JUDGMENT OF THE COURT (Fifth Chamber)

29 April 2004 *

In Case C-359/01 P,

British Sugar plc, established in Peterborough (United Kingdom), represented by T. Sharpe QC, and D. Jowell, barrister, and by A. Nourry, solicitor, with an address for service in Luxembourg,

applicant,

appeal against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) in Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, seeking the annulment of that judgment,

the other parties to the proceedings being:

Tate & Lyle plc, established in London (United Kingdom),

Napier Brown & Co. Ltd, established in London (United Kingdom),

applicants at first instance,

* Language of the case: English.

Commission of the European Communities, represented by K. Wiedner, acting as Agent, assisted by N. Khan, barrister, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Fifth Chamber),

composed of P. Jann, acting for the President of the Fifth Chamber, C.W.A Timmermans and S. von Bahr (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,
Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing

after hearing oral argument from the parties at the hearing on 10 July 2003, at which British Sugar plc was represented by T. Sharpe and K. Fisher, solicitor, and the Commission by K. Wiedner and N. Khan,

after hearing the Opinion of the Advocate General at the sitting on 21 October 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 21 September 2001, British Sugar plc ('British Sugar') appealed under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance in Joined Cases T-202/98, T-204/98 et T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035 ('the judgment under appeal'), in which the latter dismissed its action for the annulment 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) (OJ 1999 L 76, p. 1; 'the contested decision').

Legal background

2 In point I, headed 'Basic amount', of its Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines'), the Commission of the European Communities states:

'...

A. Gravity

In assessing the gravity of the 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.

...'

Facts underlying the dispute

3 In the judgment under appeal, the Community sugar market scheme, the situation of the sugar market in Great Britain and the other relevant facts underlying the dispute are described as follows:

'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.

...

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 of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty (Case No IV/30.178 — Napier Brown — British Sugar) (OJ 1988 L 284, p. 41), 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 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) (OJ 1999 L 76, p. 1; "the contested decision"). 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 ECU 39.6 million on British Sugar and ECU 7 million on Tate & Lyle for infringement of Article 85(1) on the industrial and retail sugar markets and a fine of ECU 1.8 million on Napier Brown for infringement of Article 85(1) on the industrial sugar market.'

The procedure before the Court of First Instance and the judgment under appeal

4 Tate & Lyle plc ('Tate & Lyle'), British Sugar and Napier Brown & Co. Ltd ('Napier Brown') brought actions before the Court of First Instance, respectively, on 18 December 1998 (T-202/98), 21 December1998 (T-204/98) et 23 December 1998 (T-207/98), seeking annulment of the contested decision. By order of 20 July 2000, the Court of First Instance decided to join the three cases for the purposes of the oral procedure and the judgment.

5 In the judgment under appeal, the Court of First Instance upheld Tate & Lyle's first plea in Case T-202/98, reducing the amount of the fine to 5.6 million euros.

6 However, the Court of First Instance rejected the various pleas by British Sugar and Napier Brown in Cases T-204/98 and T-207/98. Those two applicants had pleaded, in support of their main plea for annulment, first, obvious errors of fact and law in determining what constituted an agreement or concerted practice, second, that the meetings in dispute had no anti-competitive effect, and, third, misassessment of the impact of the disputed meetings on trade between Member States. The pleas in support of their secondary claim for annulment, concerning the amount of the fine, relate, first, to the proportionality of the fines and the taking into consideration of the structure of the market; second, to alleged

infringement of the principle of equality of treatment; third, to an alleged absence of intent when carrying out the actions complained of; fourth, to the taking into account of the dissuasive effect of the fines; fifth, to cooperation during the administrative procedure; and, sixth, damage allegedly suffered owing to delay by the Commission in adopting the decision.

7 In support of its appeal, British Sugar makes two pleas in law. The first claims that the Court of First Instance erred in law when assessing the impact of the disputed meetings on trade between Member States, and the second that the Court of First Instance misassessed the proportionality of the fines and failed to take the structure of the market properly into consideration.

8 In relation to the first plea on appeal, which concerns the assessments by the Court of First Instance in relation to the third plea in the main application before it, the judgment under appeal states as follows:

'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* [1969] ECR 295, paragraph 5; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, 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* [1993] ECR I-1307, paragraph 143; Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 175; Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others* v *Commission* [1996] ECR II-1201, 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* [1995] ECR II-289, 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* [1989] ECR 2117, 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* [1991] ECR II-1711, 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.'

9 In relation to the second plea on appeal, which concerns the assessments which the Court of First Instance made in connection with the first plea of the subsidiary claim before it, the Court of First Instance held as follows:

98. Under Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, the Commission may impose fines of from EUR 1 000 to EUR 1 000 000, 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* [1994] ECR II-549, 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* [1983] ECR 1825, 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 [on fines], 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 [on fines]. 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* [1994] ECR II-441, 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* [1995] ECR II-1165, paragraph 59; Case T-352/94 *Mo och Domsjö* v *Commission* [1998] II-1989, paragraph 268, confirmed on appeal in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, 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* [1997] ECR II-1689, 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.

...

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 Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 615 to 619, 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 appeal

10 British Sugar claims that the Court should:

— set aside the judgment under appeal;

— annul the contested decision in whole or, alternatively, in part;

alternatively:

— annul Articles 3 and 4 of the contested decision or reduce the fine, and

— order the Commission to pay the costs incurred by British Sugar in relation to this appeal and the costs relating to Case T-204/98, including those relating to the proceedings for interim relief.

11 The Commission contends that the Court should:

— dismiss the appeal as inadmissible in part and as unfounded as to the remainder or, alternatively, as wholly unfounded, and

— order the appellant to pay the costs incurred by the Commission in relation to the appeal.

Concerning the appeal

The plea concerning the impact on trade between Member States

Arguments of the parties

12 British Sugar begins by arguing that none of the facts or circumstances cited by the Court of First Instance in paragraphs 80 and 81 of the judgment under appeal is sufficient in law to produce the legal consequence which it asserts.

13 In that respect, the application of an agreement or concerted practice to the whole or a large part of a Member State does not in itself establish an effect on inter-State trade (see Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135). It must, British Sugar argues, be demonstrated that the agreement or concerted practice itself had, or was capable of having, an effect on trade between Member States.

14 However, the facts cited by the Court of First Instance in paragraphs 80 and 81 of the judgment under appeal do not show that the agreement or concerted practice was capable of having an effect on trade between Member States. At most, they show that there were other facts or circumstances operating during the relevant period, independently of the agreement or concerted practice, which may have been capable of having such an effect on inter-State trade.

15 The first fact relied on by the Court of First Instance, in paragraph 80 of the judgment under appeal, merely shows that there were some sugar imports to Great Britain during the period in question.

16 Concerning the second fact, British Sugar points out that it is true that one of the major preoccupations of itself and Tate & Lyle was to limit imports to a level which would not threaten their ability to sell their production in the national market (paragraph 81 of the judgment under appeal), but for reasons particular to each party.

17 In respect of the third fact relied upon by the Court of First Instance, in the second sentence of paragraph 81 of the judgment under appeal, British Sugar notes that the Court of First Instance appears to have accepted that its pricing policy consisted in pricing at a level at which no imports would be attracted by the profitability of sugar sales in the United Kingdom. That policy, however, had nothing to do with the agreement or concerted practice.

18 As to the fourth fact relied upon by the Court of First Instance, in the third sentence of paragraph 81 of the judgment under appeal, British Sugar argues that Tate & Lyle's policy was unilateral and had nothing to do with the agreement or concerted practice.

19 British Sugar goes on to maintain that, in paragraphs 84 and 85 of the judgment under appeal, the Court of First Instance appears to reject British Sugar's argument that it is necessary to show that the alleged potential effect on the pattern of trade was appreciable. However, it is apparent from the case-law that, in order to fall within the prohibition in Article 81 EC, the potential effect on the pattern of trade between Member States alleged must be appreciable (see Case 22/71 *Béguelin* [1971] ECR 949, paragraph 16; *Bagnasco and Others* cited above, and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141).

20 Finally, British Sugar argues that the judgment under appeal makes no distinction between industrial and retail sugar, although very different facts apply to each. Unlike in the case of industrial sugar there was, and is, virtually no trade in packaged retail sugar owing to high delivery costs, language and national differences over packet sizes and weights.

21 The Commission first argues that an agreement must be assessed in the light of its surrounding circumstances and thus matters extraneous to the agreement may well be relevant.

22 It then maintains that a presumption of an effect on intra-Community trade is recognised in Community law when an agreement or concerted practice extends over the whole territory of a Member State (see, to that effect, Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 48).

23 As for the factual findings in the judgment under appeal, the Commission considers that they are sufficient to support the legal consequence drawn by the Court of First Instance that the agreement at issue was capable of affecting intra-

Community trade. The Commission points out that, according to the case-law, the effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive (see *Bagnasco*, paragraph 47). The conclusion in paragraph 82 of the judgment under appeal is based on an assessment of all the facts set out in paragraphs 80 and 81 thereof. They should not, therefore, be examined in isolation.

24 Concerning British Sugar's price-fixing policy, the Commission observes that it is irrelevant that British Sugar had unilaterally adopted a pricing policy designed to prevent profitable opportunities arising for importers, because it had entered into an agreement with the other participants accounting for about 90% of the sugar supplied to the United Kingdom market.

25 As regards British Sugar's argument that the potential effect on intra-Community trade must be appreciable, the Commission takes the view that British Sugar has misinterpreted the judgment under appeal. In paragraph 78 thereof the Court of First Instance stated that the case-law did not require that intra-Community trade should in fact have been affected, but only that the agreement be potentially capable of having an appreciable effect. All subsequent references in the judgment under appeal to an effect on intra-Community trade must be understood as referring to that test.

26 Finally, as to British Sugar's argument based on the distinction between industrial and retail sugar, the Commission states that, in recital 59, the contested decision defines the relevant product market as that for white granulated sugar and that the contested decision recognises the distinction made by British Sugar only at the level of sub-markets.

Findings of the Court

27 The Court of First Instance was right to point out, in paragraph 78 of the judgment under appeal, 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 (see Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 22). Thus , the effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive (see Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 54, and *Bagnasco*, cited above, paragraph 47).

28 Furthermore, as the Court of First Instance pointed out in paragraph 79 of the judgment under appeal, 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 (see, in particular, *Belasco*, paragraphs 33 and 34).

29 In this case, it is clear from paragraph 80 of the judgment under appeal that there is no dispute that the sugar market in Great Britain is susceptible to imports. It is further undisputed that, during the meetings concerning industrial sugar prices, British Sugar gave information to all participants concerning its future prices, and that it and Tate & Lyle met several times to discuss retail sugar prices. Nor does British Sugar challenge the finding of the Court of First Instance, at paragraph 53 of the judgment under appeal, that the Commission was right to take the view that the purpose of those meetings was to restrict competition by the coordination of pricing policies. Finally, British Sugar itself acknowledges both being first in line in the matter of prices and that it established its prices, and therefore market prices,

by reference to the price just below which no imports could be profitably carried out. The fact that limiting imports from other Member States was one of the major preoccupations of British Sugar and Tate & Lyle is demonstrated, as the Court of First Instance points out in paragraph 81 of the judgment under appeal, from points 16 and 17 of the contested decision.

30 In those circumstances, the Court of First Instance did not commit any error of law by holding, in paragraph 82 of the judgment under appeal, that the Commission was right to take the view that the agreement in question was likely to have an influence on trade between Member States.

31 As for British Sugar's argument that the Court of First Instance did not accept that the Commission was under an obligation to demonstrate that the potential effect on trade between Member States was appreciable, this is based on a misreading of the judgment under appeal. The Court of First Instance held in paragraph 78 of the judgment that the conduct complained of had to be shown to be likely appreciably to affect trade between Member States. In paragraph 84 of the judgment, the Court of First Instance merely refers to its case-law to the effect that it is not necessary for the Commission to demonstrate that an agreement actually had an appreciable effect on trade between Member States, but that it is sufficient to show that the agreement is capable of affecting such trade.

32 Finally, concerning British Sugar's argument that the judgment under appeal fails to draw a distinction between industrial and retail sugar when examining the effect of the agreement on trade between Member States, and that there was therefore no correct analysis of the effect of the agreement on trade between Member States in the retail sugar market, the Court finds, first, that, as the Commission has pointed out, point 59 of the contested decision defines the relevant product market as that for granulated white sugar, retail and industrial sugar being regarded as two sub-markets. Secondly, the Commission assessed the effect of the agreement on the pattern of trade between Member States first on the granulated white sugar market, in points 159 to 161 of the contested decision, and

then on the two sub-markets, in paragraphs 163 to 168 of that decision, having indicated in point 162 that, in relation to industrial and retail sugar, there was also other evidence to support the conclusion that the agreement could have had an appreciable effect on the pattern of trade.

33 Since, in its action before the Court of First Instance, British Sugar did not raise any plea that the Commission's definition of the market was irregular, nor, more precisely, that its analysis of the retail sugar sub-market was irregular, the Court finds that this argument is based on new factors which were not put forward at first instance. Therefore, under Article 113(2) of the Rules of Procedure, they are inadmissible in the context of this appeal (see Case C-450/98 P *IECC* v *Commission* [2001] ECR I-3947, paragraph 36).

34 The first plea is therefore partly inadmissible and partly unfounded. It must therefore be dismissed in its entirety.

The second plea, concerning the proportionality of the fine and the taking into consideration of the structure of the market

Arguments of the parties

35 As a preliminary point, British Sugar recalls that it is for the Court of First Instance to verify whether the amount of the fine imposed is in proportion to the duration and gravity of the infringement (Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689) and, in particular, to weigh the seriousness of the infringement against the circumstances invoked by the applicant (Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951). In the present case, the Court of First Instance failed to carry out those tasks.

36 In that respect, British Sugar argues, in the first limb of its plea, that the Court of First Instance failed to have sufficient regard to the fact that the agreement or concerted practice had had no actual impact on prices, on competition or on trade between Member States. The fact that the effects of an agreement were limited or, as in this case, non-existent, ought to be given considerable weight in assessing the gravity of the infringement, as is shown by the first and second paragraphs of Part I (A) of the Guidelines.

37 A restriction on competition, albeit a 'horizontal' restriction, which had no actual impact on competition or prices, had no impact on inter-State trade, involved no fixing of prices charged to individual consumers, involved no fixing of minimum prices and was limited to part of one Member State should be regarded as a 'minor' and not a 'serious' infringement.

38 In any event, even if the alleged infringement must be categorised as 'serious' it ought to fall at the lower end of the range in that category. In a range from ECU 1 million to ECU 20 million, the Commission none the less set the basic fine for the gravity of the offence at ECU 18 million.

39 Both the Commission in setting the basic level of the fine at ECU 18 million in the contested decision and the Court of First Instance in upholding that aspect of the contested decision failed to give due consideration to the fact that the alleged infringement had no impact on competition, contrary to the fourth and sixth paragraphs of Part I (A) of the Guidelines.

40 British Sugar argues that the disproportionate level of the basic fine of ECU 18 million is striking when compared with other decisions of the Commission in which the infringements were also categorised as 'serious infringements'.

41 Furthermore, in determining the amount or uplift attributed to the duration of the infringement in the calculation of the amount of the fine the Commission and the Court of First Instance ought also to have taken into consideration the absence of any harmful impact on consumers, in accordance with the third paragraph of Part 1(B) of the Guidelines.

42 Finally, British Sugar argues that, in the absence of nearly all of the matters judged relevant for that purpose in the contested decision, an uplift of 75% of the fine for aggravating circumstances is excessive and unlawful.

43 In the second limb of its plea, British Sugar submits that the Court of First Instance failed to have sufficient regard to the structure of the relevant market. It submits that that structure explains why the infringement in question did not have, and was not capable of having, an effect on prices, competition or trade, and in support of that argument cites Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 615 to 619).

44 British Sugar argues in that respect that the Court of First Instance's interpretation of *Suiker Unie*, in paragraph 113 of the judgment under appeal, is flawed. The Court did not state that in the case of a price cartel it would have reached a different conclusion. It said that its conclusions would have been different if the agreement or concerted practice had led to damage to users or consumers because of 'any concerted or improper increase in the prices applied' (see *Suiker Unie*, paragraphs 619 to 621). In the present case it had not been alleged either that the agreement or concerted practice resulted in any actual increase in the prices applied or that there was any actual damage suffered by users or consumers.

45 The Commission argues that this plea is inadmissible because it amounts to a request for the Court to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance regarding the amount of the fine (see Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 129), and that, in any event, it is inadmissible to the extent that it assumes that the Court may conduct a general re-examination of the fine on grounds of proportionality.

46 As for British Sugar's argument based on the structure of the relevant market, the Commission takes the view, as set out in paragraph 113 of the judgment under appeal, that British Sugar's situation cannot be compared with that of the parties in *Suiker Unie*. According to the Commission, the Court clearly indicated that it would have taken a different view of the matter concerned had the agreement been in the nature of a price cartel. The present agreement was however an agreement 'to increase the price level for white granulated sugar in Great Britain and to refrain from increasing market shares by lowering prices'.

Findings of the Court

47 It should be recalled that the Court of First Instance alone has jurisdiction to examine how in each particular case the Commission appraised the gravity of unlawful conduct. In an appeal, the purpose of review by the Court of Justice is, first, to examine to what extent the Court of First Instance took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Article 85 of the Treaty and Article 15 of Regulation No 17 and, second, to consider whether the Court of First Instance responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced (see, in particular, *Baustahlgewebe*, paragraph 128).

48 Concerning the allegedly disproportionate nature of the fine, it should be remembered that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law (Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 31; *Baustahlgewebe*, paragraph 129).

49 This plea must therefore be declared inadmissible in so far as it seeks a general re-examination of fines (*Baustahlgewebe*, paragraph 129).

50 As to the remainder, as the Advocate General has pointed out in point 50 of her Opinion, British Sugar has not put forward anything to support the view that the Court of First Instance has not taken account, in a legally correct manner, of all the essential factors for assessing the gravity of the conduct complained of in the light of Article 85 of the Treaty and Article 15 of Regulation No 17. In that respect, it is sufficient to observe that, in paragraph 103 of the judgment under appeal, the Court of First Instance, having found that the agreement complained of should be regarded as horizontal and concerned the fixing of prices, stated that such an agreement has always been regarded as particularly harmful and is classified as 'very serious' in the Guidelines.

51 Nor has British Sugar claimed that the Court of First Instance did not reply to a sufficient legal standard to the whole of its arguments seeking withdrawal or reduction of the fine. In any event, it should be noted in particular that the Court of First Instance replied in paragraphs 101 to 103 of the judgment under appeal to the argument concerning the allegedly trivial nature of the agreement, in

paragraphs 104 to 106 to the argument concerning the duration of the infringement, in paragraphs 107 to 110 to the argument concerning aggravating circumstances, and in paragraph 113 to the argument concerning the structure of the market concerned.

52 The Court notes, finally, contrary to what British Sugar claims, that in paragraph 113 of the judgment under appeal the Court of First Instance correctly interpreted paragraphs 619 to 621 of the judgment in *Suiker Unie*, by holding that the Court of Justice itself had underlined that, in the case of an agreement on prices, its conclusions would have been different.

53 It follows from the above that this plea must also be rejected as partly inadmissible and partly unfounded.

54 Since all the appellant's pleas in law have failed, the appeal must be dismissed in its entirety.

Costs

55 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the

Commission has applied for costs to be awarded against the appellant, and the latter has been unsuccessful, the appellant must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby

1. **Dismisses the appeal;**

2. **Orders British Sugar plc to pay the costs.**

Jann Timmermans von Bahr

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass V. Skouris

Registrar President