CONCERTED PRACTICES (SUGAR) THE TATE & LYLE CASE

Subject: Concerted practices
Information exchanges
Pricing policy
Fines
Agriculture

Industry: Sugar
(Implications for other industries)

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

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

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

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

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

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

[Paragraphs 69 and 70: Arguments of the parties]

Findings of the Court

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

72. It is clear from case-law that, for the purposes of applying Article 85(1) of the Treaty, there is no need to take account of the concrete effects of an agreement when it is apparent, as in this case, that it has as its object the prevention, restriction or distortion of competition within the common market (Case T-142/89, *Boël v Commission*, paragraph 89; Case T-152/89, *ILRO v Commission*, paragraph 32).

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

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

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

[Paragraphs 75 to 77: Arguments of the parties]

Findings of the Court

78. It is settled case-law that, for an agreement between undertakings or a concerted practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability and on the basis of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market between the Member States (Case 5/69, *Völk v Vervaecke*, paragraph 5; Joined Cases 209/78 to 215/78 and 218/78, *Van Landewyck and Others v Commission*, paragraph 171; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö and Others v Commission*, paragraph 143; Joined Cases T-213/95 and T-18/96, *SCK and FNK v Commission*, paragraph 175; Joined Cases T-24/93 to T-26/93 and T-28/93, *Compagnie Maritime Belge Transports and Others v Commission*, paragraph 201). Accordingly, it is not necessary that the conduct in question should in fact have substantially affected trade between Member States. It is sufficient to establish that the conduct is capable of having such an effect (Case T-29/92, *SPO and Others v Commission*, paragraph 235).

79. Moreover, the fact that a cartel relates only to the marketing of products in a single Member State is not sufficient to exclude the possibility that trade between Member States might be affected. Since the market concerned is susceptible to imports, the members of a national price cartel can retain their market share only

if they defend themselves against foreign competition (Case 246/86, *Belasco and Others v Commission*, paragraphs 33 to 34).

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

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

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

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

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

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

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

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

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

[Paragraphs 87 to 97: Arguments of the parties]

Findings of the Court

98. Under Article 15(2) of Regulation No 17, the Commission may impose fines of from €1,000 000 to €1m, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement. In fixing the amount of the fine within those limits, that provision provides that regard shall be had both to the gravity and to the duration of the infringement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

113. As regards the complaint that insufficient consideration was given to the structure of the relevant market, it should be noted that, in *Suiker Unie*, the Court of Justice considered that the legislative and economic context of the sugar market was capable of justifying less severe treatment of practices that were potentially anti-competitive. However, the Commission has correctly pointed out that the agreements that form the subject-matter of the *Suiker Unie* judgment did

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

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

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

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

[Paragraphs 116 and 117: Arguments of the parties]

Findings of the Court

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

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

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

121. The plea must therefore be rejected.

The plea that the actions complained of were committed unintentionally

[Paragraphs 122 to 126: Arguments of the parties]

Findings of the Court

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

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

129. The plea must therefore be rejected.

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

[Paragraphs 130 to 132: Arguments of the parties]

Findings of the Court

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

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

135. In the present case, which involves a classic type of infringement of competition law, the illegality of which has been stated by the Commission many times ever since its first interventions in competition matters, it was legitimate for

the Commission to regard it as necessary to fix the amount of the fine having regard to its deterrent effect.

136. The plea must therefore be rejected.

The plea concerning cooperation during the administrative procedure

[Paragraphs 137 and 138: Arguments of the parties]

Findings of the Court

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

140. The plea must therefore be rejected.

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

[Paragraphs 141 and 142: Arguments of the parties]

Findings of the Court

143. It is settled case-law that the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy. On the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (*Musique Diffusion Française*, paragraph 109; Case T-14/89, *Montedipe v Commission*, paragraph 346).

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

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

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

147. The plea must therefore be dismissed.

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

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

The application for annulment in Case T-202/98

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

[Paragraphs 150 to 156: Arguments of the Parties]

Findings of the Court

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

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

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

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

161. In relation to the second alteration, concerning the circulation of information about discounts to be granted to specific customers, it should be noted that the Commission has not been able to prove that element of the infringement in the contested decision. Although the Commission argues that it is precisely because of the retraction by Tate & Lyle that it has been unable to prove that element, the fact remains that the existence of such communications has not been demonstrated by the Commission and has not therefore been imputed to the applicants. In those circumstances, the Commission cannot impute to Tate & Lyle a lack of cooperation in relation to an element of the infringement the actual existence of which has not been established.

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

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

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

165. On the one hand, having regard to the significance and the continuous and complete character of Tate & Lyle's cooperation, a reduction of 50% of the fine which would have been imposed upon it in the absence of cooperation is not sufficient. On other hand, as has been held in paragraph 160 above, even if Tate & Lyle did not make a retraction from its original statements when replying to the second statement of objections, it did nevertheless partially alter the characterisation of the facts which it had set out previously. This Court considers that that fact, as well as the significant role which Tate & Lyle played within the cartel, does not permit the latter to be granted a reduction of more than 60%.

166. In view of all the above considerations, the Court finds it appropriate, exercising its unlimited jurisdiction under Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17, to reduce the amount of the

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

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

Costs

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

The Court's Ruling

The Court hereby:

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

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

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

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

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

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

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