CONCERTED PRACTICES (SUGAR) THE TATE & LYLE CASE

Subject: Concerted practices
Information exchanges
Pricing policy
Fines
Agriculture

Industry: Sugar
(Implications for other industries)

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

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

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

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

1. The Community sugar market scheme is designed to support and protect the production of sugar within the Community. It comprises a minimum price at which a Community producer may always sell his sugar to the public authorities

and a threshold price at which sugar not subject to quotas may be imported from non-member countries.

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

3. British Sugar is the only British processor of sugar beet, and the entire British beet sugar quota of some 1 144 000 tonnes is allocated to it. Tate & Lyle buys cane sugar in African, Caribbean and Pacific (ACP) countries, which it then processes.

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

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

Background to the dispute

6. Between 1984 and 1986, British Sugar carried on a price war which led to abnormally low prices on the industrial and retail sugar markets. In 1986, Napier Brown, which is a sugar merchant, renewed the complaint which it had originally lodged with the Commission in 1980, complaining that British Sugar had abused its dominant position, contrary to Article 86 of the EC Treaty (now Article 82 EC).

7. On 8 July 1986, the Commission sent a statement of objections to British Sugar accompanied by provisional measures aimed at putting an end to the infringement of Article 86 of the Treaty. On 5 August 1986, British Sugar offered

the Commission undertakings as to its future conduct ('the undertakings), which the Commission accepted by letter of 7 August 1986.

8. The proceeding which had begun following the complaint by Napier Brown was closed by Commission Decision 88/518/EEC ... which found that there had been an infringement of Article 86 of the Treaty by British Sugar and imposed a fine upon it.

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

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

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

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

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

14. On 14 October 1998, the Commission adopted Decision 1999/210/EC ... In that decision, addressed to British Sugar, Tate & Lyle, James Budgett Sugars and Napier Brown, the Commission held that the latter had infringed Article 85(1) of the Treaty and, by Article 3 of the decision, imposed, inter alia, fines of 39.6m ECUs on British Sugar and 7m ECUs on Tate & Lyle for infringement of Article 85(1) on the industrial and retail sugar markets and a fine of 1.8m ECUs on Napier Brown for infringement of Article 85(1) on the industrial sugar market ...

Law: Preliminary observations

28. The applicants in Cases T-204/98 and T-207/98 base their principal claim for annulment of the contested decision on three pleas in law. First, they maintain that the Commission made obvious errors of fact and law in holding that the practices complained of constituted an agreement or concerted practice, and, in particular, an error in the determination of what constitutes an agreement or concerted practice and an error in the definition of the anti-competitive purpose of the facts complained of. Second, they consider that the Commission has failed to prove an anti-competitive effect following those facts. Third, the applicant in Case T-204/98 maintains that the Commission made an obvious error of law in analysing the condition concerning the effect of the conduct of the participants in the disputed meetings on trade between Member States.

29. In support of their alternative claim for annulment in relation to the amount of the fine imposed upon them, British Sugar and Napier Brown raise several pleas in law. In particular, they dispute the calculation of those fines, claiming, first, that the contested decision infringes the principle of proportionality in applying the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation 17 ... and, second, that it did not take account of the structure of the market and the economic context of the conduct complained of. The applicant in Case T-204/98 adds that the Commission committed an infringement of essential procedural requirements by failing to consider the whole of the arguments of the participants in the disputed meetings, particularly, as regards its differential treatment in relation to Tate & Lyle, the unintentional nature of the infringement, the lack of any further need for deterrence, and its cooperation with the Commission during the procedure. Finally, the two applicants maintain that the Commission's delay in adopting the contested decision caused an increase in the level of their fines.

30. The applicant in Case T-202/98 challenges only the part of the decision concerning the calculation of the fine. In its first plea, it argues that the contested decision misapplies the Commission Notice on the non-imposition or reduction of fines in cartel cases ... and, in its second plea, it argues that the decision gives an insufficient statement of reasons on that point.

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

[Paragraphs 31 to 41: Arguments of the parties]

Findings of the Court

42. It should be noted at the outset that British Sugar does not deny having taken part, between 1986 and 1990, in bilateral meetings with Tate & Lyle and multilateral meetings with the Merchants. Napier Brown also acknowledges its participation in the multilateral meetings. British Sugar and Napier Brown also recognise that those meetings gave rise to a notification of prices from British

Sugar to the other participants, even though they dispute the Commission's interpretation of that notification.

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

44. In that respect, as to the nature of the Community sugar market, it should be noted that, contrary to what British Sugar and Napier Brown maintain, the Court of Justice in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie* v *Commission*, while recognising that the Community system tends to consolidate a partitioning of national markets, stated that "it leaves ... a residual field ... within the provisions of the rules of competition" (paragraph 24). Moreover, the Court states that 'the prices fixed or provided for by the Community system are not sale prices for dealers, users and consumers and, consequently, allow producers some freedom to determine themselves the price at which they intend to sell their products (paragraph 21).

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

46. Moreover, as regards the oligopolistic nature of the sugar market in Great Britain, the Commission's argument that whereas, in an oligopolistic market, it is possible for each operator to acquire *ex post facto* all the information necessary to understand the commercial policy of the others, the fact remains that uncertainty as to the pricing policies which the other operators intend to practise in the future constitutes the main stimulus to competition in such a market must be accepted ...

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

48. It should first be noted that the undertakings provided: "(C) British Sugar accepts the need for sugar merchants and believes that they have a useful function to perform in the UK market. British Sugar has no intention now or in the future of undertaking any pricing practice which may in any way damage the continued existence of the merchants. British Sugar undertakes to the Commission that it will engage in normal and reasonable pricing practices which can in no way be construed as predatory. British Sugar recognises the Commission's concern that an insufficient margin between its price for industrial sugar and its price for retail sugar might be considered to be an unreasonable pricing practice.

49. This Court takes the view that the content of those undertakings does not in any way justify the need for British Sugar to discuss its pricing intentions with its competitors, or even merely to inform them of those intentions on a regular basis. In addition, the Court accepts the Commission's observation that those

undertakings could hardly justify bilateral meetings between British Sugar and Tate & Lyle, given that the undertakings concerned only unlawful conduct in relation to the Merchants.

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

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

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

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

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

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

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

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

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

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

60. That fact, even if established, has no relevance in the circumstances of this case. First, even if British Sugar did first notify its customers, individually and on a regular basis, of the prices which it intended to charge, that fact does not imply that, at that time, those prices constituted objective market data that were readily accessible. Moreover, it is undisputed that the meetings in question preceded the release onto the market of the information that was notified at those meetings. Second, the organisation of the disputed meetings allowed the participants to become aware of that information more simply, rapidly and directly than they would via the market. Third, as the Commission held in recital 72 in the preamble to the contested decision, the systematic participation of the applicant undertakings in the meetings in question allowed them to create a climate of mutual certainty as to their future pricing policies.

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

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

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

64. In those circumstances, it is for Napier Brown to adduce evidence to show that its participation in the meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit which was different from theirs (Case T-12/89, *Solvay* v *Commission*, paragraph 99).

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

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

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

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

[To be continued in the next issue]

Commission reduces planned aid to Volkswagen

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

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