole, served one and the same object as detailed in recitals 72 to 76. For the purpose of this appraisal, under Article 85(1) the conduct at issue is therefore referred to as an agreement and/or a concerted practice.

Object or effect of an appreciable restriction of competition: Pricing coordination

(72) On 20 June 1986, British Sugar and Tate & Lyle came to an understanding to increase the price level for white granulated sugar in Great Britain and to refrain form increasing market shares by lowering prices. While British Sugar as a price leader in the market has been at the origin of the decision to end the price war and to adopt the new pricing strategy, it did so in consensus with Tate & Lyle. The latter gave comfort to British Sugar with respect to its pricing intentions by confirming, during the abovementioned meeting, that it intended to follow the same pricing policy. Napier Brown and James Budgett were informed by British Sugar of the new pricing policy at a meeting subsequent to the meeting of 20 June 1986. The systematic participation of all four parties at the regular meetings over a considerable period subsequent to the meeting of 20 June 1986 and the provision and receipt of information on industrial sugar prices between all four parties, as well as on retail sugar prices between British Sugar and Tate & Lyle at these meetings, is evidence of their collusive behaviour. It created the necessary atmosphere of mutual certainty as to the participants' intentions concerning future pricing whereby each of them could rely, if not on the precise price levels of the other participants, at least on their continual pursuit of a collaborative strategy of higher pricing. For all the participants this mutual assurance was of interest, particularly - though not exclusively - in the price range above the break-even point, where price competition was possible while still profitable. Moreover, as was shown earlier, the merchants Napier Brown and James Budgett, always had a particular interest in the industrial sugar pricing differentials according to volumes as indicated by the matrix. Finally, British Sugar and Tate & Lyle had an additional interest in involving Napier Brown and James Budgett in the collusion, because

the merchants, by virtue of their traditional connections with Continental producers, could - by way of imports - have substantially frustrated British Sugar's and Tate & Lyle's joint strategy of increasing prices on the white granulated sugar market in Great Britain.

(73) The parties' conduct is to be qualified as an agreement and/or concerted practice which had as its object the restriction of competition by the coordination of their pricing policy on the market for industrial sugar in Great Britain as concerns all four parties, and on the market for retail sugar in Great Britain as concerns British Sugar and Tate & Lyle. In particular, the object of the agreement and/or concerted practice was to increase industrial and retail sugar prices in Great Britain through a coordinated pricing policy, and to refrain from aggressive price cutting aimed at gaining market share. Moreover, with regard to industrial sugar, the object of the agreement and/or concerted practice included a coordinated policy concerning price differentials to be restored and maintained between the purchasers of larger and smaller quantities of sugar. Thus, in summary, the object of the parties' collusion was the restriction of price competition in the industrial and retail sugar markets in Great Britain, which markets were already characterised by a tendency toward reduced competition due to the concentration of the market and the high entry barriers.

(74) The fact that during the relevant period Tate & Lyle, James Budgett and Napier Brown were "price followers" in respect of British Sugar does not detract from the fact that, through their conduct, they pursued the anti-competitive object of pricing coordination. This becomes clear by taking a closer look at the function of the continuous meetings and the scope for competition which exists even in a market characterised by price leadership. The meetings provided - not only for all four parties in relation to industrial sugar, but also for British Sugar and Tate & Lyle in relation to retail sugar - the assurance of an ongoing higher pricing policy on the part of their competitors. Accordingly, each of the participants at the meetings (including British Sugar) could act differently than if it was obliged to rely merely on its own perception of the market. Each of the undertakings as in a position to assess the market situation, and its future development, with more certainty than would otherwise have been the case. The fact that each of them (including British Sugar) was assured at the meetings that the other companies were all equally aware of British Sugar's pricing strategy, and that moreover each of the three "followers" also in the future intended closely to follow British Sugar's strategy, meant that all of them (including British Sugar itself) could pursue a policy of price increases in the knowledge that the others would not - whether intentionally or perhaps through ignorance or misinterpretation of what could be perceived of British Sugar's pricing policy by simply monitoring the market - continue to price at lower levels or start to undercut competitors's prices, or follow British Sugar's price leadership less closely than before. White granulated sugar is a homogeneous product and price therefore is clearly the most important competition parameter. Customers are very price sensitive and have low switching costs between different suppliers. Consequently, uncertainty as to the competitors' pricing policy is likely to increase competition by exerting a downward pressure

on the pricing policies of individual sugar companies. By the far-reaching elimination of this uncertainty brought about by the meetings, the parties pursued the anti-competitive object of restricting price competition between them. Despite British Sugar's price leadership, such price competition was possible, in particular - though not exclusively - in the price range above the break-even point, because in this range price competition was feasible, while still profitable, for all the four parties.

(75) On the basis of the case-law of the Court, the Commission holds the view that once the anti-competitive object of the parties' conduct has been established, there is no need to take account of the possible effects of the agreement and/or concerted practice.

(76) The participation in the agreement and/or concerted practice commenced, for British Sugar and Tate & Lyle, with their first bilateral meeting on 20 June 1986 and, for Napier Brown and James Budgett, with the first quadripartite meeting in late 1986. For all four parties, their participation in the agreement and/or concerted practice ended only on 2 July 1990, when the chairman and chief executive of Tate & Lyle ordered an end to all contacts with competitors of the kind which are the subject of this procedure (189). The list provided by Tate & Lyle (190) shows that the industrial sugar meetings as well as the retail sugar meetings, at regular one- to three-month intervals, continued throughout the relevant period. As the last bilateral retail sugar meeting took place only on 9 May 1990, and the last quadripartite industrial sugar meeting was only on 13 June 1990, the Commission has no reason to believe that the participation of any of the four parties in the agreement and/or concerted practice ended before 2 July 1990.

Appreciability

(77) Given the market shares of the undertakings in question, and in particular the fact that the four companies together accounted during the relevant period for almost the entire white granulated sugar market in Great Britain, the restrictions of competition which they pursued by their agreement and/or concerted practice were appreciable ...

(86) With regard to British Sugar's price leadership, the Commission notes several inconsistencies in the parties' argumentation. The gist of the issue is whether British Sugar's price leadership in the markets for industrial and retail sugar in Great Britain during the relevant period left scope for competition by the other three companies. On the one hand, the parties seem to suggest that there was no such scope when they stress that due to British Sugar's strength on these markets there was no need for the other three companies to coordinate pricing policy with it, because they had no other choice but to follow British Sugar's pricing moves. This contrasts sharply with the confirmation by all parties, reiterated in their written replies to the revised statement of objections, that there was scope for competition between all four of them and that such competition actually took place. As white granulated sugar is a homogeneous

commodity, competition in the industrial sugar market as well as the retail sugar market is, first and foremost, price competition. Tate & Lyle, in particular, with a share of about 38 to 40% in the white granulated sugar market in the UK during the relevant period, was potentially a strong competitor of British Sugar, which held about 51 to 54% of that market during that period. While Tate & Lyle suffered from a margin disadvantage compared to British Sugar, and while it is correct that Napier Brown and James Budgett were dependent on the two UK producers (British Sugar and Tate & Lyle) for much of their stock, it is not true to state that during the relevant period these three undertakings had no room to act as competitors of British Sugar, and of one another, with respect to the relevant products. The behaviour of Tate & Lyle during the price war, when it attempted to compete with British Sugar for a number of accounts, is ample demonstration of this, as is British Sugar's own evidence of attempts to acquire Tate & Lyle's accounts in the retail sugar trade ...

(87) Moreover, in a tightly oligopolistic market, price leadership is not exceptional due to the fact that, where there is only a small number of competitors, it is - in comparison with a non-oligopolistic market - easier for each of them ex post to perceive on the market what the others have done on it. However, the existence of such an oligopolistic market, in which competition for structural reasons tends to be limited to a certain extent, does not allow companies to go further and ex ante actively coordinate their future pricing policy. On the contrary, the existence of uncertainty as to the pricing intentions of the companies on markets of the described kind is the main stimulus to competition. As the Court of Justice made clear in Hoffmann-La Roche (209), in markets where competition is already limited, the Commission must be particularly vigilant to ensure that the competition which does exist is not restricted.

(88) On the basis of the foregoing, the Commission concludes that British Sugar's price leadership in the markets for industrial and retail sugar in Great Britain did not preclude price competition between the four parties in the relevant period. Since there was such scope for price competition, it follows that actual and/or potential price competition could have been restricted by agreement and/or concerted practice between the parties.

Agreement and/or concerted practice

(89) The subsequent question is whether there actually was an agreement and/or a concerted practice. In reply to the parties' arguments, the Commission can mainly refer to what has already been stated above concerning the categorisation of a complex infringement of considerable duration and concerning the subject matter of the agreement and/or concerted practice at issue in this case. A comparison between what the Commission says and what the parties expressly say, or do not mention because it is uncontentious, shows that there is a common understanding of the concepts of agreement and of concerted practice. In response to British Sugar's view that in this case there is no evidence of a consensus between the parties about joint future conduct on

the market, and that therefore there cannot have been any element in the complex infringement which could be described as an agreement, the Commission first and foremost stresses that, even if that view were correct, all the elements of the complex infringement would at least fall into the category of concerted practices. The categorisation of the infringement as agreement and/or concerted practice has taken account of this alternative view by making clear that the complex infringements as a whole can at least be described as a concerted practice. Without prejudice to this, the Commission is willing to give below an example of an element which in its opinion can be described as an agreement. Furthermore, the Commission does not agree with the proposition that those elements of the complex infringement which cannot be described as agreements cannot at least be described as concerted practices because no actual effect on the market has been sufficiently demonstrated. Finally, it has to be recalled that, where there has been a complex infringement of considerable duration, the Commission is not obliged to split up a continuous conduct, which was - as in this case - driven by a single anti-competitive object, into a number of separate infringements.

(90) According to the parties, there cannot have been an agreement and/or concerted practice concerning the pricing of white granulated sugar, because in the meetings British Sugar confined itself to making unilateral announcements about its pricing policy, while the other three parties did not learn anything new which would not have been evident in the transparent market. The Commission considers this assertion not to be credible for a number of reasons. First, if the market was as transparent as the parties describe it, and if the need to follow British Sugar's pricing moves was as cogent as the parties claim, it is not understandable why the first meetings and the series of subsequent meetings over a long period were arranged, nor why British Sugar did not simply implement its pricing policy and leave it to the other parties to perceive these changes in the market. Not even the key meeting of 20 June 1986 would have been necessary if the parties' description was correct. Thus, in comparison with merely monitoring on the market which pricing moves the other companies had taken, the regular meetings must have provided for all the parties an 'added value`. This added value had two aspects: on the one hand, the meetings provided confirmation for each of the parties that their perception of how the three other respective companies had to date priced in the market place was correct; on the other hand, the meetings provided each of the parties with an appreciably increased certainty as to the other participants' intentions concerning future pricing. Secondly, if the organisation of meetings really was British Sugar's particular style of informing other players of unilaterally decided price changes for white granulated sugar, it is not explained why only three of these other players and not all of those operating in the UK market, especially other merchants, were invited, despite the fact that the information given would have been of equal interest to all of them. On the contrary, the exclusion of the other players indicates that the meetings primarily served some other purpose of concern only to the four parties concerned by the subject of this Decision.

(91) As to the relationship between British Sugar and Tate & Lyle, Tate & Lyle's letter to the Office of Fair Trading of 29 August 1990 can, in the Commission's view, be taken as evidence of a joint intention on the part of these two undertakings to conduct themselves on the market in a specific way, namely to end the price war for all varieties of sugar, to increase prices and to abstain from aggressive pricing designed to gain market shares. The understanding with which the representative of Tate & Lyle came away from the meeting of 20 June 1986 was not their interpretation of a unilateral decision taken by British Sugar and announced to Tate & Lyle, but the result of the discussions which the same letter mentions. Discussions are bilateral, a process to which both sides contribute and at the end of which there is either disagreement, indecision or agreement, the last-named being a meeting of minds, a mutual consent about the future conduct of the discussion partners. In this case, it has never been British Sugar's or Tate & Lyle's argument that the questions and issues discussed at the meeting of 20 June 1986 resulted in disagreement or indecision. Moreover, the allegation that the pricing decisions were unilaterally taken by British Sugar, and subsequently only announced, is not compatible Tate & Lyle's statement that the meeting of 20 June 1986 "was significant in that it set the background principles against which all future discussions were held". Therefore, looking at what happened at the meeting of 20 June 1986 in isolation, the Commission is of the opinion that this element of the complex infringement can be described as the conclusion of an agreement between British Sugar and Tate & Lyle about pricing coordination of the kind described. The remaining elements of the complex infringement would at least fall into the category of concerted practices.

(92) Finally the joint memorandum submitted by British Sugar and Tate & Lyle on 15 April 1991 to the OFT, also, in the Commission's view, provides evidence that, at their initial meeting of 20 June 1986, British Sugar and Tate & Lyle came to an agreement about the described pricing coordination. It is reported under point 4b of that memorandum that both Tate & Lyle and British Sugar believed that, as a consequence of the unilateral decision taken by British Sugar to end the price war, British Sugar would not price aggressively, with the result that Tate & Lyle would not price aggressively either, although there would nevertheless remain a band of tolerance in relation to their respective market shares. This shows that both undertakings shared what is described as a 'common belief' about the nature of their future conduct on the market. Since this conduct was not something steered by a third party, British Sugar and Tate & Lyle were the masters of their conduct. Therefore, what the memorandum in fact reports is the joint intention of both parties to price in the future in a certain way. In the Commission's view, this element can be qualified as an agreement about general pricing policies between competitors. The fact that it was not reduced to writing, and that no express sanctions or enforcements measures were attached to it, is irrelevant. Moreover, the reference to the band of tolerance relating to market shares, which occurs twice in point 4 of the memorandum, points to the existence of an agreement between the two undertakings. Market shares for the sale of a homogeneous product like white granulated sugar are first and foremost the result of pricing, since this is the

judgment is based on the earlier Suiker Unie judgment. Both judgments demonstrate how far-reaching the prohibition of concerted practices is by including in it any direct or indirect contact between economic operators, the object or effect whereof is either to influence the market conduct of an actual or a 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. For the case to be decided, the Court then stated, with regard to certain meetings, which formed part of a complex infringement of considerable duration, that Rhône-Poulenc could not have failed to take account, directly or indirectly, of the information obtained during the course of these meetings with its competitors. Likewise, these competitors were bound to have taken into account directly or indirectly, the information disclosed to them by Rhône-Poulenc about the conduct which Rhône Poulenc itself had decided upon or which it contemplated adopting on the market. The Court did not look at the effects of the contacts between the competitors but simply concluded that the Commission was justified, solely on the basis of a conclusion as to the purpose of the meetings in categorising them as concerted practices within the meaning of Article 85(1) of the Treaty. From the Rhône-Poulenc and the Suiker Unie judgements it may be seen that:

- contacts between competitors with an anti-competitive object alone can constitute a concerted practice within the meaning of Article 85(1),
- disclosure between competitors of market behaviour which has been decided or is contemplated amounts at least to a concerted practice, because this information is bound to be taken into account by those competitors in determining their conduct on the market ...

Relevance of effects created by agreement and/or concerted practice

(116) The Commission accepts that it cannot be concluded on the basis of the facts that the companies in question discussed individual customer accounts or the discounts to be granted, with regard to either industrial or retail sugar. In its letter to the Office of Fair Trading dated 16 July 1990, Tate & Lyle admitted that discussions on such matters took place by stating that "it also appears that sometimes information was exchanged between the companies about the volume discounts being applied to specific customers". In the same letter, Tate & Lyle stated also that "in connection with customer negotiations information has been exchanged about changes in the discounts that would be offered to some of the larger customers (who took supplies from both companies)". However, Tate & Lyle later stated in the joint British Sugar/Tate & Lyle memorandum to the Office of Fair Trading of 15 April 1991 under point 4 that "during the arrangement, BS informed TLS, before it made a general announcement to its customers, of changes in list prices, and discount policy, although TLS was not informed of any specific price or discount which was to be quoted to a specific customer". British Sugar explicitly denies that such discussions took place ... Equally, the Commission does not challenge the information provided by British Sugar, according to which significant and varying discounts were granted, nor the fact that in particular cases British Sugar and Tate & Lyle competed for individual accounts.

principal competition parameter for such a product. Accordingly, unless there had been a mutual understanding between British Sugar and Tate & Lyle, at least about their general pricing policy, the notion of a band of tolerance relating to market shares would have been meaningless.

(93) As far as the Napier Brown and James Budgett are concerned, there is not a key meeting comparable to the one of 20 June 1986. But the Commission has compiled evidence to show that Napier Brown and James Budgett, during the meetings which they attended, took an active part in the discussions, that is to say, in the bilateral process, about industrial sugar. They were not merely the recipients of announcements concerning unilateral decisions taken by British Sugar.

(94) In its letter of 7 August 1990 to the OFT, British Sugar admits that discussions about pricing did also take place with Napier Brown and James Budgett, but it claims never to have amended its decisions or business plan as a result of such discussions. Here, British Sugar has confused two separate questions: firstly, whether there was a concertation of the intentions of the participants in the discussions, and secondly, whether the result of this concertation coincided or not with the intention which one party (British Sugar) already had before it went into the discussions. As to the first point, it has to be reiterated that it did not make sense to have discussions about pricing with Napier Brown and James Budgett it they had nothing to contribute to these discussions. In fact, it is known, that Napier Brown and James Budgett had a threat potential and bargaining power in these discussions, in the form of the possibility of resorting to aggressive marketing of imports which would have frustrated British Sugar's strategy of increasing prices on the UK market while still selling its entire A/B quota there (222). This is, for example, evidence by the document about James Budgett's business strategy 1987-90. The seriousness of the discussions with Napier Brown and James Budgett is also evidenced by the internal Tate & Lyle memorandum which reports that British Sugar discussed a certain increase, which it wished to occur in the industrial sugar market, with the chairman and joint managing director of Napier Brown. If there had been no need for British Sugar to obtain a consensus with Napier Brown and James Budgett about the parties' future industrial sugar-pricing policy, including price differentials between purchasers of larger and of smaller quantities, those discussions would have served no purpose.

(95) Furthermore, contrary to British Sugar's proposition, there can be a concerted practice even in the absence of actual effect on the market.

(96) Firstly, the wording of Article 85(1) of the Treaty itself shows that a concerted practice which has an anti-competitive object is sufficient to constitute an infringement which is caught by that provision.

(97) Secondly, the judgement of the Court of First Instance in the Rhône-Poulenc case accepts that there can be a concerted practice when an anti-competitive object alone is pursued. In this respect, the relevant part of this

(117) The Commission does, however, disagree with the conclusions drawn by the parties from these facts and observations. While the Commission does not maintain that the agreement and/or concerted practice had no effect, it accepts that it is not possible for the Commission to calculate the precise effect in terms of the prices that would have been set by Tate & Lyle, Napier Brown, James Budgett and British Sugar if the meetings to discuss pricing policy had not taken place or if British Sugar had not given advance notice of its price modifications. Such an exercise is not possible, as no parallel situation can be pointed to which might serve as a benchmark by which a meaningful comparison could be made.

(118) In any event, the Commission is not required to examine the consequences of the agreement and/or concerted practice in terms of its effect on prices in order to demonstrate an infringement of the competition rules. It suffices that an anti-competitive object can be attributed to the conduct.

(119) Article 85(1) states that the "following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . ." As the Court of Justice confirmed in its judgment in Consten and Grundig: "there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition". This was also confirmed by the Advocate-General and the Court of First Instance in the Rhône-Poulenc case. The Advocate-General considered that "if it is certain that concertation having an unlawful object has taken place and if . . . it can be assumed that the undertakings have acted on the basis of that concertation even if the Commission adduces no evidence of the concrete acts (practice), there is . . . a concerted practice with an unlawful object covered by Article 85. When undertakings act with greater knowledge and more or less justified expectations about other undertakings than they should have and normally would have, there is always a clear risk that competition will be less intense than it otherwise would have been." As was indicated above, in its judgment in that case, the Court of First Instance confirmed the Advocate-General's view by stating that Rhône-Poulenc "through its participation in those meetings, . . . took part, together with its competitors, in concerted action the purpose of which was to influence their conduct on the market and to disclose to each other the course of conduct which each of the producers itself contemplated adopting on the market". The Court went on to state with regard to Rhône-Poulenc that "accordingly, . . . in determining the policy which it intended to follow on the market, it could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings. Similarly, in determining the policy which they intended to follow, its competitors were bound to take into account, directly or indirectly, the information disclosed to them by (Rhône-Poulenc) about the course of conduct which (Rhône-Poulenc) itself had decided upon or which it contemplated adopting on the market". On this basis alone, and without

looking at possible effects, the Court concluded that the Commission was justified, having regard to the purpose of certain meetings, in categorising them as "concerted practices". Likewise, with regard to the common intentions existing between certain undertakings and relating to target prices and target volumes, the Court stated that the Commission was entitled to treat those elements of the complex infringement as "agreements" within the meaning of Article 85(1). In this regard, too, the Court did not look at the possible effects of these agreements but merely cited the established case-law, according to which, in order for there to be an agreement it is sufficient that the participating undertakings should have expressed their joint intention to conduct themselves on the market in a specific way. On these bases, and again with looking at possible effects, the Court finally concluded that the Commission was also entitled to describe the continuous conduct, which had been characterised by a single purpose, as a single infringement under the denomination "agreement and concerted practice".

The transparency of the sugar market

(120) In order to address the arguments raised by the parties under these headings, it is useful to further substantiate the function and the value which the continuous meetings had for them. This leads to the conclusion that the only convincing explanation for the parties' frequent meetings over a long period is the joint pursuit of the object of restricting competition by coordinating their pricing policy on the market in the manner described.

(121) As regards industrial sugar, it is established that during the meetings British Sugar announced its intentions as to general future price increases and as to the maintenance or increase of differentials in the prices to purchasers of larger or smaller quantities of industrial sugar. It is also established that this was done on the basis of a pricing matrix established by British Sugar, showing its target prices according to calendar quarter and tonnage purchased. The parties also do not deny that, at least on one occasion, the British Sugar matrix was handed over to Tate & Lyle, Napier Brown and James Budgett, and that on the occasions when the matrix was not actually handed over, the participants in the meetings were provided with information similar to that contained in that matrix. It has been shown above that the regular meetings over a long period provided all of the participants - including British Sugar, in spite of its price leadership - with the assurance of a continuing common policy of higher pricing which they could not have gained by simply individually monitoring the developments on the market. It is uncontested that Napier Brown and James Budgett also had a specific interest in the differentials between purchasers of larger and smaller quantities of industrial sugar as indicated in the matrix. Furthermore, it has been shown that British Sugar had a specific interest in involving Napier Brown and James Budgett in the collusion in order to control their threat potential which was based on the possibility of imports and which could have substantially damaged British Sugar's strategy of combining high pricing with its ability to sell its entire A/B sugar quota in the UK. Finally, during investigations carried out at Tate & Lyle on 27 May 1994, that company

confirmed that the information contained in the matrix was useful in that it gave Tate & Lyle an indication of British Sugar's pricing intentions. Even in its reply to the revised statement of objections, which reply is characterised by Tate & Lyle's general retraction of a lot of what it had said earlier in the proceedings, Tate & Lyle admits that "the information was of use as to BS's probable intentions". Tate & Lyle confirms "that the information provided gave T & L a certain degree of comfort regarding BS's intended pricing policy".

(122) As regards retail sugar, it is established that British Sugar on at least two occasions handed over to Tate & Lyle a copy of its new retail price list in advance of circulating it to the trade. British Sugar concludes that "what took place was simply limited advance notice, albeit to a competitor, that a revised price list increase would be announced on a certain date". Tate & Lyle accepts that it "received advance warning of BS's intention to change its retail list prices and its broad retail discount policy". It states that the advance provision of British Sugar's retail pricing decisions could be expected to "short-circuit the normal process of market intelligence, and to accelerate the adjustment to those decisions". Tate & Lyle also admits that the receipt of that pricing information "enabled T & L to publish its own new retail price lists a little earlier than might otherwise have been the case". Moreover, also with respect to retail sugar it has been shown above that the regular meetings over a long period provided not only Tate & Lyle but also - and despite its price leadership - British Sugar with assurance of a continual common policy of higher pricing which they could not have achieved by simply individually monitoring developments on the market.

(123) While the Commission is not able to determine the precise anti-competitive effect of the meetings in terms of exact price levels in the market, on the basis of the function and value of these meetings for the parties, it is nevertheless established that the parties pursued the object of restricting competition by pricing coordination between them ...

Parties' explanation of the meetings

(134) At the meetings the parties pursued the object of restricting price competition between all four of them with regard to industrial sugar, and additionally between British Sugar and Tate & Lyle with regard to retail sugar. This can be asserted in view of the fact that all the alternative justification put forward by the parties in order to explain the purposes of meetings are not convincing.

(135) The main explanation, based on the implementation of the undertakings, is not convincing, either when one considers those who actually participated in each of the 40 meetings, or with regard to the chronology of events, or with regard to the subject matter of the individual meetings, or yet with regard to the alternative methods available for achieving and monitoring the implementation of the undertakings. It is established that British Sugar and Tate & Lyle participated in all 40 meetings, whereas Napier Brown and James Budgett

participated only in meetings classified as "industrial" and "industrial/institutional price changes". Specifically James Budgett and Napier Brown participated in 18 meetings under these classifications. There was one further industrial sugar meeting in which only British Sugar and Tate & Lyle participated. Moreover, James Budgett, together with British Sugar and Tate & Lyle, attended one further meeting about imports/exports. The remaining 20 meetings were bilateral occasions between British Sugar and Tate & Lyle, variously classified as "background meeting", "general market", "general/retail", "retail", "general/imports", and "imports/exports".

(137) During the hearing on 18 and 19 April 1996, the Commission asked the parties to provide a tenable explanation for the presence of the manufacturer Tate & Lyle at all the meetings. The reason behind this question was that if the meetings were designed by British Sugar to reassure the merchants and to ensure implementation of the undertakings which British Sugar had given to the Commission - undertakings which only concerned merchants but not manufacturers - then Tate & Lyle's continuous presence would be difficult to explain. British Sugar replied that there was a common industry interest in securing the presence of both the manufacturers (British Sugar and Tate & Lyle) and both the merchants (Napier Brown and James Budgett), and that the merchants probably had as many fears concerning the future of their relationship with Tate & Lyle as they had with British Sugar. Napier Brown replied that British Sugar was at the time seeking to reassure the whole market, not just the merchants, and that British Sugar wanted to have an open forum explaining what they were doing and giving everybody, including Tate & Lyle, the opportunity of commenting. James Budgett replied that there was no simple answer explaining Tate & Lyle's presence. It said that in addition to any assurance that British Sugar would comply with its obligations, James Budgett would have wanted an indication that Tate & Lyle would behave in a like manner.

(138) As a starting point, the Commission observes that the more it is argued that the meetings served the purpose of reassuring all four parties, the less credible it becomes that the meetings' main function was the implementation of the undertakings to which Tate & Lyle was plainly not a party, which did not mention Tate & Lyle, and which were given by British Sugar in the course of Napier Brown proceedings, in which proceedings Tate & Lyle's conduct was not at issue.

(139) Tate & Lyle itself does not rely on the undertakings as an explanation for the meetings at all. When questioned at the oral hearing on 18 and 19 April 1996 about the significance of the undertakings, it referred to its two letters of 16 July 1990 and 29 August 1990 to the OFT as a proper description of the circumstances in which the meetings arose. Tate & Lyle added that the letter of 16 July 1990 mentioned "the existence of the undertakings as being part of the context in which the meetings took place". In fact, the letter of 29 August 1990 does not mention the undertakings at all and the one of 16 July 1990 mentions them only once, and then only as a minor point. The relevant part of

this letter reads: "in the summer of 1986 there were indications that British Sugar was contemplating a change in its commercial policy vis-à-vis Tate & Lyle. At that time key relevant employees of British Sugar had left or were on the point of leaving. British Sugar was also required to give undertakings to the European Commission in the context of Napier Brown proceedings and it was facing commercial pressures. It was indicated to Tate & Lyle that British Sugar was prepared to adopt new commercial policies`. This extract shows that the undertakings were only a subordinate element amongst several others and that they in any event did not constitute the principal motive for British Sugar's decision to change its policy vis-à-vis Tate & Lyle.

(140) Moreover, a more detailed analysis further contradicts the arguments based on the undertakings ...

[This analysis considers the participants in the meetings, the chronology of events, the subject matter of the meetings, the compliance programmes and alternative methods of monitoring, but still reaches the same conclusion as in paragraph 140. Paragraphs 176 to 183 consider the effect of the practices on trade between Member States; paragraph 184 notes that the agreement wa not notified, could not therefore be exempted and would not, even if notified, have qualified for exemption; and paragraph 185 makes it clear that the regulatory system under the common agricultural policy does not provide an excuse for the practices in question. Paragraphs 191 to 212, set out below, consider the seriousness of the infringement and the level of the fine.]

The parties' intentions

(191) The Court of Justice has consistently held that in order for an infringement to be regarded as having been committed intentionally, it is not necessary for the companies in question to have known that they infringed Article 85 or to have been aware that they were transgressing the prohibition laid down by that provision. It is sufficient that they could not have been unaware that the conduct concerned had the object or effect of restricting competition in the Common Market with actual or potential effect on trade between Member States

(192) The Commission considers that, owing to the fact that direct contacts between competitors concerning pricing questions are invariably considered dubious from the point of view of competition law, and on account of the seriousness as well as the systematic and repetitive nature of the anti-competitive practice which took place in this case, none of the companies concerned could have been unaware that their conduct had the object of restricting competition in the common market. Similarly, the companies concerned could not have been unaware that their conduct potentially affected trade between Member States. Moreover, in the case of British Sugar, all these findings are reinforced by the fact that in 1986 it had introduced a comprehensive Community competition law compliance programme, which described the prohibition laid down in Article 85 in detail. To sum up, an

objective evaluation of the concrete factual circumstances of this case leads to the conclusion that all four companies concerned committed the infringement intentionally.

The gravity of the infringement

(193) In this case the characteristics of the infringement were as follows. The agreement and/or concerted practice pursued the object of restricting competition by coordinating pricing policy on the horizontal level. The cartel operated in relation to a market which was highly concentrated. The participant in the infringement accounted, in the industrial sugar section, for over 90% and, in the retail sugar section, for approximately 89 % of the relevant market. However, while the collusion consisted in a collaborative strategy of higher pricing, there is not sufficient evidence to state that minimum prices, or prices to be charged to specific customers, were jointly fixed. Moreover, although it is by no means out of the question that an actual restrictive effect on competition and an actual effect on trade between Member States resulted from the parties' behaviour, the Commission does not rely on the demonstration of such effects. Furthermore, the geographic scope of the relevant market was confined to Great Britain.

(194) Against this backdrop, the Commission concludes that the agreement and/or concerted practice at issue in this proceeding constituted a serious infringement of the Community competition rules.

(195) As to the individual contributions of the parties to this infringement, considerable differentiation needs to be made.

(196) The participation of British Sugar, on account of its share of the relevant markets for industrial and retail sugar and due to its position as price leader, was essential to the operation of the cartel. For these reasons, in calculating the fine to be imposed on British Sugar, the Commission considers it appropriate to fix an amount of ECU 18 million with regard to the gravity of the infringement.

(197) Tate & Lyle, on account of its share of the relevant markets for industrial and retail sugar, was the second most important member of the cartel. For these reasons, in calculating the fine to be imposed on Tate & Lyle, the Commission considers it appropriate to fix an amount of ECU 10 million with regard to the gravity of the infringement.

(198) The merchants Napier Brown and James Budgett did not participate in the key meeting of 20 June 1986, at which the principles for the future anti-competitive conduct were set. Napier Brown and James Budgett joined the cartel only several months later, and from then onwards only participated in the infringement concerning industrial sugar. Moreover, owing to the fact that Napier Brown and James Budgett were dependent on supplies from the two domestic sugar producers (British Sugar and Tate & Lyle) for a significant part

of the sugar which they sold in their capacities as principal or as nominal merchants, their influence on the relevant market and their scope for exercising power on that market was limited. For these reasons, in calculating the fines to be imposed on Napier Brown and James Budgett, the Commission considers it appropriate to fix an amount of 1.5m ECUs for each of the two companies with regard to the gravity of the infringement.

The duration of the infringement

(199) With respect to British Sugar and Tate & Lyle, the infringement concerning industrial sugar as well as retail sugar lasted from 20 June 1986, when the first meeting was held between those companies, until 2 July 1990 when Tate & Lyle terminated the agreement and/or concerted practice in question. With respect to Napier Brown and James Budgett, the infringement regarding industrial sugar lasted from late 1986 until 2 July 1990 when the agreement and/or concerted practice in question was terminated.

(200) In terms of the Commission's fining policy, the infringement in this case is considered to have been of medium duration.

(201) The amount imposed to take account of the gravity of the infringement should therefore be increased by 7.2m ECUs in the case of British Sugar, by 4m ECUs in the case of Tate & Lyle, by 0.5m ECUs in the case of Napier Brown and by 0.5m in the case of James Budgett.

(202) The basic amounts are therefore set at 25.2m ECUs for British Sugar, at 14m ECUs for Tate & Lyle, at 2m ECUs for Napier Brown and at 2m ECUs for James Budgett.

Aggravating and Attenuating Factors

(203) No mitigation stems from the fact that, owing to the common organisation of the sugar market, the scope for competition on this market is in practice to a certain extent restricted as a consequence of regulatory intervention, as was pointed out by the Court in its Suiker Unie judgment. In its analysis of the scope for competition in the sugar market, the Court observed that the common sugar organisation in particular provided for a price support system, the collection of an import levy, the grant of export refunds and the fixing of national production quotas. The Court stated that the system of national quotas prevented the free allocation of production, as well as any large overall increase in production, and that this restriction, together with the relatively high transport costs, affected one of the essential elements in competition, namely the supply, which consequently affected the volume and pattern of trade between Member States. However, the Court stressed that, notwithstanding these restrictions, in practice a residual field of competition was left and that this field was subject to the Community competition rules. In this connection, the Court expressly mentioned price competition because the prices set by the Community system were not sales prices for dealers, users and consumers, and consequently

allowed producers some freedom to determine their sales prices. The Court also pointed to evidence of tough negotiations taking place in relation to sales prices.

(204) In its assessment of the level of fines imposed by the Commission decision, the Court stated that the Commission had not sufficiently taken into account the limitations on the scope of competition caused by the common organisation of the sugar market, and the Court further stated that this organisation helped to ensure that sugar producers continued to behave in an uncompetitive manner. However, the Court confined the possibility for reduction of fines imposed for such uncompetitive behaviour to practices engendered by and worsening the already existing anti-competitive features of that system, such as the partitioning and protection of national or regional markets by controlling supplies coming from other Member States as well as the other forms of import and export restrictions which were at issue in that case. Moreover, the Court went on to underline expressly that the damage which users and consumers suffered as a result of these anti-competitive practices was limited, in view of the fact that the parties had not engaged in any concerted or improper increase in their sales prices. Therefore, any extension of the possibilities for mitigation, such as to cover pricing collusion, cannot be defended under the principles expounded in the Suiker Unie judgment. The strict interpretation of the possibilities for mitigation allowed by the Suiker Unie judgment also follows from the fundamental rule that exceptions to general rules have to be construed narrowly.

(205) In contrast to the Suiker Unie case, the present case is about behaviour which had the object of restricting price competition in the relevant market by means of pricing coordination. The agreement and/or concerted practice pursuing this object was not engendered or facilitated by the common sugar market organisation, nor can it be said to have merely aggravated the inherently anti-competitive features of that system. Pricing coordination is a practice alien to that system. It is collusive and anti-competitive conduct concerning sales prices applied to dealers, users and consumers. Such sales prices constitute a particularly important competition parameter which the Court has expressly mentioned as forming part of the residual field of competition remaining in the sugar market which the Community competition rules are designed to protect. Moreover, with particular regard to the market for white granulated sugar in Great Britain, it has been shown that the Community sugar market organisation always left ample scope for such price competition, as is evidenced not only by the occurrence of the price war itself, but also by the conditions prevailing after the ending of that price war ...

Fines in cartel cases

(212) The Commission has declared it to be in the Community interest that favourable treatment in the imposition of fines be shown to enterprises which cooperate with it in the specific circumstances set out in the notice. While the Community already had a policy of being lenient in fixing fine levels for cartel

members who cooperate with it, the notice goes beyond that former practice and creates special incentives for enterprises who cooperate with the Commission and thereby enable or help it to detect and prohibit the cartel. The application of the conditions set out in the notice for either non-imposition of a fine, or for one of the different degrees of reduction in the level of the fine, is therefore more favourable for the enterprises than was their treatment according to the former practice. However, a direct application of the notice is only possible for cooperation which took place after the publication of the notice in the Official Journal on 18 July 1996. In all other cases of cooperation, the notice will be applied by analogy, meaning in this context essentially an extension *ratione temporis*. Such analogous application means that favourable treatment in line with the Notice will depend on fulfilment of all the substantive requirements of cooperation as set out in that Notice.

[The operative part of the Decision is as follows.]

Article 1

British Sugar plc, Tate & Lyle plc, Napier Brown & Company Ltd and James Budgett Sugars Ltd have infringed Article 85(1) by participating in an agreement and/or concerted practice the object of which was to restrict competition by the coordination of the parties' pricing policy on the market for industrial sugar in Great Britain. In the case of British Sugar plc and Tate & Lyle plc this participation lasted from 20 June 1986 until 2 July 1990. In the case of Napier Brown & Company Ltd and James Budgett Sugars Ltd the participation lasted from late 1986 until 2 July 1990.

Article 2

British Sugar plc and Tate & Lyle plc have infringed Article 85(1) by participating from 20 June 1986 until 2 July 1990 in an agreement and/or concerted practice the object of which was to restrict competition by the coordination of the parties' pricing policy on the market for retail sugar in Great Britain.

Article 3

A fine of 39.6m ECUs is hereby imposed on British Sugar plc in respect of the infringement referred to in Articles 1 and 2. A fine of 7m ECUs is hereby imposed on Tate & Lyle plc in respect of the infringement referred to in Articles 1 and 2. A fine of 1.8m ECUs is hereby imposed on Napier Brown & Company Ltd in respect of the infringement referred to in Article 1. A fine of 1.8m ECUs is hereby imposed on James Budgett Sugars Ltd in respect of the infringement referred to in Article 1. □