31999D0210

1999/210/EC: Commission Decision 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 (notified under number C(1998) 3061) (Only the English text is authentic)

Official Journal L 076 , 22/03/1999 P. 0001 - 0066

COMMISSION DECISION 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 (notified under number C(1998) 3061) (Only the English text is authentic) (1999/210/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (1), as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 15(2) thereof,

Having regard to the decision taken by the Commission on 4 May 1992 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 91(1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (2),

After having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. INTRODUCTION AND PROCEDURE

(1) This Decision is concerned with the coordination by the two sugar manufacturers in Great Britain, British Sugar plc (hereinafter referred to as 'British Sugar` (3)) and Tate & Lyle plc (hereinafter 'Tate & Lyle` (4)), and two sugar merchants, Napier Brown & Company Ltd (hereinafter 'Napier Brown`) and James Budgett Sugars Ltd (hereinafter 'James Budgett`) of their pricing policy for industrial white granulated sugar in Great Britain. It is also concerned with the coordination by the two sugar manufacturers of their pricing policy for retail white granulated sugar in Great Britain. The period during which the infringement took place (hereinafter 'the relevant period`) was between 20 June 1986 and 2 July 1990 with respect to British Sugar and Tate & Lyle, and between late 1986 and 2 July 1990 with respect to Napier Brown and James Budgett.

(2) The starting point of the Commission's procedure in this case, and of a parallel procedure by the UK Office of Fair Trading (OFT) (5), is with two self-incriminating letters which Tate & Lyle wrote to the OFT on 16 July 1990 and on 29 August 1990. On 4 May 1992, the Commission initiated proceedings against the four abovementioned parties, as well as against other European sugar producers, and on 12 June 1992 the Commission sent a statement of objections to all of them. This initial statement of objections concerned several instances of anti-competitive conduct relating to the sugar trade in the United Kingdom and infringing Articles 85(1) and 86 of the Treaty. In the light of the parties' written replies and the submissions made at the oral hearing in relation to the initial statement of objections, the Commission decided to re-direct its case and to concentrate on the infringement that could be sustained with the high degree of proof required by the case-law of the Court of Justice of the European Communities. Accordingly, on 18 August 1995, a revised statement of

objections, replacing the initial one, was sent to the parties. this Decision takes into consideration the parties' written replies to the revised statement of objections, their submissions made at the oral hearing on 18 and 19 April 1996 and thereafter, as well as the parties' replies to the initial statement of objections and their submissions at the oral hearing following that initial statement of objections, in so far as they remain relevant in relation to the allegations made in the revised statement of objections.

II. FACTS

A. THE PRODUCT

(3) The product concerned by this case is white granulated sugar.

Sugar is produced from sugar beet or sugar cane. With the exception of a very small part of the south of Spain and the French overseas departments, sugar cane is not grown in the Community. For the purposes of this Decision (6), a distinction can be made between the three main different types of sugar: white granulated, liquid and speciality sugars.

White granulated sugar, which is often simply called 'white sugar`, is the final product after processing and refining beet or cane. Different qualities are identified in Community Regulations (7). The standard quality is EC II sugar. White granulated sugar represents by far the most important part of the sugar production and consumption in the Community as a whole and in the UK and Great Britain in particular (8). It is sold to industry (hereinafter referred to as 'industrial sugar`) and to the retail trade (hereinafter referred to as 'retail sugar`).

Liquid sugars are mainly used in the food-processing industry. The highest quality liquid sugar is made by dissolving white granulated sugar. Lower grades are made only from cane, by blending liquors produced at various stages of the cane-sugar refining process.

Speciality sugars consist of all sugars other than white granulated. This category includes African, Caribbean and Pacific (ACP) direct consumption raw, brown sugars, caster sugars, icing sugars and other milled sugars, and also syrups and treacles (9).

B. THE COMMON AGRICULTURAL POLICY SUGAR SCHEME

(4) The sugar scheme of the common agricultural policy is designed to support and protect the production of sugar within the Community. Sugar production from beet and cane harvested in the Community is restricted by means of national quotas ('A` and 'B` quotas) which are decided by the Council. In principle, these quotas have remained unchanged since 1981. The quota allocated to each country is then divided amongst the national sugar producers by the government in question.

A system of price support exists, but only for A/B quota sugar. Any sugar produced by Community undertakings in addition to their A/B quota is referred to as 'C` sugar, and must be sold on the world market - that is, to non-member countries, without support, or stored for at least 12 months and used as part of the following years' A/B sugar.

(5) In addition to A/B sugar, the Community provides price support for a limited amount of sugar imported pursuant to the Lomé Convention (10). During the period from 1986 to 1990, total preferential imports were set at 1 305 000 tonnes. Almost all of the preferential sugar is (and was during the relevant period) imported by Tate & Lyle in the form of partially processed cane sugar, which is then further refined into finished sugar products. Importers and refiners of ACP cane sugar receive a margin ('the institutional margin`) for this activity. This refining margin, is set in a manner different from that used to calculate the manufacturing margin fixed for sugar produced from beet, because of the specific nature of the refining operation. During the relevant period, the institutional margin for sugar refined from cane was lower than the margin available for the processing of beet sugar. As a result, during the relevant period, the refiners of preferential cane sugar suffered a structural margin disadvantage compared to the Community's beet processors (11).

(6) Each year the Council fixes a number of institutional prices in relation to the purchase of sugar beet and its processing and sale, the most important of which is the intervention price: the price at which any manufacturer may sell his A/B sugar to national intervention boards. Companies selling into intervention will receive the intervention price for their processed sugar. However, no sugar has been sold into intervention in recent years. As part of the measures to ensure that the sugar scheme is self-financing (12) a storage levy is applied equally to all A/B sugar which is not sold into intervention. Intervention price plus the storage levy therefore represent the guaranteed minimum price for A/B sugar. This is known as the effective support price. Preferential sugar imported pursuant to the Lomé Convention does

not participate in the system of storage costs reimbursement and therefore the storage levy is not applied to it.

During the relevant period, the Council also set a threshold price. This was the price at which non-quota sugar might be imported from third countries. Such imports had to pay a levy representing the difference between the free market price on the world market and the threshold price. Form 1 July 1995 onwards (Uruguay Round implementation), the variable levy has been replaced by first a fixed duty, and secondly by an additional duty as safeguard clause in the event of very low world market prices.

Community regulations therefore have the effect of fixing minimum (intervention plus storage levy) prices for sugar to be sold in the Community.

The Council also fixes minimum prices that the processors must pay to beet growers for the sugar beet.

(7) Processors of beet sugar may sell A/B sugar freely throughout the Community. If they are unable to sell all their A/B sugar in this way they may either sell it into intervention or export it onto the world market. If they choose the latter option they receive an export refund which is calculated on the basis of a tender system. Normally, such 'selling into restitution` is more attractive than selling into intervention (13).

C. THE UNDERTAKINGS CONCERNED AND THEIR POSITION IN THE UNITED KINGDOM AND SPECIFICALLY IN GREAT BRITAIN

1. The producers of sugar in the United Kingdom

1.1. British Sugar

(8) British Sugar is the sole UK processor of sugar beet. The entire annual United Kingdom A/B sugar quota of some 1,144 million tonnes is allocated to it. In the business year ending on 30 September 1989, British Sugar's worldwide turnover in all products was GBP 677,6 million. Between 1982 and 1990, British Sugar was a subsidiary of S & W Berisford plc (14). It was acquired by Associated British Foods plc (15) in December 1990/January 1991.

1.2. Tate & Lyle

(9) From the beginning of the relevant period to the present day, the structure of the Tate & Lyle group has not changed. Tate & Lyle is the ultimate parent company of the group whose companies operate worldwide in different sectors of the economy. Within this group, Tate & Lyle Industries Ltd, a direct subsidiary of Tate & Lyle plc, is responsible for the business of refining cane sugar in the UK. This is carried out by its operating division, Tate & Lyle Sugars (TLS). The overwhelming majority of Community imports of preferential raw cane sugar are refined by Tate & Lyle in its refineries in Great Britain. To ensure its provision of raw cane sugar, Tate & Lyle has concluded supply contracts with a number of ACP producers on a five-year rolling basis. It had two refineries in Great Britain, one in London (Silvertown) and one in Scotland (Greenock). Meanwhile, the refinery in Scotland has been closed. Both refineries had been working at or near to full capacity since the financial year 1982/83. Besides the refining of sugar in the United Kingdom, Tate & Lyle is a refiner of sugar in other countries including Portugal, the USA, Canada, Australia and Zimbabwe. It is furthermore in the business of cereal sweeteners and starch production in Europe and North America. In the business year which ended on 30 September 1989, Tate & Lyle's worldwide group turnover in all products was GBP 3 359,9 million.

2. The sugar merchants

(10) During the relevant period, the distribution of sugar in Great Britain was performed by British Sugar and Tate & Lyle, by one Continental sugar producer (De Danske Sukkerfabrikker) through an exclusive agent (Czarnikow Ltd), and by independent merchants. The main merchants in Great Britain were Napier Brown, James Budgett, Billington and J. M. Thomas.

(11) The merchants carry out business in two forms: 'nominal merchanting` and 'principal merchanting`. In their nominal merchanting business, the merchants act as agents for the two UK producers (British Sugar and Tate & Lyle), for which they receive a fixed commission or fee. In this function, they take care of order processing, invoicing and collecting payments. They are not involved in the price negotiations, which take place directly between the producer and the customer (16). Even though this activity is normally not very attractive financially, it does provide market share and therefore a platform for selling sugar on other more profitable terms known as principal merchanting (17). In this business, the merchant purchases sugar on its own account and sells it in its own name fixing the terms and

consequently the profit for itself. The sources of supply for the principal merchanting business are the two UK producers and imports. The merchants engage in imports on their own account and in their own name (18). During the relevant period, Napier Brown and James Budgett imported sugar from the Continent. James Budgett also imported Community sugar from the Republic of Ireland.

2.1. Napier Brown

(12) Napier Brown is the largest of the four sugar merchants in Great Britain. Its nominal merchanting business for British Sugar and Tate & Lyle has gradually decreased from some 33 % to 23 % of its total granulated sugar business. Its principal merchanting business has varied between some 67 % and 77 %. During the business year which ended on 31 March 1990 and ever since, Napier Brown has been a wholly owned subsidiary of Napier Brown Holdings Ltd whose activities consist of trading, processing and packaging of sugar, dried fruits, nuts and chilled foods. In the business year ending on 31 March 1990, Napier Brown attained a worldwide turnover in all products of GBP 258,2 million.

2.2. James Budgett

(13) James Budgett is the second largest merchant in Great Britain. Its nominal merchanting business for Tate & Lyle and British Sugar decreased from some 70 % of its total granulated sugar business in 1986 to some 50 % by 1990. Its principal merchanting business with sugar from the two UK producers has over the same period of time increased from some 20 % to about 40 %. Its import business tripled between 1986 and 1990 to constitute some 10 % of its sugar business. During the business year ending on 31 March 1990 and ever since, the majority of the shares in James Budgett have been owned by ED & F Man Ltd, the world's largest sugar trader, which was renamed ED & F Man Group plc in 1994. On 17 May 1989, Irish Sugar acquired 33,3 % of the shares in James Budgett. At the same date, James Budgett became the exclusive distributor of Irish Sugar in Great Britain. On 10 August 1992, James Budgett changed its name from James Budgett & Son Ltd to James Budgett Sugars Ltd. In the business year ending 31 March 1990, James Budgett's worldwide turnover in all products was GBP 163,8 million.

D. PRODUCTION AND SUPPLY OF SUGAR IN THE UNITED KINGDOM AND SPECIFICALLY IN GREAT BRITAIN

1. Market shares

(14) Supply and demand for sugar in the UK is largely in balance, and has been during the relevant period. This can be seen from the following table (19):

>TABLE>

The table expresses all figures in 'white sugar equivalent` (WSE) which covers all kinds of sugars including in particular the main three categories, i. e. white granulated sugar, liquid sugar and speciality sugar (20) and which applies a conversion factor to all types of sugar which are not white granulated. With regard to the figures for imports from other Member States, which are most important for the present case, it is uncontested that the vast majority of these imports enter the UK as white granulated sugar in the form of bulk (tanker), 50 kilogram bags or retail packets.

(15) British Sugar and Tate & Lyle have, during the relevant period, produced between them more than 90 % of the sugar supplied in the United Kingdom. Market shares in the United Kingdom have been stable during the relevant period (21). If one considers the market for granulated sugar as a whole, British Sugar has held a share of between 51 % and 54 % between 1986/87 and 1989/90, Tate & Lyle has held between 38 % and 40 %, retail sales by Napier Brown have accounted for an overall [deleted, business secret] % of the market, and imports have accounted for between 6 % and 8 % (22). The sources of these imports were mainly Denmark, France and Ireland. Imports from all of these three countries, and in particular from Denmark and France, increased between 1986/87 and 1989/90 (23).

2. Imports from other Member States into the United Kingdom and specifically into Great Britain

(16) British Sugar has confirmed (24) that, during the relevant period, it followed the policy of attempting to set its prices just below the level at which Continental sugar producers would export significant quantities of sugar to the United Kingdom, thus threatening British Sugar's ability to sell its entire A/B sugar quota in the UK. This statement is accepted by all the other parties to this proceeding and it matches the Commission's findings in its Napier Brown decision (25). While most of these sources mention the United Kingdom as such, the findings

(26) are in particular true of Great Britain. The fact that in some respects different conditions prevail in Northern Ireland (27) does not hinder the application of these findings on the market in Great Britain. In the market in Great Britain, the sugar price is somewhat higher than the current price in markets of neighbouring Member States. This is due to the costs incurred in transporting sugar across the English Channel. It is also due to the fact that, in order to secure a substantial volume of imports, a considerably higher price is necessary in Great Britain than on the Continent because potential exporters may require a significant premium to persuade them to export large quantities of sugar to Great Britain for fear of retaliatory exports by the British producers (28).

(17) During the relevant period, Tate & Lyle adopted an active policy of attempting to deter imports (29). It contacted all the major Continental sugar producers that had traditionally sold significant quantities of sugar in Great Britain: Béghin-Say (France), Irish Sugar and De Danske Sukkerfabrikker, informing them that if they decided to export larger amounts of sugar to the United Kingdom than had traditionally been the case, Tate & Lyle would react by selling larger quantities into their home markets (30). The reason for this policy to sell its entire A/B quota on the United Kingdom market (31), and that, as the price was in 1984 to 1986 had shown, if necessary British Sugar was willing and able to drop its prices to do so. As United Kingdom production and consumption during the relevant period were largely in balance, it follows that if imports of A/B sugar from the Continent were successfully marketed in the United Kingdom, a quantity similar to the amount imported had to be exported by one of the two UK producers to other Member States, or sold into restitution or into intervention (32). In a renewed price war in which both UK producers (British Sugar and Tate & Lyle) would have tried to sell their traditional quantity in the UK market in spite of the imports, Tate & Lyle would have been in a weaker position than British Sugar. Moreover, in the absence of such a price war, sales in the UK market were for both UK producers more profitable than exporting to other Member States or selling into restitution or intervention. Against this backdrop, it was Tate & Lyle's particular interest to deter as many imports as possible.

As in recital 16 the description and analysis made for the United Kingdom in relation to other Member States also applies mutatis mutandis to Great Britain in relation to the other Member States.

(18) A number of factors contributed in the relevant period, and continue to contribute, to limiting imports into the sugar market of the UK as a whole, and of Great Britain in particular. Many customers require frequent and rapid (just-in-time) deliveries (33), as well as guaranteed and regular deliveries (34). Meeting such needs with deliveries from Continental supply points is an unlikely option. Continental producers willing to meet such requirements would therefore need to invest in distribution facilities based in Great Britain (35).

(19) Traditionally, imports of approximately 4 to 10 % of national consumption do enter the United Kingdom each year. This is because many of the larger customers wish to maintain a further source of supplies from Continental EC producers (36), first as a bargaining tool when engaging in price discussions with the domestic British producers, and second to provide a mechanism that might assist them in obtaining alternative supplies in the event of a shortage of domestic sugar, due for example to crop failure (37). Such sugar is either ordered direct from the Continental producer by the company in question or acquired via merchant. Merchants therefore purchase Continental sugar for that reason, and also to act as a bargaining tool when they enter discussions with the domestic suppliers for the sugar they wish to purchase for their principal merchanting activities, for which they are to a large extent dependent on the domestic suppliers. Additionally, sugar is imported by the merchants during periods when Continental sugar is cheaper than domestic sugar, which may occur in particular for rather limited periods due to currency fluctuations (38).

(20) During the sugar campaign years (1 October to 30 September) which cover the relevant period, imports of sugar from other Member States into the UK increased form 88 000 tonnes in 1986/87 to 110 000 tonnes in 1987/88, then 132 200 tonnes in 1988/89 to finally 153 00 tonnes in 1989/90. This is an increase of 73,9 %, representing an increase of the import share in the total national consumption from 3,9 % in 1986/87 to 6,7 % in 1989/90 (39). The import figure for 1985/86 is 137 000 tonnes. The increase between 1985/86 and 1989/90 is 11,7 %. The vast bulk of the sugar imported from other Member States into the UK was white granulated sugar.

(21) In the calendar years from 1986 to 1990 inclusive, Napier Brown's imports of white sugar into the UK increased by 60 % (40). In the calendar years from 1 January 1986 to 31 December 1990, James Budgett's imports of sugar in the UK nearly trebled (41).

E. THE RELATIVE COMPETITIVE POSITIONS OF BRITISH SUGAR, TATE & LYLE, NAPIER BROWN AND JAMES BUDGETT

(22) Due to the specific characteristics of the common agricultural policy (42), British Sugar, being a beet-sugar processor, has benefited during the relevant period from a built-in advantage compared to the cane-refiner Tate & Lyle, because it has received a higher margin for the sugar it produced and sold. As a consequence of this it is widely accepted (43), and the Commission takes the view, that British Sugar during the relevant period was the price leader on the markets for sugar (including white granulated sugar) in Great Britain, and that Tate & Lyle was a price follower of British Sugar on this market. The fact that British Sugar had the decisive influence in determining the price level was also apparent in the price war between 1984 and 1986 (44). However, as will be shown, British Sugar's position as a price leader did not preclude competition by Tate & Lyle in the markets for industrial and retail sugar in Great Britain, which for the purpose of the present case are the markets relevant to the relationship between these two companies (45).

(23) Napier Brown and James Budgett were also to a large extent price followers of British Sugar (46) on the sugar markets (including white granulated sugar) in Great Britain during the relevant period. British Sugar has confirmed that during the relevant period its policy has been to attempt to set its prices just below the level at which Continental sugar producers would export significant quantities of sugar to the UK, thereby threatening British Sugar's ability to sell its entire A/B sugar quota in the UK (47). In such circumstances, Napier Brown and James Budgett were dependent on the two UK sugar producers (British Sugar and Tate & Lyle) for a significant part of the sugar that they sold in their capacities either as principal or nominal merchants, although imports allowed them a certain margin and could have been used as a bargaining tool (48). Thus the pricing policy options available to them, including those for white granulated sugar, were to a large extent dependent on the pricing decisions of their major supplies. However, as will be shown, British Sugar's price leadership did not preclude competition by Napier Brown and James Budgett against British Sugar or Tate & Lyle on the industrial sugar market in Great Britain, which for the purpose of the present case, is the market relevant to the relationship between all four parties (49).

F. FACTS UNDERLYING THE INFRINGEMENT OF THE COMPETITION RULES

1. Background facts

(24) Between 1984 and 1986 a price war took place on the sugar market in Great Britain, including the market for white granulated sugar (50). This resulted largely from an aggressive pricing strategy adopted by British Sugar in an attempt to maximise its sugar sales in Great Britain. The consequence was to drive prices down to very low levels.

(25) In 1988, the Commission acting on a formal complaint, adopted a decision (51) pursuant to Article 86 of the Treaty, finding that British Sugar had abused the dominant position that it held on the markets for industrial and retail sugar in Great Britain. The practices pursued by British Sugar, found to be an infringement of Article 86, consisted of a number of actions intended to remove Napier Brown from the market for retail white granulated sugar. This Decision was preceded by an interim measures statement of objections which was sent to British Sugar on 8 July 1986 and which sought the termination of the infringement of Article 86.

(26) On 5 August 1986, British Sugar wrote to the Commission offering undertakings which were intended to terminate the practices which the Commission in its abovementioned interim measures statement of objections had considered to be infringements of the Community competition rules. The Commission accepted the undertakings by letter of 7 August 1986. Of particular relevance to the present proceeding is the following undertaking:

'(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.` (52).

(27) In October 1986, British Sugar informed the Commission that it intended to adopt a Community competition law compliance programme. This programme, which was adopted in December 1986, describes the particular responsibilities of a dominant firm, but also sets out

in detail the obligations that flow from Article 85(1). Of particular relevance to the present proceeding is the following section of the compliance programme:

'Article 85(1) Anti-competitive agreements

(. . .) Agreements or concerted practices fixing prices, limiting production or markets, sharing markets, collective boycotts of actual or potential customers or suppliers and tie-in agreements, are all, for instance, prohibited.

(. . .) Article 85(1) also prohibits agreements or concerted practices for the exchange of information between competitors about prices, trading terms, credit notes, discounts and so on, and may even apply where such information is given unilaterally.

(. . .) In line with its policy of complying with all applicable laws the company is therefore committed to compliance with the EEC competition rules and will take every step to ensure observance of that policy. It is also the company's policy not only to observe the law but to go beyond mere compliance with the strict letter of the law and seek to avoid any conduct which may give rise to doubt as to whether or not it has acted lawfully.` (53).

(28) The provision of the undertakings and the adoption of the compliance programme were taken into account by the Commission in its Napier Brown Decision of 1988 (54) as mitigating factors when setting the fine, which was fixed at ECU 3 million.

2. The anti-competitive conduct

2.1. Summary

(29) The facts and evidence compiled by the Commission demonstrate that:

(a) as regards industrial sugar, British Sugar informed Tate & Lyle at a meeting of 20 June 1986, and also informed Napier Brown and James Budgett at a subsequent meeting which took place before the end of 1986, of its intention to end the sugar price war and to cease the low pricing policy, which had been designed to increase market share, and of its intention to increase the price level in Great Britain. Tate & Lyle confirmed that it intended to follow this pricing policy. After the bilateral meeting of 20 June 1986, 18 meetings about industrial sugar between all four parties took place at regular intervals throughout the relevant period up to 13 June 1990. During these meetings, British Sugar informed Tate & Lyle, Napier Brown and James Budgett of the price increases it intended to seek to obtain with respect to industrial sugar. This was done by reference to a 'pricing matrix` specifying British Sugar's target pricing according to volume of purchases. Owing to this structure, the matrix necessarily also indicated the price differentials between purchasers of larger and of smaller quantities of industrial sugar. At least once, a copy of the written matrix was supplied to Tate & Lyle, Napier Brown and James Budgett, and at other meetings information of a similar nature to that contained in the matrix was supplied by British Sugar also made indications to the other three companies of its intention to change some or all list prices, at times as much as nine months ahead of the actual change.

(b) with regard to retail sugar, British Sugar informed Tate & Lyle at the meeting of 20 June 1986 that in this business it also intended to cease the low-pricing policy, which had been designed to increase market share, and that it now intended to increase the price level in Great Britain. Subsequently, between 25 February 1987 and 9 May 1990, eight meetings concerning retail sugar took place between the two companies. In the course of at least two of these meetings, British Sugar gave to Tate & Lyle a copy of its new retail price list a few days before it was officially circulated to the trade. During their meetings, the two companies also discussed their respective discount policies towards larger retail customers. However, there is not sufficient evidence that British Sugar informed Tate & Lyle of any specific price or discount to be applied to a specific customer. Furthermore, British Sugar signalled retail price rises to Tate & Lyle at least two or three weeks before the new written price list had been produced and could have been circulated to the trade.

2.2. Detailed presentation

(30) Almost two months prior to writing to the Commission formally offering undertakings, the then Chairman of S & W Berisford telephoned the chairman of Tate & Lyle on 17 and 18 June 1986, informing him that the senior management of British Sugar was going to be changed imminently, and suggesting a meeting with Tate & Lyle to introduce British Sugar's new team (55). Such a meeting was held between the senior management of the two companies on 20 June 1986. During the meeting, British Sugar informed Tate & Lyle of its decision to end the sugar price war which had been based on low pricing designed to increase market share. The following is an extract of the letter written by a director of Tate & Lyle of the Office of Fair

Trading on 29 August 1990, of which the Commission obtained a copy, setting out his company's understanding of what happened during that meeting (56):

'The Tate & Lyle representatives came away with the understanding that the price war that had been going on for some two years would cease. It was also understood that the retail market shares enjoyed by Tate & Lyle and British Sugar at that moment should remain and that neither party would price in an aggressive manner. It was also accepted by Tate & Lyle that British Sugar could not be prevented from putting their full A + B quota of 1 144 000 tonnes into the United Kingdom market. The implication of these discussions, as understood by Tate & Lyle, was that British Sugar would not disturb the market by importing sugar because to do so would be to restart the price war, since the market was in balance. In order to give these matters commercial substance, Mr Pepler for Tate & Lyle Sugars carried the message back to his staff that they should not cut prices so as to try to gain market share from British Sugar.

This meeting was significant in that it set the background principles against which all future discussions were held.` (57).

(31) According to both British Sugar and Tate & Lyle, this statement does not mean that the companies agreed to fix prices, market shares or to take a common position regarding imports. In a joint memorandum submitted by both British Sugar and Tate & Lyle to the Office of Fair Trading (58) the parties gave their common understanding of what took place. The relevant part of this memorandum states the following:

'4 BS announced at a meeting on 20 June 1986 that the price war then current in the United Kingdom sugar market, resulting from BS's then commercial policy, would cease. In the context of the ongoing EEC Commission investigation into the affairs of BS pursuant to the Napier Brown Decision, BS was concerned to ensure that there was no further possibility of BS engaging in a form of pricing policy which could give rise to a complaint to the EEC Commission or the OFT of predatory pricing or other such abuses of its dominant position. Both TLS and British Sugar believed that as a consequence of the unilateral decision taken by British Sugar to end the price war:

(a) retail market shares would tend to remain at around the level the parties believed existed at the time of the making of the announcement by British sugar; and further to that end;

(b) British Sugar would not price aggressively with the result that TLS would not price aggressively although there would nevertheless still be a band of tolerance in relation to their respective market shares.

During the arrangement, BS informed TLS, before it made a general announcement to its customers, of changes in list prices, and discount policy, although TLS was not informed of any specific price or discount which was to be quoted to a specific customer. Prior to TLS being given any such information all major customers of BS would have known of its general intentions as to the order of magnitude of its price increases for the relevant period. At times the parties would be in contact about whether their shares in the retail market were within the band of tolerance.` (59).

(32) Subsequent to the meeting between British Sugar and Tate & Lyle on 20 June 1986, British Sugar held a series of meetings up to and including 13 June 1990 with Tate & Lyle, together in some cases with Napier Brown and James Budgett. Tate & Lyle provided a list of the meetings of which it is aware to the Commission (60). This was drawn up on the basis of the diary records of its employees. In detail, the list states the date, the individual participants and the company to which they belong, the venue and the topic discussed at each meeting.

(33) A total of 40 meetings are detailed in the list provided by Tate & Lyle. British Sugar, Napier Brown and James Budgett accept that the meetings took place and they also accept that these meetings took place as described and detailed in the list provided by Tate & Lyle (61). In this list, Tate & Lyle has indicated that there is doubt as to whether the meeting of 5 November 1987 actually took place. Apart from specifying the venue where the meetings took place, the list gives the following information.

>TABLE>

(34) The subject matter of the meetings breaks down as follows:

>TABLE>

(35) The list shows that - apart from the first bilateral meeting between British Sugar and Tate & Lyle on 20 June 1986 - there were 18 meetings about industrial sugar in which all four parties participated - that is, 17 meetings under the heading 'industrial` and one under the

heading 'industrial/institutional price changes`. As to the first quadripartite meeting (between British Sugar, Tate & Lyle, Napier Brown, James Budgett) on industrial sugar, it is recorded on the list, and it is uncontested, that it took place in late 1986, which means after 16 September 1986 and before the end of 1986.

As to retail sugar, there were - apart from the first bilateral meeting of 20 June 1986 - eight meetings between British Sugar and Tate & Lyle: seen under the heading 'retail` and one under the heading 'general/retail`.

The other meetings listed are not relevant for this case.

(36) In a letter dated 16 July 1996 (62) to the Office of Fair Trading from the chairman of Tate & Lyle, of which the Commission obtained a copy, Tate & Lyle set out its understanding of the meetings:

'Certain meetings took place, at which British Sugar indicated its paramount commercial and political requirement to sell all its A and B quota sugar in the United Kingdom. They also indicated their desire to see United Kingdom price levels rise from the low levels that they had by then reached, and also to see differentials between customers taking different volumes restored to more sensible and logical levels. As a price follower, and given the parlous state of the cane refining business, Tate & Lyle had little commercial alternative to falling in with British Sugar's new pricing policy.

Views were exchanged between the companies as to the minimum prices which British Sugar wanted to achieve in the industrial and retail markets and the likely phasing of price increases. Tate & Lyle stressed that its commercial policy was both to follow British Sugar's price leadership and to defend its then market share of around one third of the retail market. British Sugar subsequently introduced industrial and retail price increases in the United Kingdom during the summer of 1986, and Tate & Lyle followed with substantially similar increases. Tate & Lyle understood that it could not prevent British Sugar selling the whole of its A and B quota in the United Kingdom, and that British Sugar would not import sugar into this country.

As regards sales of sugar in the industrial market, it appears that since that time meetings have taken place two or three times a year between representatives of British Sugar and Tate & Lyle. At some of these meetings, British Sugar tabled the minimum net prices to customers in various volume bands it intended to achieve over the coming year. This matrix and other matters relating to prices, has been the subject of communication between the companies and also representatives of Napier Brown and Budgetts. The timing of changes in list prices, and the content of such changes, has also been the subject of communication as have matters such as drop sizes, customer credit-worthiness, etc. It also appears that sometimes information was exchanged between the companies about the volume discounts being applied to specific customers.

(. . .)

As regards retail prices there have also been contacts between the companies, in which British Sugar indicated the dates and timing of increases in its retail price list. In connection with customer negotiations information has been exchanged about changes in the discounts that would be offered to some of the larger customers (who took supplies from both companies). Tate & Lyle has consistently made it clear that it would defend its one-third share of the retail market and has made every effort to prevent British Sugar from eroding that share. It has not been in Tate & Lyle's commercial interests to attack British Sugar's market position, nor undermine British Sugar's commercial objective of improving its returns from the United Kingdom sugar market (63).`

2.2.1. Industrial sugar pricing, and in particular the matrix

(37) In an annex to the abovementioned letter of 16 July 1990, Tate & Lyle provided a copy of a pricing matrix handed to Tate & Lyle by British Sugar during a meeting held in 1989. This matrix, which concerns industrial sugar only, sets out British Sugar's target price on a quarterly basis for the 1990 calendar year, broken down into 10 columns according to the tonnage purchased.

(38) Whilst British Sugar believes that the matrix was handed over during only one meeting they accept (64) that 'on all the other occasions, I think we admit, I don't think we've anything to fear, the matrix was discussed in general terms but we have found no instance where another printed or written document was handed to Tate's or the merchants` (65). During investigations carried out at British Sugar, a representative of the company stated (66) 'what we would normally do is just announce that we were attempting to move, if you like,

the 50 000 tonne band by a certain amount and thereafter an increase for the balance lower down, so it might have been 2£/2,5£/3£ and so on` (67). James Budgett also states that the matrix was only handed over on one occasion (68). On the other hand, during investigations at Tate & Lyle, a representative of the company stated that the British Sugar matrix was handed over to Tate & Lyle, 'twice or three times possibly` (69). Moreover, answering the investigator's enquiry as to the nature of the information which was provided to Tate & Lyle on those occasions where the matrix was not handed over, a representative of the company stated (70) '. . . the point was really that they presented a piece of paper which they said was their intent in terms of moving the market price (. . .) Now it wasn't a matter of it appearing every time. It related to their intent for a subsequent period, a year ahead` (71). In its written reply to the revised statement of objections (72), Tate & Lyle maintained that by referring to the presentation of 'a piece of paper` its representative was referring to the matrix on the occasions when it was handed over. According to Tate & Lyle (73), 'other than on the one or possibly two or three occasions when the matrix was handed to T & L and the merchants, no written or printed pricing information was passed to T & L. T & L therefore agrees with BS that, except for the matrix, no other printed or written documents were handed to T & L` (74).

However, none of the parties has called the revised statement of objections into question in so far as it reports - as reiterated in this Decision (75) - British Sugar's recollection of what happened when the matrix was not handed over, namely discussion of the matrix 'in general terms` and an announcement by British Sugar of the levels by which it was intending to move the various volume bands. A comparison shows that the information provided by British Sugar on these occasions was of a similar nature to the information provided by the actual handing-over of the matrix to the other parties. Napier Brown expressly agrees (76) with the Commission's description of the facts as put forward in its revised statement of objections (77) and as reiterated in this Decision (78): 'At least once a copy of the written matrix was provided to Tate & Lyle, Napier Brown and James Budgett, and on other occasions information of a similar nature to that of the matrix was provided by British Sugar . . .` (79).

(39) In its reply to the initial statement of objections (80), Tate & Lyle states that 'while the matrices were talked about at the meetings, they were not "proposed" by BSC for discussion and amendment but represented BSC's unilateral decision` (81). It goes on to state (82) that 'the "matrix" was a BSC internal document which, for its own reasons, it chose on occasion (although not invariably) to disclose to T & L and the two merchants` (83).

(40) Further clarification as to the nature of the matrix can be gained from the following. At the oral hearings in this case, British Sugar described (84) the matrix as 'an internal document, it is a vertical document, if you like, within British Sugar` (85). It specified the prices below which British Sugar's sales representative were not permitted to sell industrial sugar without the express permission of the general manager responsible for industrial sugar sales (86). British Sugar also pointed out, however, that in many cases the actual price at which industrial sugar was sold was below the matrix price.

James Budgett, in its written reply to the initial statement of objections (87) stressed that it never 'considered the volume/price matrix tabled by BS as anything other than a guide as to the price BS was asking its salesmen to seek. This information was not secret (it was available to industrial customers who enquired)` (88). In its written reply to the revised statement of objections, James Budgett described (89) the matrix to be 'understood to constitute only a British Sugar internal guide to its salesmen, which they could depart from (but should first seek internal management approval) (90)`, thus providing 'an internal monitoring mechanism` (91).

Tate & Lyle during investigations stated (92) that 'they (British Sugar) presented a piece of paper which they said was their intent in terms of moving the market price (. . .) this presentation was for the benefit of the others so that we would know what they intended to do` (93).

(41) British Sugar has informed the Commission that the matrix was not - otherwise than at the meetings between the parties which are at issue in this proceeding - given to customers (94). The document was thus not freely available. However, looking at timing, British Sugar states that in practice well before it disclosed the matrix to others it had already embarked on negotiations and even concluded some major industrial sugar contracts. According to British Sugar, at the time the matrix was disclosed, its activities in the industrial sugar market place were already known to its rivals. The matrix did not offer surprises and did not serve to reduce any uncertainty over British Sugar's prices to its customers (95). Referring more

specifically to the point in time when Tate & Lyle obtained from British Sugar the information contained in the matrix, Tate & Lyle explained during investigations (96) that 'in general` the information was given to it 'at the early stages` of its annual negotiations with industrial buyers when 'we might have been already negotiating with some, maybe not with others` (97). Tate & Lyle maintained that in the event it had not been provided with the matrix information by British Sugar it would have to a certain extent been able, by talking to buyers, to obtain the information via the market. (98). However, on the same occasion, Tate & Lyle confirmed (99) that the information contained in the matrix was useful to it by stating 'it would be foolish to say it wasn't useful, it was useful (. . .) if we had an indication of their intents it had some bearing perhaps on the way in which we might have seen it. We are followers` (100).

(42) Moreover, there is evidence that the information conveyed by British Sugar to Tate & Lyle, Napier Brown and James Budgett regarding industrial sugar was not limited simply to the advance handing over of industrial price matrices, or the giving of equivalent information, but that British Sugar also provided those companies with considerable advance warning of its intention to raise prices, before detailed matrices had been produced. In a written reply, dated 15 January 1991 (101), to questions raised by the Commission regarding industrial sugar, Tate & Lyle stated that, whilst it never received draft list price changes from British Sugar, 'indications of an intention to change some or all list prices were at times made as much as nine months ahead. Please note that the majority of industrial sales are not contracted at List Price` (102).

(43) With regard to the Commission's conclusion that Tate & Lyle had confirmed during the investigations of 27 May 1994 that the information provided a higher degree of certainty and advance knowledge, Tate & Lyle, in its written reply to the revised statement of objections, stated (103): 'Price lists in the industrial sector are of very little relevance in terms of the actual prices charged to individual customers. The information provided by BS was of far more relevance to the merchants to enable them to base their prices. In terms of competing with BS on individual accounts such information was of little value to T & L. Therefore, (. . .) the information was of use as to BS' probable intentions rather than providing any certainty` (104).

As to the aspect of advance knowledge, Tate & Lyle stated (105): 'Although the matrix itself was not given to customers, the information it contained, by the time T & L received it, would have been available to customers at the same time as it was released to T & L. Consequently, T & L would have already begun to pick up the information from the market or at the very least, would have obtained that information very quickly thereafter. T & L did not therefore receive information on the content of BS' price intentions in advance of BS' customers (see also paragraphs 152 and 160 of BS's response to the First SO` (106).

(44) Furthermore, it is clear that during the meetings on industrial sugar the differentials to be maintained or created between the prices charged to purchasers of large quantities of sugar compared to purchasers of smaller quantities were indicated. In its letter to the Office of Fair Trading dated 16 July 1990 (107), Tate & Lyle states that during the meetings British Sugar 'indicated their desire to see United Kingdom price levels rise from the low levels that they had by then reached, and also to see differentials between customers taking different volumes restored to more sensible and logical levels` (108).

Indeed, the fact that British Sugar tabled its pricing matrix during at least some of these meetings, and that this matrix stated their intended minimum price for customers according to the size of their purchases, meant that consideration of differentials during these meetings was inevitable, This is confirmed by British Sugar. During investigations it stated (109) that the 'sharing of the matrix . . . was designed to be able to impress upon them that certain relativities between price and volume would be preserved` (110); and in its written reply to the initial statement of objections (111) it stated that such meetings 'considered industrial price differentials between larger and smaller purchases of sugar` (112). This is also confirmed in Tate & Lyle's letter to the Office of Fair Trading dated 29 August 1990 (113), which states that at the meetings regarding industrial sugar 'matters discussed included price changes, differentials, delivery terms, credit terms, concerns about volume loss and, in some cases, the situation in particular accounts` (114).

(45) Napier Brown and James Budgett have given evidence that, as merchants, they had a particular interest in the restoration and maintenance of appreciable price differentials between the purchasers of larger and of smaller volumes of industrial sugar. This is due in particular to the fact that in the industrial sugar business the purchasers of larger quantities

were mainly customers of British Sugar whereas the purchasers of smaller quantities were the traditional customers of the merchants. Napier Brown, in its written reply to the revised statement of objections, made it clear (115) that it derived reassurance from the meetings that British Sugar would no longer pursue with regard to industrial sugar pricing 'the unrealistically "flat" structure which had developed during the course of the price war` (116) due to 'British Sugar's policy of drastically reducing the differentials between prices charged to customers taking large quantities of sugar (who were frequently existing customers of British Sugar) and customers taking smaller quantities, who were the traditional customers of the merchants` (117).

James Budgett, in its written reply to the revised statement of objections, explained (118): 'Budgett had just been suffering, not from the absolute level of average prices for industrial sugar (. . .) but rather from the lack of distinction in the price charged by British Sugar to different sizes of customers. (. . .) From Budgett's point of view therefore, elimination of differentials was clearly the main unfair pricing practice conducted by British Sugar, and one which had inflicted substantial damage on Budgett. (. . .) From Budgett's point of view, the meetings provided reassurance that British Sugar's determination to avoid unfair pricing practices which damaged the merchants, evident at a senior management level, was also subject to some internal mechanism concerning the day to day activity of British Sugar's salesmen` (119).

2.2.2. Retail sugar pricing

(46) With regard to the meetings on retail sugar, Tate & Lyle was also invited to comment, during the investigations of 27 May 1994, on the indications that British Sugar provided a number of price lists at a number of stages before the actual prices became generally available, and that British Sugar provided Tate & Lyle with advance warning of price list increases. Asked about what was given, when and how far in advance, a representative of Tate & Lyle stated (120): 'It tended to be a matter of three or four weeks I think before the official date of the price increase and I think it was really just to get the information across so that we weren't totally unaware and they (British Sugar) were comfortable that we were going to follow. We always had followed and they always assumed that we would. And it was just to make themselves comfortable that we were going to follow on that occasion` (121). Tate & Lyle confirmed (122) that it would amend its prices shortly thereafter and 'go the same increase per tonne in general`. Tate & Lyle also admitted (123) that the information provided by British Sugar was a 'safety factor`.

(47) Commenting on the certainty and advance knowledge provided by British Sugar on retail prices, Tate & Lyle, in its written reply to the revised statement of objections, stated (124) that 'T & L was provided with copies of BS's price lists on only three occasions during the period in question, once five days and once two days before the price lists were officially circulated to the trade. T & L was on the third occasion handed a copy of the price lists four days after its official circulation to the trade. However, BS would invariably have spoken to its customers before talking to T & L and in particular would have indicated to customers two or three weeks in advance that it was going to increase its prices. T & L were not therefore given any privileged information. Any "advance" knowledge was only in advance of the official circulation of the price lists and not in advance of BS' customers being made aware of new prices` (125).

(48) However, there is evidence that the information provided by British Sugar to Tate & Lyle regarding retail sugar, was not limited simply to the provision of retail price lists. British Sugar also provided Tate & Lyle with considerable advance warning of its intention to raise retail prices, before detailed price lists had been produced. In a written statement, dated 12 December 1990 (126), given to the Commission, the national retail sales manager of Tate & Lyle, stated the following regarding retail sugar: 'Since my first meeting with BS in February 1987, I cannot remember any subsequent price increase that they initiated that was not signalled to me at least 2 to 3 weeks in advance of their official trade circular` (127). during the investigations carried out at Tate & Lyle on 27 May 1994, a representative of the company confirmed (128) that 'signalling` meant that British Sugar 'would actually say the amount of the price intended listings` and that this was done on the basis of a standard list price. Also in relation to retail sugar, the Commission's question, put at some other point during the same investigations, about the advance provision of price lists and the advance warning of price list increases provided by British Sugar, was answered by a representative of Tate & Lyle (129) summarily to the effect that 'it tended to be a matter of three or four weeks I think before the official date of the price increase` (130).

2.2.3. The availability and value of the sugar-pricing information

(49) As to the availability and value of the pricing information provided by British Sugar at the meetings, the Commission notes as a fact that technically it is always more difficult and burdensome to obtain information about a competitor's pricing intentions on a piecemeal basis by talking to a number of his potential customers than by receiving this information directly and comprehensively from the competitor himself in meetings with him. Moreover, it is common experience that second-hand information obtained by a number of third parties (here British Sugar's potential buyers) is less reliable and accurate than first-hand information obtained from the source itself (here British Sugar). This is confirmed by Tate & Lyle's letter to the Office of Fair Trading dated 16 July 1999 (131), in which it stated that 'information passing between customer and producer may often be unreliable if not totally misleading. This has been especially true of the sugar market over the past few years` (132). In this letter, Tate & Lyle also stated that statements by one competitor to another may be unreliable. However, Tate & Lyle later confirmed that the information provided by British Sugar was useful to it (133); this can also be deduced from the fact that Tate & Lyle continued to attend the meetings on a regular basis.

James Budgett stated in its reply to the initial statement of objections (134) that 'market sources, although they might not give perfect, immediate information as to prices to individual accounts (e. g. individual buyers might quote misleading buy-in prices from third parties) provided very accurate, rapid information about general price levels. The unique market structure was ideally suited to this` (135). It also stated (136) that the 'information concerning BS's matrix was rapidly and accurately communicated via the market (especially customers) to all major players at least` (137). Napier Brown shares this view as expressed by James Budgett (138). Similarly, British Sugar considers (139) that the merchants could have obtained the information from the market place, and that the information merely 'had an effect in terms of providing a degree of assurance to merchants` (140).

2.2.4. Further accounts of the meetings

(50) In the letter to the OFT of 29 August 1990 (141), Tate & Lyle further explains its recollection of the subjects discussed during the meetings.

'2. Industrial sales

(. . .)

Mr Smith's recollection is that at the first of these meetings of the four representatives a minimum floor price in the region of £370 per tonne was accepted for industrial sugar. At subsequent meetings this floor price was assumed to be upgraded in accordance with the general increase in prices shown by the "matrix" which was produced by British Sugar and which gave minimum net prices for specific volume bands. Matters discussed included price changes, differentials, delivery terms, credit terms, concerns about volume loss and, in some cases, the situation in particular accounts. In the early days the meetings appeared to Tate & Lyle to be partly a fence mending exercise for British Sugar and the merchants. During the price war the merchants had suffered substantial losses of tonnage in small accounts and British Sugar were gradually surrendering the small accounts back to them. Tate & Lyle Sugars was not involved in this since they had never had much presence in small accounts.

(. . .)

3. Retail sales

Meetings between the individuals at British Sugar and Tate & Lyle responsible for retail marketing, Mr (deleted, business secret) and Mr (deleted, business secret) respectively, occurred in two situations: first, to enable British Sugar to inform Tate & Lyle of an imminent price increase, and secondly when specific instances arose leading one of the sugar producers to believe that the other was soliciting business from his customers by undercutting price. At price change meetings British Sugar would hand over its price list a few days before publication and inform Tate & Lyle of the level of discount that it would quote to the multiples to ensure that the multiples profit margin was not reduced. However, Tate & Lyle was not informed of any specific price which was to be quoted to a specific customer` (142).

(51) In a letter to the OFT dated 7 August 1990 (143), British Sugar commented on Tate & Lyle's letter to the OFT of 16 July 1990 (144) and set out its own recollection of the meetings in question. Both Napier Brown and James Budgett concur with these recollections (145):

'Paragraph 3 on page 4 of Mr Shaw's letter refers to sales of industrial sugar, and to meetings and communications between the two companies and the major sugar merchants, Napier

Brown and Budgetts. Initial meetings (146) were with the merchants. One of the complaints made by Napier Brown and upheld by the Commission as constituting an infringement of Article 86 was that British Sugar had reduced its prices for retail and industrial sugar. The initial purpose of the meetings and of British Sugar confirming what the merchants (who were also customers of British Sugar) would have discovered in the market place was to give comfort to the merchants that the problem was not about to recur. Later at these meetings, information was given on British Sugar's pricing intentions. Meetings with Tate & Lyle began in late 1987. The British Sugar representative at these meetings announced the prices that British Sugar intended to achieve in future quarterly periods. As is normal business practice in such situations, a pricing matrix was developed on a volumetric sugar usage basis for guidance of British Sugar's own sales force - identifying minimum prices below which it must seek managerial approval. The existence of this matrix was known to both the trade and competition - there was even discussion as to the publishing of the matrix. The matrix was developed within the annual planning process of British Sugar and was one of the key elements in the profit mix. It also represented a deliberate move to satisfy the indication which British Sugar had received from the European Commission that it ought to have a cost-related price structure. Thus, it must be emphasised, what was communicated to the other companies were commercial decisions which had already been taken by British Sugar. At no time were prices which were to be charged to particular customers agreed. Likewise, there was no agreement between the parties as to prices which were to be quoted. The information was centred upon the price increases British Sugar intended to apply to customers purchasing different volumes. However, this information would also have been available to any industrial customers of British Sugar at the same time as it was released to Tate & Lyle and the sugar merchants (147). Though discussion did take place, on no occasion were British Sugar decisions and consequently its business plan amended. Additional discussion did take place concerning market issued such as customer credit worthiness. At all times Tate & Lyle and the merchants had the opportunity, and in practice took the opportunity, to make their own pricing decisions(146) That is, Tate & Lyle's letter to the OFT of 16 July 1990.

(147) This statement is irreconcilable with all other statements by British Sugar. In its written reply to the initial statement of objections and in its written reply to the revised statement of objections, as well as in the two hearings which took place, British Sugar never disputed the Commission's finding that its meetings with Tate & Lyle started on 20 June 1986.` (146).

As regards retail sugar, British Sugar stated in the same letter of 7 August 1990: 'it appears that British Sugar has, on occasion, indicated to Tate & Lyle the dates and timing of increases in its retail price list. Again, the information flow appears to have been entirely one-sided. We are assured that at no time has information been exchanged about the level of specific discounts which would be offered to particular customers. For the most part, the information as to the timing of price increases which was given to customers was a matter of public knowledge within the industry. Prices are increased annually with effect from 1 July, to reflect changes in the Community pricing structure. Thus, on the 11 May this year, British Sugar informed its customers of the price increases which would be effective as of 1 July. Tate & Lyle was given the information on 9 May. If any particular customer inquires of British Sugar whether it intends to increase its prices at other times during the year, that customer will be informed of British Sugar's current intentions and, if possible, the likely amount of the proposed increase` (147).

2.2.5. The parties' understanding of the market situation during the relevant period

(52) A number of other documents illustrate the parties' understanding of the market situation during the relevant period:

(53) A document entitled 'James Budgett & Son Limited - Business strategy 1987-1990` (148) in its first section, headed 'Sugar dealing, distribution and processing`, states that: 'It is now in British Sugar's interest to switch to a high price strategy, since they are ex growth in volume terms, and to rebuild market premiums. To achieve this they require, and are currently seeking, the dealers' cooperation because aggressive marketing of imports can entirely frustrate their ambitions. Progress towards an orderly market is under way. Improved refiners commissions are under negotiation and profits from dealing are improving` (149).

(54) A market report submitted to the board of James Budgett in preparation for a board meeting to be held on 2 August 1990 (150) states that 'Recent independent discussions with BS and T & L suggest minimum increase of £3-£4 per tonne will be sought by British Sugar and no doubt T & L will follow` (151).

(55) A document minuting a meeting held between the executive director of De Danske

Sukkerfabrikker and senior management of British Sugar on 26 June 1987 (152) states that 'discussions are under way between T & L and BSC to attempt to coordinate the development of the market but BSC does not want to risk anything in this. PJ (155) claims that T & L always break their agreements while BSC always stick to their minimum prices, do not grant secret special discounts, etc.

(155) Peter Jacobs, at that time managing director of British Sugar.` (153).

(56) An internal Tate & Lyle memorandum addressed, inter alia, to the sales and marketing director (industrial sugar) (154) states: 'BS have indicated that the bottom line loss to them, following a 5 % cut in support levels, would be of the order of £ 9 m. They are proposing to advise the trade (industrial) that with effect from January 1990 price levels will need to increase by £ 20 per tonne to retrieve a position which would permit them to continue with their necessary levels of investment for the future!! They have obviously discussed this with Ridgwell (158) who rang me to put this point across

(158) Mr Ridgwell is the chairman and joint managing director of Napier Brown.` (155).

2.2.6. The gap between institutional price increases and British Sugar's price increases

(57) Finally, it is established that in the relevant period, British Sugar increased its industrial sugar prices as well as its retail sugar prices beyond the institutional price increases, so that the gap between the institutional prices and the prices charged by British Sugar in the market widened. During the oral hearing, the Commission stated that a comparison of the Commission's figures for institutional prices (which means intervention price plus storage levy representing the guaranteed minimum price for A/B sugar (156) between January 1986 and December 1990 with British Sugar's figures (157) for its market prices applied to major customers during the same period had shown that the maximum surplus of British Sugar's prices over the institutional prices had doubled between January 1986 and December 1990. British Sugar did not dispute the Commission's mathematics, nor that there had been a widening of the gap in the amount stated by the Commission. However, British Sugar considered this widening to be minimal and pointed out that it had merely pursued its publicly known commercial aspiration, namely to try and obtain in the market place price increases beyond the institutional increases (158).

G. PARALLEL PROCEDURE BY THE UK OFFICE OF FAIR TRADING

(58) Since 1990, the UK Office of Fair Trading (OFT) had undertaken a parallel procedure against British Sugar and Tate & Lyle on the same matter. As was mentioned in recital 2, in July and August 1990, Tate & Lyle wrote two self-incriminating letters to the OFT. On 15 April 1991, Tate & Lyle and British Sugar submitted to the OFT a memorandum describing the arrangements which existed between these two companies in the period from 20 June 1986 to 2 July 1990 (159). In June 1991, this memorandum was placed on the Register of Restrictive Trading Agreements. Some time after the Commission had issued its initial statement of objections in the current proceedings in June 1992, British Sugar applied to the Restrictive Practices Court seeking to remove the memorandum from the Register. British Sugar's arguments were, first, that this memorandum did not accurately record the arrangements between British Sugar and Tate & Lyle and, second, that even if the record was correct it did not disclose a restrictive agreement. Tate & Lyle did not make any application. By judgment of 21 August 1996, the Restrictive Practices Court rejected both of British Sugar's arguments. The court held that the memorandum accurately recorded the arrangements and disclosed the existence of a restrictive agreement between British Sugar and Tate & Lyle in the period between 20 June 1986 and 2 July 1990. British Sugar did not appeal against this judgment within the time limit and so it became definite. On 10 December 1996, British Sugar and Tate & Lyle gave undertakings to the Restrictive Practices Court not to operate a restrictive pricing agreement nor to enter into any similar arrangement in the future and not to enforce any other registrable agreement details of which had not been notified to the OFT in time. The undertakings apply to both companies' whole range of business (160).

III. LEGAL ASSESSMENT

A. DEFINITION OF THE RELEVANT MARKET

1. The relevant product market

(59) The relevant product market is white granulated sugar. This market is further subdivided into two sub-markets of sugar for sale to retail clients ('retail sugar`) and sugar for sale to industrial clients ('industrial sugar`).

Speciality sugars and liquid sugars, being used for different purposes than white granulated sugar, do not meet the same needs and are not therefore part of the relevant product market because they are not substitutable from the customer's point of view.

Industrially produced sugar substitutes such as saccharin, cyclamates or aspartame only compete with natural sugar for limited uses, e. g. as diet products, and thus do not form part of the same relevant product market as white granulated sugar (161).

2. The relevant geographical market

(60) The sugar scheme of the common agricultural policy (162) allocates a specific sugar quota to each Member State. This national sugar quota is divided between beet-processing companies in each Member State. During the relevant period and ever since, British Sugar has been the sole processor of sugar beet in the United Kingdom and has received the entire UK A/B sugar quota (163). The Court of Justice has recognised that the common organisation of the sugar market has a significant influence on the production and sales of sugar in the Community, and that it contributes to consolidating a partitioning of national markets:

'It is beyond doubt that, as the aforementioned system of national quotas stopped production moving gradually to areas particularly suitable for the cultivation of sugar beet and, in addition prevented any large increase in production, it cut down the quantities which producers can sell in the common market` (164).

'This restriction together with the relatively high transport costs, is likely to have a not inconsiderable effect on one of the essential elements in competition, namely the supply, and consequently on the volume and pattern of trade between Member States` (165).

'Whatever criticism may be made of a system, which is designed to consolidate a partitioning of national markets by means of national quotas, the effects of which will be examined later, the fact remains that it leaves in practice a residual field of competition, that field comes within the provisions of the rules of competition` (166).

(61) Taking into account the processing and refining activity of both British Sugar and Tate & Lyle, enough sugar is produced in the United Kingdom to cover nearly the entire domestic demand for all different kinds of sugar.

(62) Imports do, however, enter the United Kingdom, because purchasers of sugar demand a further source of supply from outside the United Kingdom in order to ensure continuity of supplies, particularly so as to protect against the risk of a shortage of sugar developing as happened in the 1974/75 season, and in order to use it as a competitive threat to the two UK producers (167). Furthermore, merchants import sugar when conditions are favourable. As far as sugar imports from other Member States into the UK are concerned, by far the largest part of these imports has always been in the form of white granulated sugar.

(63) In recent years, imports from other Member States into the UK have made up approximately 4 % to 10 % of total UK sugar consumption. This amount appears to represent, to a large extent, a structural limit on imports, which are unlikely to exceed this figure (168). This is mainly due to the peculiarities of the sugar market in Great Britain as opposed to neighbouring markets:

(i) because of the natural barrier of the English Channel, which gives rise to additional transport costs, British producers of sugar are able to charge a premium on the price of sugar compared with Continental prices. British prices generally correspond to British Sugar's prices. It is established that during the relevant period (169) British Sugar attempted to set its prices near the ceiling at which it would expect significant quantities of imports to be drawn into the domestic market, thus threatening its ability to sell its entire A/B sugar quota on that market;

(ii) if customers requiring large, frequent and rapid deliveries upon order were to be supplied by imports, stocks for the storage of imported sugar would have to be built up and run in Great Britain; an additional cost would thereby have to be incurred;

(iii) furthermore, as the MMC pointed out in its second report (170), in order to ensure a substantial volume of imports, a higher price in Great Britain than on the Continent would be necessary. Potential exporters may require a large premium to persuade them to export large quantities of sugar to Great Britain for fear of retaliatory exports by the British producers (171).

(64) The only part of the United Kingdom in which different conditions prevail is Northern Ireland, which does not form part of the relevant geographical market for the purposes of this case (172).

While both Tate & Lyle and British Sugar supply sugar in Northern Ireland, neither has refining facilities in Northern Ireland and no sugar is produced there. Because of transport costs, most sugar supplies in Northern Ireland are imported from the Republic of Ireland by Irish Sugar, which accounts for 60 % to 70 % of the sugar market in Northern Ireland. British Sugar and Tate & Lyle account for the remaining sugar supplies in Northern Ireland. Both companies include in their price a standard surcharge for the additional sea freight to Northern Ireland (173).

(65) The Commission therefore concludes that for the purposes of these proceedings the relevant market is that of retail and industrial white granulated sugar in Great Britain, which is a significant part of the common market.

On the basis of the information available to the Commission it can be said that during the relevant period British Sugar, Tate & Lyle, Napier Brown and James Budgett together held over 90 % of the market for industrial sugar in Great Britain, and that British Sugar and Tate & Lyle together held approximately 89 % of the market for retail sugar in Great Britain. Against this backdrop, the Commission takes the view that both markets were tightly oligopolistic in structure.

B. AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN UNDERTAKINGS WITH THE OBJECT OR EFFECT OF AN APPRECIABLE RESTRICTION OF COMPETITION

1. The Commission's assessment

1.1. Agreement and/or concerted practice between undertakings

(66) From the case-law of the Court of Justice of the European Communities and the Court of First Instance, it may be seen that an agreement within the meaning of Article 85(1) can be said to exist when the parties have reached a consensus, even in broad terms, as to the lines of their mutual action, or abstention from action, in the market. It may involve joint decision-making and commitment to a common scheme. It suffices that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (174). The agreement does not have to be made formally or in writing, and no express sanctions or enforcement measures need be involved.

(67) A concerted practice within the meaning of Article 85(1), on the other hand, does not require that the participants should have reached an agreement in terms as to what each should precisely do or not do in the market. The object of the Treaty in creating the concept of concerted practice in addition to that of agreement was to forestall the possibility of undertakings evading the prohibition of Article 85(1) by a form of coordination which, without having reached the stage where an agreement in the sense described above has been concluded, knowingly substitutes practical cooperation between them for the risks of competition (175). In the ICI judgment (176), the Court of Justice went on to say that a concerted practice might arise inter alia out of coordination by the participants. although parallel behaviour may not by itself constitute a concerted practice, it may nonetheless amount to strong evidence of such a practice if it has led to conditions of competition which do not correspond to the normal conditions of the market, regard being had to the nature of the products, the size and number of the undertakings, and the volume of the said market. The Court of Justice said that this was especially the case if the parallel conduct was such as to enable those concerned to attempt to stabilise prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers.

(68) In its judgment of 16 December 1975 (177), the Court of Justice held that the criteria of coordination and cooperation laid down by the case-law of the Court, which in no way required the working out of an actual plan, had to be understood in the light of the concept inherent in the provisions of the Treaty relating to competition: each economic operator must determine independently the commercial policy which he intends to adopt in the common market. This requirement of independence did not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, but it did strictly preclude any direct or indirect contact between them the object or effect whereof was either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves had decided to adopt or contemplated adopting on the market.

(69) Thus conduct may fall under Article 85(1) as a concerted practice where the parties have not agreed or decided in advance among themselves what each will do in the market, but

knowingly adopt or adhere to some collusive device which encourages or facilitates the coordination of their commercial behaviour.

(70) The Court of First Instance in various judgments (178) made it clear that it was not necessary, particularly in the case of a complex infringement of considerable duration, for the Commission to characterise it as exclusively an agreement or concerted practice, or to split it up into separate infringements. Indeed, it might not even be feasible or realistic to make any such distinctions, as the infringement as a whole might present characteristics of both types of prohibited conduct, while considered in isolation some of its manifestations could more accurately be described as one rather than the other. In particular, it would be artificial to subdivide continuous conduct, having one and the same overall objective, into several discrete infringements. The Court of First Instance in its judgments therefore endorsed the Commission's dual characterisation of the single infringement as an agreement and a concerted practice, and stated that this had to be understood, not as requiring, simultaneously and cumulatively, proof that each of the factual elements contained in the continuous conduct presented the constituent elements both of an agreement and of a concerted practice, but rather as referring to a complex whole which comprised a number of factual elements some of which in isolation would be characterised as agreements whereas others would be considered concerted practices.

(71) The Commission is of the opinion that the above described facts evidence a complex infringement of considerable duration (179) in which British Sugar, Tate & Lyle, Napier Brown and James Budgett participated, and which during the relevant period involved elements which in isolation could be characterised as agreements as well as elements which could be categorised as concerted practices. Even if one does not accept that some, or indeed any, of these elements could be characterised as agreements (180), all the elements of the complex infringement not constituting agreements would at least fall into the category of concerted practices (181). However, it would be artificial to subdivide this complex conduct of considerable duration into separate infringements, since it was a continuing common scheme which, taken as a whole, served one and the same object as detailed in recitals 72 to 76. For the purpose of this appraisal, under Article 85(1) the conduct at issue is therefore referred to as an agreement and/or a concerted practice.

1.2. Object or effect of an appreciable restriction of competition

1.2.1. Pricing coordination

(72) On 20 June 1986, British Sugar and Tate & Lyle came to an understanding to increase the price level for white granulated sugar in Great Britain and to refrain form increasing market shares by lowering prices. While British Sugar as a price leader in the market has been at the origin of the decision to end the price war and to adopt the new pricing strategy, it did so in consensus with Tate & Lyle. The latter gave comfort to British Sugar with respect to its pricing intentions by confirming, during the abovementioned meeting, that it intended to follow the same pricing policy. Napier Brown and James Budgett were informed by British Sugar of the new pricing policy at a meeting subsequent to the meeting of 20 June 1986. The systematic participation of all four parties at the regular meetings over a considerable period subsequent to the meeting of 20 June 1986 and the provision and receipt of information on industrial sugar prices between all four parties, as well as on retail sugar prices between British Sugar and Tate & Lyle at these meetings, is evidence of their collusive behaviour. It created the necessary atmosphere of mutual certainty as to the participants' intentions concerning future pricing whereby each of them could rely, if not on the precise price levels of the other participants, at least on their continual pursuit of a collaborative strategy of higher pricing. For all the participants this mutual assurance was of interest, particularly - though not exclusively - in the price range above the break-even point, where price competition was possible while still profitable. Moreover, as was shown earlier (182), the merchants Napier Brown and James Budgett, always had a particular interest in the industrial sugar pricing differentials according to volumes as indicated by the matrix. Finally, British Sugar and Tate & Lyle had an additional interest in involving Napier Brown and James Budgett in the collusion, because the merchants, by virtue of their traditional connections with Continental producers, could - by way of imports - have substantially frustrated British Sugar's and Tate & Lyle's joint strategy of increasing prices on the white granulated sugar market in Great Britain.

(73) The parties' conduct is to be qualified as an agreement and/or concerted practice which had as its object the restriction of competition by the coordination of their pricing policy on the market for industrial sugar in Great Britain as concerns all four parties, and on the market for retail sugar in Great Britain as concerns British Sugar and Tate & Lyle. In particular, the

object of the agreement and/or concerted practice was to increase industrial and retail sugar prices in Great Britain through a coordinated pricing policy, and to refrain from aggressive price cutting aimed at gaining market share. Moreover, with regard to industrial sugar, the object of the agreement and/or concerted practice included a coordinated policy concerning price differentials to be restored and maintained between the purchasers of larger and smaller quantities of sugar. Thus, in summary, the object of the parties' collusion was the restriction of price competition in the industrial and retail sugar markets in Great Britain, which markets were already characterised by a tendency toward reduced competition due to the concentration of the market and the high entry barriers.

(74) The fact that during the relevant period Tate & Lyle, James Budgett and Napier Brown were 'price followers` in respect of British Sugar does not detract from the fact that, through their conduct, they pursued the anti-competitive object of pricing coordination. This becomes clear by taking a closer look at the function of the continuous meetings and the scope for competition which exists even in a market characterised by price leadership. The meetings provided - not only for all four parties in relation to industrial sugar, but also for British Sugar and Tate & Lyle in relation to retail sugar - the assurance of an ongoing higher pricing policy on the part of their competitors. Accordingly, each of the participants at the meetings (including British Sugar) could act differently than if it was obliged to rely merely on its own perception of the market. Each of the undertakings as in a position to assess the market situation, and its future development, with more certainty than would otherwise have been the case. The fact that each of them (including British Sugar) was assured at the meetings that the other companies were all equally aware of British Sugar's pricing strategy, and that moreover each of the three 'followers` also in the future intended closely to follow British Sugar's strategy, meant that all of them (including British Sugar itself) could pursue a policy of price increases in the knowledge that the others would not - whether intentionally or perhaps through ignorance or misinterpretation of what could be perceived of British Sugar's pricing policy by simply monitoring the market - continue to price at lower levels or start to undercut competitors's prices, or follow British Sugar's price leadership less closely than before (183). White granulated sugar is a homogeneous product and price therefore is clearly the most important competition parameter. Customers are very price sensitive and have low switching costs between different suppliers. Consequently, uncertainty as to the competitors' pricing policy is likely to increase competition by exerting a downward pressure on the pricing policies of individual sugar companies. By the far-reaching elimination of this uncertainty brought about by the meetings, the parties pursued the anti-competitive object of restricting price competition between them. Despite British Sugar's price leadership, such price competition was possible, in particular - though not exclusively - in the price range above the break-even point, because in this range price competition was feasible, while still profitable, for all the four parties.

(75) On the basis of the case-law of the Court (184), the Commission holds the view that once the anti-competitive object of the parties' conduct has been established, there is no need to take account of the possible effects of the agreement and/or concerted practice.

(76) The participation in the agreement and/or concerted practice commenced, for British Sugar and Tate & Lyle, with their first bilateral meeting on 20 June 1986 and, for Napier Brown and James Budgett, with the first quadripartite meeting in late 1986. For all four parties, their participation in the agreement and/or concerted practice ended only on 2 July 1990, when the chairman and chief executive of Tate & Lyle ordered an end to all contacts with competitors of the kind which are the subject of this procedure (185). The list provided by Tate & Lyle (186) shows that the industrial sugar meetings as well as the retail sugar meetings, at regular one- to three-month intervals, continued throughout the relevant period. As the last bilateral retail sugar meeting took place only on 9 May 1990, and the last quadripartite industrial sugar meeting was only on 13 June 1990, the Commission has no reason to believe that the participation of any of the four parties in the agreement and/or concerted practice ended before 2 July 1990.

1.2.2. Appreciability

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

1.3. Conclusion

(78) In conclusion, the above described facts establish for the relevant period the existence of

an agreement and/or concerted practice, which had the object of restricting competition within the meaning of Article 85(1) by coordinating the pricing policy on the industrial sugar market in Great Britain between all four parties, and additionally by coordinating the pricing policy on the retail sugar market in Great Britain between British Sugar and Tate & Lyle.

2. The arguments of the parties and the Commission's replies

2.1. No agreement, no concerted practice; British Sugar's price leadership

2.1.1. British Sugar's arguments

(79) With respect to the fact that British Sugar convened a meeting with Tate & Lyle on 20 June 1986 and subsequently also met Napier Brown and James Budgett in order to indicate that the price war was over and to reassure them of its intention not to recommence an aggressive low-pricing policy but to seek price increases instead, British Sugar argues that this action could not have had any appreciable effect on the behaviour of these companies. British Sugar had already taken the decision to end the price war. Tate & Lyle, Napier Brown and James Budgett, being price followers, had no choice but to follow this initiative, and would have done so, whether they had learned of British Sugar's intentions directly, through the trade, or via the press. Thus, argues British Sugar (187), the agreement of the other companies to British Sugar's unilateral decision was unnecessary and irrelevant and there was therefore no agreement within the meaning of Article 85(1).

(80) In its reply to he revised statement of objections (188), British Sugar cites Tate & Lyle's confirmation that British Sugar decided upon its pricing moves unilaterally and that there was no agreement of any kind at any point in time during the relevant period. British Sugar accepts that the legal concept of 'agreement` must be interpreted flexibly, but it stresses that there should be evidence of a consensus as to future joint conduct. According to British Sugar, all the evidence points to the absence of any joint intention of the parties to conduct themselves in a particular way. Moreover, British Sugar submits that, as regards classification of an arrangement, the distinction between agreement and concerted practice becomes irrelevant only when there is evidence supporting the existence of both them.

(81) Continuing this approach, British Sugar then argues (189) that neither was there a concerted practice, because the Commission cannot identify any effect on the market arising from the meetings. According to British Sugar, the comparison which the Commission makes, in its revised statement of objections, with the judgment of the Court of First Instance in Rhône-Poulenc v. Commission (190) is unfair and prejudicial. In British Sugar's view, the Court did not endorse the Commission's theory according to which there is a concerted practice as soon as there is concerted action having as its object the restriction of the autonomy of the undertakings in relation to each other, even if no actual effect has been found on the market. According to British Sugar, the Court of First Instance made its finding in that case on the basis of ample evidence of an effect produced by the parties' conduct in the market place, and identified what took place as an 'agreement`. British Sugar alleges that the Court stated that it was an open question in European competition law whether a concerted practice could exist in the absence of any effect but, from the fact that the Court then went on to analyse the effects produced in that case, British Sugar draws the conclusion that the identification of an effect capable of restricting competition is necessary.

2.1.2. Tate & Lyle's arguments

(82) In its written reply to the revised statement of objections (191), Tate & Lyle argues that there was no need for any agreement or collaborative strategy on prices because British Sugar's dominance enabled it unilaterally to set prices which Tate & Lyle, Napier Brown and James Budgett were bound to follow. Tate & Lyle argues that British Sugar never needed any assurance of a continued higher pricing policy because it alone determined prices. The 'certainty` and 'reassurance` that Tate & Lyle, Napier Brown and James Budgett would follow British Sugar's pricing had been, and still was, a consequence of the nature of the UK sugar market, resulting from the operation of the Community sugar scheme and not from the parties' participation in the meetings.

(83) The foregoing statements contrast with Tate & Lyle's reply to the initial statement of objections in which it acknowledged (192) 'that the contacts gave rise to an Arrangement which, subject to the appreciability of its effect on trade between Member States, fell within the prohibition of Article 85` (193). Moreover, in its reply to the revised statement of objections, Tate & Lyle continues to acknowledge (194) 'that it was party to arrangements which, subject to the appreciability of their effect on inter-State trade, infringed Article 85(1). In those circumstances and given the reduction in the scope of the allegations in the SO,

there is substantial common ground between T & L and the Commission` (195). Whilst Tate & Lyle argues that it would have followed British Sugar's move to a higher pricing strategy, when the latter decided to end the price war, whether or not it had been directly informed of this fact by British Sugar, it accepts (196), that 'the contacts that took place may have affected the speed of the ending of the price war, but they could not affect the outcome` (197). Tate & Lyle admits that the arrangements in question had anti-competitive effects but argues that these effects were 'minimal` (198) or 'very limited` (199).

2.1.3. Napier Brown's arguments

(84) Napier Brown in its written reply to the revised statement of objections (200) states that 'coordination` of pricing policy, which implied a consensus between the different suppliers, was meaningless where the policy was dictated by one dominant supplier which all the other suppliers were bound to follow.

2.1.4. James Budgett's arguments

(85) James Budgett in its written reply to the revised statement of objections (201) pointed out that apart from being commercially obliged to maintain some of its unattractive nominal merchanting business, Budgett's commercial position in respect of principal merchanting was also largely dependent on the attitude taken by the two UK refiners (British Sugar, in particular, and Tate & Lyle) which could in practice determine the profitability of Budgett's principal merchanting business. Moreover, Budgett criticises (202) the fact that the Commission wrongly assumed that any arrangements or understandings between British Sugar and Tate & Lyle were 'extended` to Napier Brown and James Budgett.

2.1.5. The Commission's replies

(a) British Sugar's price leadership

(86) With regard to British Sugar's price leadership, the Commission notes several inconsistencies in the parties' argumentation. The gist of the issue is whether British Sugar's price leadership in the markets for industrial and retail sugar in Great Britain during the relevant period left scope for competition by the other three companies. On the one hand, the parties seem to suggest that there was no such scope when they stress that due to British Sugar's strength on these markets there was no need for the other three companies to coordinate pricing policy with it, because they had no other choice but to follow British Sugar's pricing moves. This contrasts sharply with the confirmation by all parties, reiterated in their written replies to the revised statement of objections (203), that there was scope for competition between all four of them and that such competition actually took place. As white granulated sugar is a homogeneous commodity, competition in the industrial sugar market as well as the retail sugar market is, first and foremost, price competition. Tate & Lyle, in particular, with a share of about 38 to 40 % in the white granulated sugar market in the UK during the relevant period, was potentially a strong competitor of British Sugar, which held about 51 to 54 % of that market during that period. Whilst Tate & Lyle suffered from a margin disadvantage compared to British Sugar, and whilst it is correct that Napier Brown and James Budgett were dependent on the two UK producers (British Sugar and Tate & Lyle) for much of their stock, it is not true to state that during the relevant period these three undertakings had no room to act as competitors of British Sugar, and of one another, with respect to the relevant products. The behaviour of Tate & Lyle during the price war, when it attempted to compete with British Sugar for a number of accounts, is ample demonstration of this, as is British Sugar's own evidence of attempts to acquire Tate & Lyle's accounts in the retail sugar trade. The same is true of the continual endeavours of the merchants to import low-priced white granulated sugar and, finally, the possibility available to them of purchasing bulk supplies from the two UK producers and to resell it in smaller amounts at higher prices in their principal merchanting capacities. In particular, it has not been demonstrated by the parties that, had British Sugar increased the prices for white granulated sugar in the British market, there would not have been scope for the other three parties to undercut those increases by smaller increases or by no increases at all. This should at least have been possible in the price range above the break-even point (204).

(87) Moreover, in a tightly oligopolistic market, price leadership is not exceptional due to the fact that, where there is only a small number of competitors, it is - in comparison with a non-oligopolistic market - easier for each of them ex post to perceive on the market what the others have done on it. However, the existence of such an oligopolistic market, in which competition for structural reasons tends to be limited to a certain extent, does not allow companies to go further and ex ante actively coordinate their future pricing policy. On the contrary, the existence of uncertainty as to the pricing intentions of the companies on

markets of the described kind is the main stimulus to competition. As the Court of Justice made clear in Hoffmann-La Roche (205), in markets where competition is already limited, the Commission must be particularly vigilant to ensure that the competition which does exist is not restricted.

(88) On the basis of the foregoing, the Commission concludes that British Sugar's price leadership in the markets for industrial and retail sugar in Great Britain did not preclude price competition between the four parties in the relevant period (206).

Since there was such scope for price competition, it follows that actual and/or potential price competition could have been restricted by agreement and/or concerted practice between the parties.

(b) Agreement and/or concerted practice

(89) The subsequent question is whether there actually was an agreement and/or a concerted practice. In reply to the parties' arguments, the Commission can mainly refer to what has already been stated above concerning the categorisation of a complex infringement of considerable duration (207) and concerning the subject matter of the agreement and/or concerted practice at issue in this case (208). A comparison between what the Commission says and what the parties expressly say, or do not mention because it is uncontentious, shows that there is a common understanding of the concepts of agreement and of concerted practice. In response to British Sugar's view that in this case there is no evidence of a consensus between the parties about joint future conduct on the market, and that therefore there cannot have been any element in the complex infringement which could be described as an agreement, the Commission first and foremost stresses that, even if that view were correct, all the elements of the complex infringement would at least fall into the category of concerted practices. The categorisation of the infringement as agreement and/or concerted practice has taken account of this alternative view by making clear that the complex infringements as a whole can at least be described as a concerted practice. Without prejudice to this, the Commission is willing to give below (209) an example of an element which in its opinion can be described as an agreement. Furthermore, the Commission does not agree with the proposition that those elements of the complex infringement which cannot be described as agreements cannot at least be described as concerted practices because no actual effect on the market has been sufficiently demonstrated. Finally, it has to be recalled that, where there has been a complex infringement of considerable duration, the Commission is not obliged to split up a continuous conduct, which was - as in this case - driven by a single anti-competitive object, into a number of separate infringements (210).

(aa) The significance of the meetings

(90) According to the parties, there cannot have been an agreement and/or concerted practice concerning the pricing of white granulated sugar, because in the meetings British Sugar confined itself to making unilateral announcements about its pricing policy, while the other three parties did not learn anything new which would not have been evident in the transparent market. The Commission considers this assertion not to be credible for a number of reasons.

Firstly, if the market was as transparent as the parties describe it, and if the need to follow British Sugar's pricing moves was as cogent as the parties claim, it is not understandable why the first meetings and the series of subsequent meetings over a long period were arranged, nor why British Sugar did not simply implement its pricing policy and leave it to the other parties to perceive these changes in the market. Not even the key meeting of 20 June 1986 would have been necessary if the parties' description was correct. Thus, in comparison with merely monitoring on the market which pricing moves the other companies had taken, the regular meetings must have provided for all the parties an 'added value`. This added value had two aspects: on the one hand, the meetings provided confirmation for each of the parties that their perception of how the three other respective companies had to date priced in the market place was correct; on the other hand, the meetings provided each of the parties with an appreciably increased certainty as to the other participants' intentions concerning future pricing.

Secondly, if the organisation of meetings really was British Sugar's particular style of informing other players of unilaterally decided price changes for white granulated sugar, it is not explained why only three of these other players and not all of those operating in the UK market, especially other merchants (211), were invited, despite the fact that the information given would have been of equal interest to all of them. On the contrary, the exclusion of the other players indicates that the meetings primarily served some other purpose of concern only

to the four parties concerned by the subject of this Decision.

(bb) Agreement and/or concerted practice between British Sugar and Tate & Lyle

(91) As to the relationship between British Sugar and Tate & Lyle, Tate & Lyle's letter to the Office of Fair Trading of 29 August 1990 (212) can, in the Commission's view, be taken as evidence of a joint intention on the part of these two undertakings to conduct themselves on the market in a specific way (213), namely to end the price war for all varieties of sugar, to increase prices and to abstain from aggressive pricing designed to gain market shares. The 'understanding` with which the representative of Tate & Lyle came away from the meeting of 20 June 1986 was not their interpretation of a unilateral decision taken by British Sugar and announced to Tate & Lyle, but the result of the 'discussions` which the same letter mentions. Discussions are bilateral, a process to which both sides contribute and at the end of which there is either disagreement, indecision or agreement, the last-named being a meeting of minds, a mutual consent about the future conduct of the discussion partners. In this case, it has never been British Sugar's or Tate & Lyle's argument that the questions and issues discussed at the meeting of 20 June 1986 resulted in disagreement or indecision. Moreover, the allegation that the pricing decisions were unilaterally taken by British Sugar, and subsequently only announced, is not compatible Tate & Lyle's statement that the meeting of 20 June 1986 'was significant in that it set the background principles against which all future discussions were held` (214). Therefore, looking at what happened at the meeting of 20 June 1986 in isolation, the Commission is of the opinion that this element of the complex infringement can be described as the conclusion of an agreement between British Sugar and Tate & Lyle about pricing coordination of the kind described. The remaining elements of the complex infringement would at least fall into the category of concerted practices.

(92) Finally the joint memorandum submitted by British Sugar and Tate & Lyle on 15 April 1991 to the OFT (215), also, in the Commission's view, provides evidence that, at their initial meeting of 20 June 1986, British Sugar and Tate & Lyle came to an agreement about the described pricing coordination. It is reported under point 4b of that memorandum that both Tate & Lyle and British Sugar believed that, as a consequence of the unilateral decision taken by British Sugar to end the price war, British Sugar would not price aggressively, with the result that Tate & Lyle would not price aggressively either, although there would nevertheless remain a band of tolerance in relation to their respective market shares. This shows that both undertakings shared what is described as a 'common belief` about the nature of their future conduct on the market. Since this conduct was not something steered by a third party, British Sugar and Tate & Lyle were the masters of their conduct. Therefore, what the memorandum in fact reports is the joint intention of both parties to price in the future in a certain way. In the Commission's view, this element can be qualified as an agreement about general pricing policies between competitors. The fact that it was not reduced to writing, and that no express sanctions or enforcements measures were attached to it, is irrelevant (216).

Moreover, the reference to the band of tolerance relating to market shares, which occurs twice in point 4 of the memorandum, points to the existence of an agreement between the two undertakings. Market shares for the sale of a homogeneous product like white granulated sugar are first and foremost the result of pricing, since this is the principal competition parameter for such a product. Accordingly, unless there had been a mutual understanding between British Sugar and Tate & Lyle, at least about their general pricing policy, the notion of a band of tolerance relating to market shares would have been meaningless.

(cc) Agreement and/or concerted practice between British Sugar, Tate & Lyle, Napier Brown and James Budgett

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

(94) In its letter of 7 August 1990 to the OFT (217), British Sugar admits that discussions about pricing did also take place with Napier Brown and James Budgett, but it claims never to have amended its decisions or business plan as a result of such discussions. Here, British Sugar has confused two separate questions: firstly, whether there was a concertation of the intentions of the participants in the discussions, and secondly, whether the result of this concertation coincided or not with the intention which one party (British Sugar) already had before it went into the discussions. As to the first point, it has to be reiterated that it did not

make sense to have discussions about pricing with Napier Brown and James Budgett it they had nothing to contribute to these discussions. In fact, it is known, that Napier Brown and James Budgett had a threat potential and bargaining power in these discussions, in the form of the possibility of resorting to aggressive marketing of imports which would have frustrated British Sugar's strategy of increasing prices on the UK market while still selling its entire A/B quota there (218). This is, for example, evidence by the document about James Budgett's business strategy 1987-90 (219). The seriousness of the discussions with Napier Brown and James Budgett is also evidenced by the internal Tate & Lyle memorandum which reports that British Sugar discussed a certain increase, which it wished to occur in the industrial sugar market, with the chairman and joint managing director of Napier Brown (220). If there had been no need for British Sugar to obtain a consensus with Napier Brown and James Budgett about the parties' future industrial sugar-pricing policy, including price differentials between purchasers of larger and of smaller quantities, those discussions would have served no purpose.

(dd) Concerted practice without a proof of actual effect

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

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

(97) Secondly, the judgement of the Court of First Instance in the Rhône-Poulenc case (221) accepts that there can be a concerted practice when an anti-competitive object alone is pursued. In this respect, the relevant part of this judgment (222) is based on the earlier Suiker Unie judgment (223). Both judgments demonstrate how far-reaching the prohibition of concerted practices is by including in it any direct or indirect contact between economic operators, the object or effect whereof is either to influence the market conduct of an actual or a potential competitor, or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market. For the case to be decided, the Court then stated (224) with regard to certain meetings, which formed part of a complex infringement of considerable duration, that Rhône-Poulenc could not have failed to take account, directly or indirectly, of the information obtained during the course of these meetings with its competitors. Likewise, these competitors were bound to have taken into account directly or indirectly, the information disclosed to them by Rhône-Poulenc about the conduct which Rhône Poulenc itself had decided upon or which it contemplated adopting on the market. The Court did not look at the effects of the contacts between the competitors but simply concluded (225) that the Commission was justified, solely on the basis of a conclusion as to the purpose of the meetings in categorising them as concerted practices within the meaning of Article 85(1) of the Treaty.

From the Rhône-Poulenc and the Suiker Unie judgements it may be seen that:

- contacts between competitors with an anti-competitive object alone can constitute a concerted practice within the meaning of Article 85(1),

- disclosure between competitors of market behaviour which has been decided or is contemplated amounts at least to a concerted practice, because this information is bound to be taken into account by those competitors in determining their conduct on the market.

2.2. The transparency of the sugar market; privileged information in advance of other sources; the value of the pricing information provided at the meetings; the function of the meetings and their anti-competitive effect in the market

2.2.1. British Sugar's arguments

(98) British Sugar argues that, even if it had not informed Tate & Lyle of its decision to end the price war they would in any event have realised that it had taken that decision. On 20 June 1986, it was reported in The Financial Times that the managing director of British Sugar had resigned. This is the same date as the meeting held between British Sugar and Tate & Lyle at which British Sugar explained its decision to pursue a high-pricing strategy. On 25 June 1986, it notified price rises for sugars to the trade. British Sugar argues that, as a consequence of these facts, Tate & Lyle would in any event have been fully aware of British Sugar's change in policy. In addition to this, British Sugar maintains that the actual advance warning given by it to Tate & Lyle, Napier Brown and James Budgett of its changed overall approach, and of individual price rises, was limited. After the meeting on 20 June 1986, for example, British Sugar claims to have informed the trade of its new retail sugar price lists on

25 June 1986; these were to take effect on 14 July 1986. This would mean that in this instance Tate & Lyle had five days advance warning of the changes (226).

(99) In addition to this, British Sugar argues the following:

(a) Industrial sugar

(100) Regarding the quality of the industrial sugar information provided by British Sugar to Tate & Lyle, Napier Brown and James Budgett at the meetings, whilst British Sugar admits that during these meetings it announced its basic pricing intentions and, on one occasion, handed out price matrix, it argues that no anti-competitive effect was engendered because there was no discussion regarding specific information concerning sales to individual industrial customers, price information, delivery terms, credit loans, etc. (227).

(101) Moreover, British Sugar points out that the matrix did not set a minimum price and that the matrix prices bore no relationship to actual transaction prices. In support of the argument that the matrix, or general information regarding price changes, provided at the meetings had no effect on the actual competitive behaviour of the companies involved, British Sugar submits an analysis of the differences between the matrix price and the prices actually charged to a selection of 11 major industrial customers during the relevant period. This analysis demonstrates significant and varying differences (228). British Sugar argues that, as the Commission accepts that there was no relationship between the matrix and the actual prices, it must accept, as a matter of logic, that effective competition was unaffected by the industrial sugar meetings (229).

(102) British Sugar also points out that there is no evidence that industrial sugar prices would have been lower if the meetings had not taken place (230).

(b) Retail sugar

(103) With respect to retail sugar, British Sugar accepts in its reply to the initial statement of objections as well as in its reply to the revised statement of objections that it met Tate & Lyle on a regular basis and several times provided it with an advance copy of its retail price list. However, British Sugar argues that this action could not conceivably have had any effect on Tate & Lyle's pricing practices, that the meetings were trivial, had no anti-competitive object and were incapable of appreciably affecting competition between British Sugar and Tate & Lyle (231). As evidence of this, British Sugar argues that shortly after providing a copy of the list to Tate & Lyle, it made the list generally available to the sugar trade. British Sugar considers that, of the seven occasions on which Tate & Lyle believes that the two companies met regarding retail sugar, on only three occasions were price lists handed over. According to British Sugar, on these three occasions the trade received the price lists, respectively five days after, four days before and two days after the meetings, and in one case this was even after publication of the price list (232). British Sugar claims that these price lists were never seen in draft form, and were never modified following the meetings (233). British Sugar furthermore claims that the main subject matter discussed at these meetings (and the only matter discussed when price lists were not handed out) was not related to pricing or other competitive matters, but concerned general issues such as the activities of the Sugar Bureau, a generic advertising campaign for sugar, bar-coding of products etc. British Sugar argues that it never discussed individual accounts with Tate & Lyle, nor did it ever discuss the levels of discounts that could, would or should be granted from the price list. British Sugar therefore argues that the practices had no appreciable effect on competition (234).

(104) Thus, according to British Sugar, retail price lists gave no reliable indication of prices actually charged, and would not have been useful to Tate & Lyle in attempting to align its prices with those of British Sugar. According to British Sugar, it was impossible to calculate from the list price what any customer would actually be paying for white granulated sugar (235). British Sugar produced evidence comparing its retail list prices with the net prices actually paid by its major retail customers. This shows that in the relevant period there were significant and varying differences between the list prices and net prices actually paid by individual customers (236).

(105) As evidence that the provision of retail price lists had no effect on the behaviour of the two companies, British Sugar further provided:

- a comparison containing the dates on which changes in British Sugar's and in Tate & Lyle's respective price lists became effective, the dates on which the trade was notified of these changes, the retail sugar prices respectively listed by the two companies and the dates of meetings concerning general and retail issues held between Tate & Lyle and British Sugar. This shows wide variations between the two companies in respect of the dates of notification

and implementation of their price changes as well as in their prices listed,

- copies of internal memos demonstrating that during the relevant period British Sugar actively sought to gain business from Tate & Lyle on a number of occasions by offering terms different from those of its rival (237).

(106) British Sugar also argues that if the effect of the provision of information to Tate & Lyle had resulted in the effective organisation of the market between the two companies, leading to a similarity of pricing and a lack of competition between them for individual accounts, one would have expected complaints from the retailers, or at least some evidence of price fixing to have been supplied by them (238). Moreover, in its reply to the revised statement of objections, British Sugar stresses that, contrary to the impression created by the Commission, retail sugar prices did not increase materially as a result of discretionary pricing decisions taken by British Sugar (239).

In the light of this, British Sugar concludes (240) that 'what took place was simply limited advance notice, albeit to a competitor, that a revised price list increase would be announced on a certain date. Such information was not confidential or proprietary and would have already been discussed with many customers` (241). Thus, British Sugar states (242): 'It follows that the meetings and the passing of information had no actual effect on the competitive behaviour of the parties` (243). In its reply to the revised statement of objections British Sugar concludes that, regarding the Commission's allegation of coordination of a collaborative strategy of higher prices, it is impossible to discern any evidence of such coordination or to discern any general price effect attributable to such coordination (244).

(107) Moreover, in its reply to the revised statement of objections, British Sugar attacks the Commission's case regarding the advance provision of retail price lists and advance warning of intended retail price list changes. British Sugar identifies four sources of evidence concerning the retail pricing meetings: the correspondence with the Director-General of Fair Trading from Tate & Lyle, British Sugar's correspondence with him, British Sugar's reply to the first statement of objections and the evidence given by (the relevant executive; deleted, business secret) for British Sugar, both orally and in his affidavit.

(108) British Sugar describes Tate & Lyle's correspondence with the Director-General of Fair Trading as erratic and unclear (245). It points to the fact that Tate & Lyle's representations, given during the investigations on 27 May 1994, as to the time by which it claims to have received advance knowledge of British Sugar's price increases differ between '3 or 4 weeks` and 'by a week or two`. British Sugar criticises the fact that, despite the confusion about the extent of advance knowledge admitted by Tate & Lyle, the Commission decided to describe it as 'considerable` (246). British Sugar reiterates that, on the three occasions when price lists were handed over to Tate & Lyle, the trade received the price list, respectively five days after, four days before and two days after the meetings. The price lists were never seen in draft form and were never modified following the meetings. British Sugar also says that there is no evidence supporting Tate & Lyle's contention of advance signalling of intended price-list changes by British Sugar (247). It concludes (248) that there was no need for any advance warning of an imminent price change because this information was predictable and had usually already been discussed with customers. British Sugar concurs with Tate & Lyle's description of the retail sugar meetings as 'just a safety factor, a belt and braces job really` (249).

2.2.2. Tate & Lyle's arguments

(109) In its replies to the initial statement of objections as well as to the revised statement of objections, Tate & Lyle pursues a similar line to British Sugar. However it reaches a different conclusion on the basis of the facts as it understands them. Tate & Lyle argues that its contacts with British Sugar and the advance provision by British Sugar of its price lists did not result in any significant change to its long-term pricing patterns, because in any event it would have followed the pricing initiatives of British Sugar which it would have determined through its market intelligence (250). Moreover, in its reply to the revised statement of objections, Tate & Lyle attacks the Commission's description of the arrangements between the parties as 'coordination of their pricing policy`, 'price collusion` and 'collaborative strategy of higher pricing`. Tate & Lyle reiterates that British Sugar's dominance enabled it to give effect to its unilateral decisions with or without Tate & Lyle's acceptance and that Tate & Lyle's vulnerability precluded it from exercising any real freedom of choice of the kind normally implied by expressions such as 'coordination`, 'collaboration` and 'collusion` (251).

(110) Notwithstanding this, Tate & Lyle in its reply to the revised statement of objections continues to acknowledge (252) 'that it was party to arrangements which, subject to the

appreciability of their effect on inter-State trade, infringed Article 85(1). In those circumstances and given the reduction in the scope of the allegations in the SO, there is substantial common ground between T & L and the Commission` (253). Already in its reply to the initial statement of objections Tate & Lyle had acknowledged (254) 'that the contacts gave rise to an arrangement which, subject to the appreciability of its effect on trade between Member States, fell within the prohibition of Article 85` (255). Whilst Tate & Lyle argues that it would have followed British Sugar's move to a higher pricing strategy when the latter decided to end the price war, whether or not it had been directly informed of this fact by British Sugar, it concedes (256) that 'the contacts that took place may have affected the speed of the ending of the price war, but they could not affect the outcome` (257).

(111) Regarding the effects of the regular meetings between British Sugar, Tate & Lyle, Napier Brown and James Budgett, and the advance provision by British Sugar of its retail price lists, Tate & Lyle, in its reply to the initial statement of objections, agrees (258) that 'At most, the communication of such decisions could be expected only to short-circuit the normal process of market intelligence, and to accelerate the adjustment to those decisions which the market would in any event have had to make` (259).

In the same reply, Tate & Lyle also reiterates (260), with reference to page 3 of the transcript of investigations carried out at the premises of Tate & Lyle, that 'the information provided gave T & L a certain degree of comfort regarding BS' intended pricing policy` (261). In relation to retail sugar, Tate & Lyle concedes (262) that 'Although T & L received advance warning of BS' intention to change its retail list prices and its broad retail discount policy such information was of little commercial value and merely provided limited comfort that BS were not intending to resume the price war. Moreover, receipt of such information did not affect end prices or the timing of the implementation of T & L's new retail prices, but simply enabled T & L to publish its own new retail price lists a little earlier than might otherwise have been the case` (263).

(112) Moreover, Tate & Lyle points out that, although the revised statement of objections recognises the margin disadvantage suffered by Tate & Lyle during the relevant period, it denies that as a result Tate & Lyle had no room to compete with British Sugar (264). According to Tate & Lyle, the fact that it was forced during the price war to respond to British Sugar's aggressive behaviour provides no evidence that it had any independent ability to act as a competitor of British Sugar (265).

(113) Finally, Tate & Lyle submits that, due to the special characteristics of the sugar market resulting from the Community sugar scheme, the arrangements in this case are devoid of any significant effects (266).

2.2.3. Napier Brown's arguments

(114) According to Napier Brown (267), the Commission is mistaken when stating that the information supplied by British Sugar would have been difficult to gather piecemeal from the market. Rather, Napier Brown concurs with James Budgett in saying that market forces provided very accurate, rapid information about general price levels, and that information concerning British Sugar's matrix was rapidly and accurately communicated via the market (especially customers), at least to all major players. Moreover, Napier Brown thinks that the Commission's allegation of a collaborative strategy of higher pricing is wholly unsupported by facts or evidence (268).

2.2.4. James Budgett's arguments

(115) James Budgett in its reply to the revised statement of objections (269) stresses that the sort of information provided by British Sugar was not such as to allow James Budgett to change its negotiating position with customers. According to James Budgett, the market, including in particular the merchants, was well aware of British Sugar's general pricing aspirations. Consequently, the statements of British Sugar at the meetings did not add to James Budgett's knowledge of British Sugar's desire as to the general direction of white granulated sugar prices, nor did they affect the prices or the pricing policy of James Budgett. It states (270) that it did not understand the matrix as constituting minimum or target prices for British Sugar. James Budgett claims to have been aware that individual pricing decisions varied, but to have obtained from the meetings the reassurance that this would not be the result of British Sugar's salesmen systematically discriminating without the knowledge of their management.

2.2.5. The Commission's replies

(a) The relevance of effects created by the agreement and/or concerted practice

(116) The Commission accepts that it cannot be concluded on the basis of the facts that the companies in question discussed individual customer accounts or the discounts to be granted, with regard to either industrial or retail sugar. In its letter to the Office of Fair Trading dated 16 July 1990 (271) Tate & Lyle admitted that discussions on such matters took place by stating that 'It also appears that sometimes information was exchanged between the companies about the volume discounts being applied to specific customers` (272). In the same letter (273), Tate & Lyle stated also that 'In connection with customer negotiations information has been exchanged about changes in the discounts that would be offered to some of the larger customers (who took supplies from both companies)` (274). However, Tate & Lyle later stated in the joint British Sugar/Tate & Lyle memorandum to the Office of Fair Trading of 15 April 1991 (275) under point 4 that 'During the arrangement, BS informed TLS, before it made a general announcement to its customers, of changes in list prices, and discount policy, although TLS was not informed of any specific price or discount which was to be quoted to a specific customer` (276). British Sugar explicitly denies that such discussions took place. Tate & Lyle has not provided a convincing explanation of why it retracted its earlier statements. There is also no indication that these earlier statements were made under duress or that Tate & Lyle had some other reason for giving a false account of the facts. However, in the absence of any other evidence supporting Tate & Lyle's original version of events, the Commission considers that it is not able to prove that individual accounts, or the discounts granted from price lists, were discussed, or that information about changes in discounts to be offered to specific customers was exchanged during the meetings. Equally, the Commission does not challenge the information provided by British Sugar, according to which significant and varying discounts were granted, nor the fact that in particular cases British Sugar and Tate & Lyle competed for individual accounts.

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

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

(119) Article 85(1) states that the 'following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . .`. As the Court of Justice confirmed in its judgment in Consten and Grundig (277) 'there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition`. This was also confirmed by the Advocate-General and the Court of First Instance in the Rhône-Poulenc case (278). The Advocate-General considered that 'if it is certain that concertation having an unlawful object has taken place and if . . . it can be assumed that the undertakings have acted on the basis of that concertation even if the Commission adduces no evidence of the concrete acts (practice), there is . . . a concerted practice with an unlawful object covered by Article 85. When undertakings act with greater knowledge and more or less justified expectations about other undertakings than they should have and normally would have, there is always a clear risk that competition will be less intense than it otherwise would have been` (279). As was indicated above (280), in its judgment in that case, the Court of First Instance confirmed the Advocate-General's view by stating that Rhône-Poulenc 'through its participation in those meetings, (. . .) took part, together with its competitors, in concerted action the purpose of which was to influence their conduct on the market and to disclose to each other the course of conduct which each of the producers itself contemplated adopting on the market` (281). The Court went on to state with regard to Rhône-Poulenc that 'Accordingly, (. . .) in determining the policy which it intended to follow on the market, it could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings. Similarly, in determining the policy which they intended to follow, its competitors were bound to take into account, directly or

indirectly, the information disclosed to them by (Rhône-Poulenc) about the course of conduct which (Rhône-Poulenc) itself had decided upon or which it contemplated adopting on the market` (282). On this basis alone, and without looking at possible effects, the Court concluded that the Commission was justified, having regard to the purpose of certain meetings, in categorising them as 'concerted practices` (283). Likewise, with regard to the common intentions existing between certain undertakings and relating to target prices and target volumes, the Court stated that the Commission was entitled to treat those elements of the complex infringement as 'agreements` within the meaning of Article 85(1). In this regard, too, the Court (284) did not look at the possible effects of these agreements but merely cited the established case-law (285), according to which, in order for there to be an agreement it is sufficient that the participating undertakings should have expressed their joint intention to conduct themselves on the market in a specific way. On these bases, and again with looking at possible effects, the Court finally concluded that the Commission was also entitled to describe the continuous conduct, which had been characterised by a single purpose, as a single infringement under the denomination 'agreement and concerted practice` (286).

(b) The transparency of the sugar market; privileged information in advance of other sources; the value of the pricing information provided at the meetings; the function of the meetings

(120) In order to address the arguments raised by the parties under these headings, it is useful to further substantiate the function and the value which the continuous meetings had for them. This leads to the conclusion that the only convincing explanation for the parties' frequent meetings over a long period is the joint pursuit of the object of restricting competition by coordinating their pricing policy on the market in the manner described (287).

(121) As regards industrial sugar, it is established (288) that during the meetings British Sugar announced its intentions as to general future price increases and as to the maintenance or increase of differentials in the prices to purchasers of larger or smaller quantities of industrial sugar. It is also established that this was done on the basis of a pricing matrix established by British Sugar, showing its target prices according to calendar quarter and tonnage purchased. The parties also do not deny that, at least on one occasion, the British Sugar matrix was handed over to Tate & Lyle, Napier Brown and James Budgett, and that on the occasions when the matrix was not actually handed over, the participants in the meetings were provided with information similar to that contained in that matrix. It has been shown above (289) that the regular meetings over a long period provided all of the participants - including British Sugar, in spite of its price leadership - with the assurance of a continuing common policy of higher pricing which they could not have gained by simply individually monitoring the developments on the market (290). It is uncontested that Napier Brown and James Budgett also had a specific interest in the differentials between purchasers of larger and smaller quantities of industrial sugar as indicated in the matrix (291). Furthermore, it has been shown that British Sugar had a specific interest in involving Napier Brown and James Budgett in the collusion in order to control their threat potential which was based on the possibility of imports and which could have substantially damaged British Sugar's strategy of combining high pricing with its ability to sell its entire A/B sugar quota in the UK. Finally, during investigations carried out at Tate & Lyle on 27 May 1994, that company confirmed that the information contained in the matrix was useful in that it gave Tate & Lyle an indication of British Sugar's pricing intentions (292). Even in its reply to the revised statement of objections, which reply is characterised by Tate & Lyle's general retraction of a lot of what it had said earlier in the proceedings, Tate & Lyle admits (293) that 'the information was of use as to BS' probable intentions` (294). Tate & Lyle confirms (295) 'that the information provided gave T & L a certain degree of comfort regarding BS' intended pricing policy` (296).

(122) As regards retail sugar, it is established that British Sugar on at least two occasions handed over to Tate & Lyle a copy of its new retail price list in advance of circulating it to the trade (297). British Sugar concludes (298) that 'what took place was simply limited advance notice, albeit to a competitor, that a revised price list increase would be announced on a certain date` (299). Tate & Lyle accepts (300) that it 'received advance warring of BS' intention to change its retail list prices and its broad retail discount policy` (301). It states (302) that the advance provision of British Sugar's retail pricing decisions could be expected to 'short-circuit the normal process of market intelligence, and to accelerate the adjustment to those decisions` (303). Tate & Lyle also admits (304) that the receipt if that pricing information 'enabled T & L to publish its own new retail price lists a little earlier than might otherwise have been the case` (305). Moreover, also with respect to retail sugar it has been shown above (306) that the regular meetings over a long period provided not only Tate & Lyle but also - and despite its price leadership - British Sugar with assurance of a continual

common policy of higher pricing which they could not have achieved by simply individually monitoring developments on the market.

(c) Conclusion

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

2.3. The alleged objects of the meetings, especially the undertakings

2.3.1. British Sugar's arguments

(124) British Sugar argues that there also was no anti-competitive object to the industrial-sugar meetings. According to British Sugar, these meetings performed three functions (307): first, the undertakings given by British Sugar to the Commission during the Napier Brown procedure in 1986 required regular contact with, and reassurance to, the merchants. As the only other manufacturer in the UK market, Tate & Lyle had a similar interest in reassuring the merchants; second, as the merchants were among the largest customers of both British Sugar and Tate & Lyle, major interrelated transactions required careful coordination between the participants in the meetings; third, other administrative issues needed to be handled jointly across the trade.

(125) Likewise for retail sugar, British Sugar claims (308) that the provision of retail price lists had no anti-competitive object.

(a) The undertakings

(126) British Sugar, in its reply to the initial statement of objections (309), already stated that as a consequence of the giving of these undertakings, it was 'anxious to involve the merchants in pricing decisions. They were competitors yet as customers, they derived their raw materials from, inter alia, British Sugar . . . If British Sugar misjudged the situation in establishing its industrial price schedules or in its sales to the retail trade, the merchants would have been the first to complain. This is why bilateral discussions and meetings between the British Sugar and each merchant, which were paralleled by meetings between T & L and each merchant, evolved to meetings between all four parties` (310). Furthermore, British Sugar stated (311) that its decision to engage in the practices in question was based on its understanding that, in order to comply with the undertakings, it 'was obliged to consult with the merchants on the maintenance of an acceptable differential between industrial and retail prices, and also on acceptable differentials in price between the larger and smaller customers` (312).

(127) In its reply to the revised statement of objections (313), British Sugar argues that 'Following the acceptance of the undertakings in August 1986 the merchants acquired a special "protected" status both as customers and as competitors of British Sugar` (314). British Sugar stresses that the undertakings have to be interpreted as a generalised statement that the merchants had a future, and as a blanket prohibition on entering into pricing policies which would have damaged the survival of the merchants, whether those policies concerned the merchants' sale of either retail sugar or industrial sugar (315). Therefore, British Sugar does not accept the Commission's reasoning (316) that it is hard to understand how British Sugar's discussions with Napier Brown and James Budgett, which exclusively concerned industrial sugar prices, could have served to implement the undertakings which did not specifically mention the differentials between prices charged to purchasers of respectively large and small quantities of industrial sugar, while they expressly mentioned the margin between industrial and retail sugar prices. British Sugar recalls that the bulk of Napier Brown's trading business, and all of James Budgett's, related to the sale of industrial sugar (317), and that the general assurance contained in the undertakings as to continued existence of the merchants required British Sugar to avoid discriminatory pricing for industrial sugar (318). 'From British Sugar's perspective it was vital (. . .) for British Sugar's prices to be sufficient for the merchants to secure an adequate margin on resale in order for them to survive` (319). On the one hand, British Sugar's prices to the merchants had been too high, British Sugar would have been in breach of the undertakings. On the other hand, if British Sugar's prices to other customers which it shared with the merchants had been too low, the merchants would have been discriminated against and placed at a competitive disadvantage, in breach of Article 86 of the Treaty (320). British Sugar stresses that Napier Brown and James Budgett attended the meetings as customers, not as competitors (321). According to British Sugar (322), with regard to the undertakings, 'it was essential, for the parties to have met regularly

to ensure that the regime was working as it was intended to do and, in particular, to ensure that the merchants received prices which were non-discriminatory having regard to the volumes they purchased and that British Sugar would not discriminate against them, especially in relation to customers they had in common` (323).

(128) At the oral hearing on 18 and 19 April 1996, British Sugar also raised the argument (324) that the undertakings were accurately reflected in its 'EEC compliance programme`, drawn up in December 1986. From the compliance programme, it cited in particular Section IV, subheading 2 'Unfair pricing`, as proof that maintaining an insufficient margin between industrial and retail sugar prices was only one of a list of different forms of conduct which British Sugar had understood to constitute infringements of the Community competition rules.

(129) According to British Sugar (325) Tate & Lyle's presence at the meetings can, in part be explained by the fact that Tate & Lyle, which - according to the Commission (326) - held a position of joint dominance together with British Sugar, was a potential subject of a complaint by the merchants and therefore had a strong interest in ensuring that it gave no reason for such a complaint.

(b) Other objects of the meetings

(130) Moreover, British Sugar in its reply to the revised statement of objections (327) claims that the complex commercial relationships between the parties demand frequent meetings between them, including Tate & Lyle. According to British Sugar, the sale and purchase arrangements between the four parties were discussed and finalised during these meetings.

2.3.2. Tate & Lyle's arguments

(131) Tate & Lyle hardly comments at all on the issue of the undertakings. They were only briefly mentioned in its letter to the OFT of 16 July 1990 (328) and during the oral hearing (329).

Concerning the object of the meetings, Tate & Lyle only comments very briefly. The retail sugar meetings were described by Tate & Lyle during the investigation on 27 May 1994 as 'just a safety factor, a belt and braces job really` (330).

Moreover, Tate & Lyle claims (331) that there were 'other legitimate matters of general interest to the industry to be discussed` (332).

2.3.3. Napier Brown's arguments

(132) Napier Brown, in its reply to the revised statement of objections (333), underlines that the undertakings were concerned with the role of the merchants generally and not just with pricing. The differential between the prices of industrial and of retail sugar was only one element in the Commission's Napier Brown Decision. According to Napier Brown, British Sugar's policy of drastically reducing the differentials between prices charged to large customers, which were frequently those of British Sugar, and prices charged to small customers, which were traditionally customers of the merchants (334), was a type of pricing practice which was also intended to be covered by the undertakings. Napier Brown thinks that the meetings were a useful way of emphasising to British Sugar's senior management the importance of its monitoring the observance by its sales force, not only of the letter, but also of the spirit of the undertakings. In Napier Brown's view, the wording of the undertakings makes it clear that the insufficient margin between British Sugar's price for industrial sugar and its price for retail sugar was merely an example of a pricing practice that was not 'normal and reasonable` and which therefore might be 'construed as predatory`.

2.3.4. James Budgett's arguments

(133) James Budgett, in its reply to the revised statement of objections (335), claims to have believed that British Sugar's movement to re-establish volume-based pricing differentials (336) was part of British Sugar's compliance with the undertakings. Budgett believed that the Commission had warned British Sugar not to engage in predatory pricing in respect of smaller accounts for industrial white sugar in a manner which amounted to a breach of Article 86 of the Treaty.

2.3.5. The Commission's replies

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

(a) The undertakings

(135) The main explanation, based on the implementation of the undertakings, is not convincing, either when one considers those who actually participated in each of the 40 meetings, or with regard to the chronology of events, or with regard to the subject matter of the individual meetings, or yet with regard to the alternative methods available for achieving and monitoring the implementation of the undertakings.

(136) It is established (337) that British Sugar and Tate & Lyle participated in all 40 meetings, whereas Napier Brown and James Budgett participated only in meetings classified as 'industrial` and 'industrial/institutional price changes`. Specifically James Budgett and Napier Brown participated in 18 meetings under these classifications. There was one further industrial sugar meeting in which only British Sugar and Tate & Lyle participated. Moreover, James Budgett, together with British Sugar and Tate & Lyle, attended one further meeting about imports/exports. The remaining 20 meetings were bilateral occasions between British Sugar and Tate & Lyle, variously classified as 'background meeting`, 'general market`, 'general/retail`, 'retail`, 'general/imports`, and 'imports/exports`.

(137) During the hearing on 18 and 19 April 1996, the Commission asked the parties to provide a tenable explanation for the presence of the manufacturer Tate & Lyle at all the meetings. The reason behind this question was that if the meetings were designed by British Sugar to reassure the merchants and to ensure implementation of the undertakings which British Sugar had given to the Commission - undertakings which only concerned merchants but not manufacturers (338) - then Tate & Lyle's continuous presence would be difficult to explain. British Sugar replied (339) that there was a common industry interest in securing the presence of both the manufacturers (British Sugar and Tate & Lyle) and both the merchants (Napier Brown and James Budgett), and that the merchants probably had as many fears concerning the future of their relationship with Tate & Lyle as they had with British Sugar. Napier Brown replied (340) that British Sugar was at the time seeking to reassure the whole market, not just the merchants, and that British Sugar wanted to have an open forum explaining what they were doing and giving everybody, including Tate & Lyle, the opportunity of commenting. James Budgett replied (341) that there was no simple answer explaining Tate & Lyle's presence. It said that in addition to any assurance that British Sugar would comply with its obligations, James Budgett would have wanted an indication that Tate & Lyle would behave in a like manner.

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

(139) Tate & Lyle itself does not rely on the undertakings as an explanation for the meetings at all. When questioned at the oral hearing on 18 and 19 April 1996 about the significance of the undertakings, it referred to its two letters of 16 July 1990 (342) and 29 August 1990 (343) to the OFT as a proper description of the circumstances in which the meetings arose. Tate & Lyle added (344) that the letter of 16 July 1990 mentioned 'the existence of the undertakings as being part of the context in which the meetings took place` (345). In fact, the letter of 29 August 1990 does not mention the undertakings at all and the one of 16 July 1990 mentions them only once, and then only as a minor point. The relevant part of this letter (346) reads: 'in the summer of 1986 there were indications that British Sugar was contemplating a change in its commercial policy vis-à-vis Tate & Lyle. At that time key relevant employees of British Sugar had left or were on the point of leaving. British Sugar was also required to give undertakings to the European Commission in the context of Napier Brown proceedings and it was facing commercial pressures. It was indicated to Tate & Lyle that British Sugar was prepared to adopt new commercial policies` (347). This extract shows that the undertakings were only a subordinate element amongst several others and that they in any event did not constitute the principal motive for British Sugar's decision to change its policy vis-à-vis Tate & Lyle.

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

(aa) The participants in the meetings

(141) Firstly, it is not credible that the 20 bilateral meetings between British Sugar and Tate &

Lyle served the purpose of implementing the undertakings, while at the same time excluding Napier Brown and James Budgett although these two companies in their capacity as merchants were directly concerned by the undertakings. Secondly, besides Napier Brown and James Budgett, the undertakings equally concerned the other merchants operating on the market in white granulated sugar in Great Britain (348). The fact that they did not take part in any of the 40 meetings is further indication that these meetings did not serve the purpose of implementing the undertakings.

(bb) The chronology of events

(142) The decisive meeting between British Sugar and Tate & Lyle, at which Napier Brown and James Budgett were not present, took place on 20 June 1986, whereas the undertakings were only offered on 5 August 1986. In its letter of 29 August 1990 (349), Tate & Lyle described the meeting of 20 June 1986 as 'significant in that it set the background principles against which all future discussions were held`. In the light of this, it is clear, first, that the meeting of 20 June 1986 with regard not only to the absence of Napier Brown and James Budgett but also on account of its date, could not have concerned the implementation of the undertakings. Secondly, the fact that the meeting of 20 June 1986, which was crucial in setting the principles for the future anti-competitive conduct and for all the subsequent meetings - that is to say, for the bilateral and for the quadripartite meetings, took place before the undertakings were offered, is a strong indication that the subsequent meetings were not concerned with their implementation.

(143) Furthermore, if the meetings were designed to implement the undertakings given on 5 August 1986 in the Napier Brown proceedings, it is not understandable why for almost the two years which elapsed between that date and the adoption of the Commission decision in that case (350), British Sugar never told the Commission that these bilateral and quadripartite meetings between the parties were taking place. In these proceedings, British Sugar endeavoured to create the impression that it ensured compliance with its undertakings as well as with the Community competition rules generally, in two ways. Firstly, it drew up a general Community competition rules compliance programme in December 1986 and, secondly, it took specific action aimed at compliance in the form of the meetings which are at issue in these proceedings. In its Napier Brown Decision, the Commission took the giving of the undertakings and the adoption of the compliance programme into account as mitigating factors (351), but still imposed a fine of ECU 3 million. Against this backdrop, it cannot be explained why the meetings, the alleged prime purpose of which was to ensure compliance with the undertakings and the Community competition rules generally, were never mentioned by British Sugar to the Commission. Following British Sugar's logic, it would have been in its interest to demonstrate to the Commission that it took the implementation of the undertakings and of its compliance programme very seriously, and it could have introduced this fact as a further argument when trying to obtain a reduction of the fine imposed.

(cc) The subject matter of the meetings

(144) It should be recalled that the undertakings were given in the course of the Napier Brown procedure, a case which had focused on the retail sugar business. Industrial sugar is the raw material for manufacturing the downstream product, retail sugar. The Napier Brown Decision found that British Sugar was dominant on the market for the supply of both industrial and retail sugar in Great Britain (352). Consequently, in so far as merchants wish to engage in the retail sugar business on the basis of industrial sugar purchased from British Sugar, they depend on British Sugar's maintaining a sufficient margin in its pricing (the repackaging margin) between industrial and retail sugar. The major element of Napier Brown's complaint, and the Commission's finding in the decision, were that British Sugar had artificially reduced its prices for retail sugar to the extent that the margin between its prices for retail sugar and industrial sugar became insufficient for Napier Brown to survive in the British retail sugar market. Consequently, the undertakings expressly refer to the margin between British Sugar's industrial and retail sugar prices on which the merchants' retail business vitally depends (353). The undertakings do not deal with the general level of prices for industrial and retail sugar. Nor does the text of the undertakings specifically mention the differentials to be created or maintained between prices to purchasers of larger quantities of industrial sugar and those purchasing smaller quantities of industrial sugar. This is due to the fact that in the Napier Brown procedure the Commission never accused British Sugar of maintaining an abusive, or even an unfair, margin between large and small purchases of industrial sugar.

(145) According to the information available to the Commission, Naper Brown and James

Budgett were only involved in discussions with British Sugar and Tate & Lyle regarding industrial sugar prices, and in particular regarding the price differentials to be created and maintained between customers purchasing larger and those purchasing smaller quantities of industrial sugar. 18 industrial sugar meetings were held between all four parties; one further industrial sugar meeting was held only between British Sugar and Tate & Lyle.

Napier Brown and James Budgett were not involved in the seven meetings classified 'retail` and the one meeting classified 'general/retail`; those were bilateral meetings between British Sugar and Tate & Lyle. Apart from the first bilateral meeting between British Sugar and Tate & Lyle on 20 June 1986, there was no meeting covering jointly the aspects of industrial and retail sugar. It is possible that, at their first bilateral meeting on 20 June 1986 British Sugar and Tate & Lyle also discussed the aspect of margins between industrial and retail sugar prices, although the reason for doing so could not have been the undertakings, because they were given with regard to the merchants in the course of the Napier Brown procedure in which Tate & Lyle had not been involved. Moreover, if the issue of margins between industrial and retail sugar prices was actually discussed at the meeting of 20 June 1986, and if the parties' explanations about the role of the undertakings were correct, it would have been logical, first for British Sugar, Napier Brown and James Budgett together to have taken part in that first meeting of 20 June 1986, and secondly, for these three companies to have continued over the entire course of the relevant period to participate together in meetings which jointly dealt with the issues of both industrial and retail sugar pricing.

Against this backdrop, in view of the subject matters and the participants in the different meetings, the Commission concludes that - apart from possibly the first meeting on 20 June 1986 - the issue of margins between industrial and retail sugar prices was discussed neither at the meetings about industrial sugar nor at the meetings about retail sugar. In the view of the absence of Napier Brown and James Budgett from the first meeting of 20 June 1986, and since there were no further meetings which jointly dealt with both industrial and retail sugar and which thus could have discussed the margins issue, which was specifically addressed in the Napier Brown Decision and expressly mentioned in the undertakings, it is not credible that any of the meetings served the implementation of these undertakings.

(146) Likewise, if the undertakings were designed, as British Sugar claims, to reassure the merchants of their future, it cannot be explained why Napier Brown and James Budgett were present only at the meetings covering industrial sugar but not at the meetings dealing with the retail sugar business. The industrial sugar market as such was not the focus of the Napier Brown procedure, nor did it in itself involve an issue specifically mentioned in the undertakings. On the contrary, the retail sugar market was the focus of the Napier Brown procedure and, on this basis, the position of the merchants on that market was a concern which the undertakings were designed to address.

(147) As a consequence, therefore, it is not credible that the meetings in which Napier Brown and James Budgett were present in any way pursued the object of implementing the undertakings, all the more so because Tate & Lyle, being a party not concerned by the undertakings (354), was always present. It is likewise not credible to contend that British Sugar and Tate & Lyle, when they excluded Napier Brown and James Budgett and held bilateral retail sugar meetings, or indeed when they held any other of their bilateral meetings, in any way pursued the object of implementing the undertakings, again all the more so because Tate & Lyle - as explained above - was not a party concerned by the undertakings. Accordingly, in view of the actual subject matter of the meetings and Tate & Lyle's continuous participation therein, British Sugar's argument (355) that its conduct was based on its understanding that in order to comply with the undertakings it 'was obliged to consult with the merchants on the maintenance of an acceptable differential between industrial and retail prices, and also on acceptable differentials in price between the larger and smaller customers` (356) is not accepted by the Commission.

(148) The Commission's view is confirmed by the answers which Napier Brown and James Budgett gave at the oral hearing on 18 and 19 April 1996 concerning the question of why they were not at least also involved in discussions about the margin between retail and industrial sugar prices. The representative of Napier Brown said (357): 'We certainly did discuss it, but I had no intention of discussing that with the other parties there. It was a private matter between us and British Sugar` (358). The representative of James Budgett said (359): 'My view, and I would endorse what's been said by Pat Ridgwell, whatever these meetings were about, the early ones, they weren't specifically about the issue of the retail over the bulk margin` (360).

(dd) The significance of the compliance programme

(149) Moreover, the existence and the content of the Community competition law compliance programme, which British Sugar announced to the Commission in October 1986 and adopted in December 1986, further weakens the credibility of its argument that its conduct was based on its understanding that in order to comply with the undertakings it 'was obliged to consult with the merchants` on pricing in any way. The compliance programme covers the whole range of the Community competition rules applicable to economic operators. It does not neglect Article 85(1) and it sufficiently indicates the risk of infringing Article 85(1) which any direct contacts between competitors about pricing questions entail.

(150) The Commission's Napier Brown Decision of 18 July 1988 (361) reports: '. . . in October 1986, BS informed the Commission that it intended to implement a comprehensive compliance programme in order to ensure that in the future the company fulfilled all of its obligations under Article 85(1) and particularly Article 86 of the Treaty. This programme has subsequently been adopted. As part of this programme, BS holds an annual anti-trust compliance review meeting following which a report is compiled, a copy of which is forwarded to the Commission`.

The reason for the particular mentioning of Article 86 in this part of the Napier Brown Decision lies solely in the fact that the Napier Brown procedure was based on Article 86. As the same part of the decision indicates - and reference to the text of the compliance programme confirms this (362) - it covers the whole range of obligations under Articles 85(1) and 86. Detailed explanations and practical examples are given for both Article 85(1) and Article 86. Moreover, the compliance programme states: 'In line with its policy of complying with all applicable laws the company is therefore committed to compliance with the EEC competition rules and will take every step to ensure observance of that policy. It is also the company's policy not only to observe the law but to go beyond mere compliance with the strict letter of the law and seek to avoid any conduct which may give rise to doubts as to whether or not is has acted lawfully. . . . Therefore all directors, managers and other employees throughout the company are expected to follow the company's policy and comply with the spirit and the letter of the EEC competition rules. They are also expected to instil in all their subordinates a sense of obligation and concern to comply in the same way. No member of staff, at whatever level has the authority to give orders or to take any action which contradicts the company's policy as set out above` (363).

(151) Furthermore, the all-embracing scope of the compliance programme is reflected by the information which British Sugar supplied to the Commission in the course of its request of 23 December 1986 for negative clearance for the same compliance programme (Case IV/32.214). In the Annex to form A/B British Sugar stated under the heading '1. Brief description: A compliance programme to be enforced by British Sugar in respect of the supply, pricing and marketing of its products having regard to the competition rules contained in the Treaty of Rome` (364). Under heading '2. Market` it is said: 'The relevant product market for the purposes of this application is granulated sugar for sale to retail and industrial clients. The relevant geographical market is the United Kingdom` (365).

(ee) Alternative methods of achieving and monitoring the implementation of the undertakings

(152) Finally, if the UK and the British white granulated sugar markets, as well as British Sugar's pricing policy, were as transparent as all the parties claim, it is hard to understand why any meetings at all were necessary to achieve and monitor the implementation of the undertakings. It would have sufficed for Napier Brown and James Budgett simply to monitor British Sugar's pricing conduct on the market. Moreover, the undertakings continue in force. The fact that since July 1990 no further meetings between the parties have taken place, and that no complaints have been made by any of the merchants, demonstrates that it is possible to successfully achieve and monitor the implementation of the undertakings without holding meetings.

(b) The other explanations for the meetings

(153) The further argument that the complex commercial relationships between the parties required frequent meetings between them, is not convincing. The fact that since July 1990 no such meetings have taken place, while the commercial relationships between the parties have remained as complex as they were in the relevant period, shows that it is possible to manage these relationships successfully without meetings. Nor is it credible to assert that the parties' commercial relationships with other operators on the white granulated sugar market in Great Britain, especially other merchants, were less complex than the relationships between the

parties themselves. The fact, therefore, that the parties did not involve these other operators in their meetings is further indication that these meetings did not serve the purpose claimed by the parties.

(c) Conclusion

(154) In view of the fact that the explanations offered by the parties for their meetings are unconvincing, and that no meetings have proved necessary in order to achieve the alleged objects of the meetings after the relevant period, it can be concluded that the true reason for the parties' continuing to invest time and ressources in the organisation of and attendance at meetings, with such frequency and over such a long period, lay in all four parties' pursuit of the object of restricting price competition between them by coordinating their pricing policy on the industrial sugar market in Great Britain, and additionally British Sugar and Tate & Lyle by coordinating their respective pricing policies on the retail sugar market in Great Britain.

C. APPRECIABLE EFFECT ON TRADE BETWEEN MEMBER STATES

1. The Commission's assessment

1.1. The wording of Article 85(1) and the standards set by the Court

(155) The agreement and/or concerted practice concerning the coordination of the parties' pricing policy may have appreciably affected trade between Member States. This can be stated although the object of this agreement and/or concerted practice concerned the pricing policy pursued on a market, not extending to the whole of the UK, but covering Great Britain alone. An infringement of Article 85(1) does not presuppose that the object or effect of the restriction of competition concerns a market which in terms of geography or product goes beyond the borders of one Member State, so long as the pattern of trade between Member States may have been affected, either negatively or positively.

(156) In this case, it is not possible to determine the precise extent to which imports were drawn into Great Britain as a result of the agreement and/or concerted practice concerning pricing coordination.

(157) However, it is not necessary for the Commission to make such a determination. First the wording of Article 85(1), which mentions 'agreements . . . and concerted practices which may affect trade between Member States`, demonstrates that proof of actual effect on trade is not necessary in order for the provision to become operative. Secondly, the Court of Justice has stated on a number of occasions (366) that, in order for an agreement or a concerted practice to affect trade between Member States, it need only make it possible to foresee with a sufficient degree of probability on the basis of a set of objective elements of law or of fact that it may have an appreciable influence, direct or indirect, actual or potential, on the pattern of trade between Member States capable of hindering the attainment of the objectives of a single market between Member States. The influence which an agreement or a concerted practice may have on trade between Member States is to be determined by taking into account in particular the position and importance of the parties on the relevant market (367).

(158) Moreover, the Court has stated on various occasions (368) that a restrictive agreement extending over the whole territory of one single Member State by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis thereby holding up the economic interpretation which the Treaty is designed to bring about. In the Belasco case (369), which concerned a cartel in the roofing felt market in Belgium, the Court of Justice pointed out that the members of the cartel had reached an understanding about the defensive measures to be taken in the event of increased competition from foreign undertakings, and that the share of the domestic market in question which the cartel members held allowed them to apply these measures effectively. Therefore, the agreement and/or concerted practice had to be considered capable of influencing intra-Community trade. In the John Deere case (370), the Court of First Instance pointed to the highly olipolistic nature of the relevant domestic market (the UK agricultural tractor market) and the fact that the members of the cartel held 88 % in the market. The Court concluded that, under these circumstances, the Commission had correctly found that the information exchange operating between the companies concerned was liable to substantially affect trade between Member States because the lessening of competition resulting from this exchange necessarily influenced the volume of imports to the domestic market concerned.

1.2. The assessment of this case

(159) Applied to this case, the standards set by the Court lead to the conclusion that the agreement and/or concerted practice was capable of appreciably affecting trade between Member States.

(160) The agreement and/or concerted practice had the object of increasing in a coordinated way the prices for white granulated sugar in Great Britain. Economically, it is logical to expect imports of white granulated sugar into Great Britain to rise in response to increased prices in Great Britain, notwithstanding the structural limits on imports resulting from the factors indicated above (371). From this point of view, therefore, it is possible to conclude with a sufficient degree of probability that the agreement and/or concerted practice may have had an appreciable influence on the pattern of trade between Member States.

(161) This is, moreover, confirmed by the structure of the relevant market and the parties' strength on it. Both the industrial and the retail sugar markets in Great Britain were tightly olipolistic in the relevant period (372). The four companies involved in the agreement and/or concerted practice concerning industrial sugar together held over 90 % of the relevant market. The two companies involved in the agreement and/or concerted practice concerning retail sugar held approximately 89 % of the relevant market. The fact that the relevant geographical market does not cover the whole territory of the United Kingdom, but excludes Northern Ireland and is limited to Great Britain (373), is immaterial with regard to the question of effect on trade in the present case. Where a minor part of a Member State's territory is separated from the remaining major part of its territory - as is the case with respect to Northern Ireland's position in relation to Great Britain - the logic concerning compartmentalisation, put forward by the Court of Justice (374) with regard to anti-competitive conduct covering the whole territory of one single Member State, also applies in the relation between that remaining major part of a Member State's territory and the other Member States, unless appreciable effects on trade can be fully ruled out. This is the situation here.

As a result, regard being had to the structure of the relevant market and the parties' strength on it, it is possible to conclude with a sufficient degree of probability that the agreement and/or concerted practice will have had an appreciable influence on the pattern of trade between Member States.

(162) Furthermore, in relation to industrial sugar and to retail sugar, there are additional facts in evidence, which make it possible to conclude with a sufficient degree of probability that the agreement and/or concerted practice will have had an appreciable influence on the pattern of trade between Member States.

1.2.1. Industrial sugar

(163) As far as industrial sugar is concerned, a number of companies in Great Britain including the sugar merchants in their principal merchanting role, purchase sugars from Continental producers in order to secure for themselves an alternative source of supply in the event of production difficulties in Great Britain, such as crop failure. They will, if necessary, be willing to pay a price premium for such purchases. Moreover, major Continental sugar producers have traditionally sold significant quantities of industrial sugar in Great Britain. Logically, if the industrial sugar price in Great Britain increases owing to the four parties' agreement and/or concerted practice concerning coordinated higher pricing, British companies will find alternative sources of supply located in other Member States more attractive. Furthermore, this would encourage companies from other Member States to seek an increase of their exports to Great Britain.

(164) Indeed, there are indications that the agreement and/or concerted practice for the coordinated increase in prices for industrial sugar in Great Britain after the price war did result in an appreciable change in the patterns of trade in industrial sugar between Great Britain and neighbouring Member States, in particular France and Denmark (375).

(165) First, it is notable, as was stated earlier (376), that during the sugar campaign years (1 October to 30 September) covering the relevant period, imports of sugar from other Member States into the UK increased from 88 000 tonnes in 1986/87 to 110 000 tonnes in 1987/88, then to 132 200 tonnes in 1988/89 and finally to 153 000 tonnes in 1989/90. This is an increase of 73,9 %, representing an increase of the imported share of total national consumption from 3,9 % in 1986/87 to 6,7 % in 1989/90. The import figure in the last year during which the price war was still largely ongoing, namely 1985/86, was 137 000 tonnes. If one compares this figure with the figure of the last year which was substantially affected by the agreement and/or concerted practice, 1989/90, an increase of 11,7 % can be observed. The vast bulk of the sugar imported in the UK and into Great Britain has traditionally been, and was during the relevant period, white granulated sugar, most of which was destined for industrial claims.

(166) Secondly, the fact that Tate & Lyle, in particular, felt it necessary to adopt an active policy of threatening importers with retaliatory exports if they sold additional quantities of sugar into Great Britain, as was described earlier (377), gives a clear indication that the parties were concerned that the increased pricing level in Great Britain would lead to increased imports. The fact that the Commission in its revised statement of objections dropped the qualification of this aspect of Tate & Lyle's and British Sugar's conduct as infringements of Article 85(1) and 86 does not mean that this conduct cannot be taken into account in this Decision. Moreover, in its written reply to the revised statement of objections, Tate & Lyle again acknowledged (378) 'that it had stressed to importers that it would defend its sales on the UK market and that on occasion it had unilaterally threatened retaliatory action (although in fact it took no action despite increases in imports)` (379). This statement confirms the Commission's assessment in two ways: first, it admits that Tate & Lyle did indeed have a policy of threatening importers. Secondly, it demonstrates that, notwithstanding this, imports into Great Britain increased, for which the most logical explanation is that, due to the parties' agreement and/or concerted practice, market prices in Great Britain had increased.

1.2.2. Retail sugar

(167) Although imports of white granulated sugar packaged in one-kilogram bags for retail sale are not a historic feature of the sugar market in Great Britain, such imports are by no means impossible. Even though there are significant barriers to the entry of such products (notably the need to print specific English-language bags or labels, consumer loyalty to known brands, and the unwillingness of supermarkets to rely on suppliers in respect of whom they have no guarantee as to their ability to ensure regular and adequate supplies), when retail prices in Great Britain rise, such imports increasingly become a real threat to the domestic producers. In particular, the major supermarket chains have strong buying power and are perfectly capable of launching own-brand labels using imported supplies.

(168) Furthermore, it is perfectly possible for companies, such as sugar merchants or major supermarkets for example, to purchase industrial sugar in other Member States, import it and then repackage it for retail sale, as was done by Napier Brown up to 1988. When prices for retail sugar rise in Great Britain, such repackaging operations become commercially more attractive. The domestic producers have little interest in selling industrial sugar to a customer wishing to repackage it and sell it for retail sale. The entry onto the market of a new repackager, or the expansion of an existing repackager, will inevitably put the margin between retail and industrial prices under pressure. Thus, even if some domestic producers are willing to sell for this purpose, it is foreseeable that any company intending to set up a repackaging operation will wish to source at least some, if not most or all, of its industrial sugar requirements from producers in other Member States, in particular in times when prices of industrial sugar on the British market are rising.

2. The arguments of the parties

2.1. British Sugar

(169) British Sugar emphasises that there was no actual effect on trade and that the limited increase in imports had nothing to do with changes in the relative sugar prices. It states (380) that for the quantification of import increases the Commission should have adopted a base year in which prices and imports into the UK were affected by the price war and not a year which would not have been affected by the price war. Therefore, the appropriate base year would be 1985/86 and not 1986/87. In comparison with the year 1989/90, the last year which could have been affected by the alleged pricing concertation, this would lead to an import increase figure of only 12 %, rather than 74 %. For the increase - which it admits - British Sugar offers two main explanations (381): first, it says that from a long-term perspective, the increase observed after 1986 was no more than a return toward previous levels of imports. Secondly, British Sugar claims that an element of the import increase was simply a reflection of increasing gains from speculation as the green pound was progressively devalued.

(170) With regard to retail sugar (382), British Sugar describes the Commission's finding as to the effect on trade as pure speculation. It points out that, over the relevant period, the retail sugar price increases attributable to decisions by British Sugar amounted to a trivial total figure, 6,8 % , of which the most important part was accounted for by institutional price adjustments which were invariably contractually passed on to retail buyers. Moreover, British Sugar claims that, during the relevant period, only 350 tonnes were imported by one retailer in 1989/90.

(171) Finally, British Sugar recalls that, as the price leader during the relevant period, it always set its prices as close as possible to the minimum price at which it was attractive for other European producers to begin to export sugar from the Continent in quantities which would threaten British Sugar's ability to sell its entire quota in the UK (383). On this basis, British Sugar argues (384) that 'even if British Sugar had engaged in anti-competitive conduct, which is strenuously denied, it did so in a manner which was carefully limited by the objective never to encourage imports. Thus the alleged "agreement" was incapable of affecting trade between Member States` (385).

2.2. Tate & Lyle

(172) Tate & Lyle acknowledges that rising UK sugar prices enhance the attractiveness of imports. Tate & Lyle claims, however, that the UK price rises in the relevant period could not reasonably be attributed to the parties' arrangements. Rather, they were the consequence of British Sugar's unilateral decision to end the price war (386).

2.3. Napier Brown

(173) Napier Brown states that there is no evidence that the increase in sugar prices in the UK over the relevant period had any impact at all on the level of imports (387). At the oral hearing (388), Napier Brown explained that 'the main area of competition is the cost of importing sugar from the Continent plus the freight` (389). Napier Brown confirmed that, over the period from 1986 to 1990, it increased its imports of white sugar into the UK (390), that it made imports for strategic reasons, such as establishing a third independent source of supply, and that it used its imports as leverage in its purchase negotiations with British Sugar and Tate & Lyle (391).

2.4. James Budgett

(174) James Budgett stresses that price levels in Great Britain were set by British Sugar, which it describes as 'the dominant supplier`. According to James Budgett, prices were not affected by the industrial sugar meetings in which James Budgett took part, and consequently that those meetings had no actual or potential effect on imports (392).

(175) James Budgett also states that, in the calendar years from 1986 to 1990 inclusive, it trebled its imports of sugar into the UK although this did not provide short-term profit opportunities. According to James Budgett, it imported mainly for strategic reasons, in particular to satisfy customer demand for alternative sourcing and to obtain leverage in its negotiations with British Sugar and Tate & Lyle (393).

3. The Commission's replies

(176) In the first place it has to be stated that the parties' arguments concentrate on the question of actual effect on trade between Member States and do not adequately take into account the wording of Article 85(1), as well as the standards set by the Court for assessing whether an agreement and/or concerted practice may affect inter-State trade. Therefore, the Commission primarily reiterates what it has said above (394) concerning these standards and the appraisal of this case. In particular, it has to be stressed that the fact that, with regard to the restriction of competition, the Commission relies on the object of the conduct does not preclude it - for the question of effect on trade - from relying on the potential effect. Such a conclusion is clearly compatible with the wording of Article 85(1).

(177) British Sugar's conclusion that, in this case, under no circumstances can even a potential effect on trade be foreseen with a sufficient degree of probability, has to be rejected. In particular, the argument that British Sugar's policy of setting prices below a certain level ruled out the possibility of any effect on trade is not convincing.

Nor is British Sugar's line of argumentation consistent. It says in its written reply to the initial statement of objections (395), and reiterates in its written reply to the revised statement of objections (396), that during the relevant period it set prices at a level designed to avoid imports in quantities which would threaten its own ability to sell its entire sugar quota in the UK. However, such a pricing policy does not prove that imports were not already profitable for other Community producers or for merchants, while taking place in quantities that threatened only other undertakings' ability, and especially Tate & Lyle's ability, but not British Sugar's, to maintain their respective market shares in the UK and in Great Britain. This explains why Tate & Lyle was particularly active in dissuading other Community producers from exporting into the UK and Great Britain. Moreover, during the oral hearing which followed the revised statement of objections, British Sugar presented a calculation according to which sugar price increases during the relevant period - after deduction of institutional price changes and green

pound adjustments - left a profit margin, albeit a small one, for operators wishing to import sugar into Great Britain (397).

(178) British Sugar's further arguments in relation to the import statistics which the Commission mentions are not convincing either.

(179) Firstly, it has to be pointed out that, apart from pointing to import figures, the Commission has already (398) provided sufficient other elements of fact and law which make it possible to conclude with a sufficient degree of probability that the agreement and/or concerted practice may have had an appreciable influence on the pattern of trade between Member States.

(180) Secondly, it is uncontested that the quantity of imports increased during the relevant period. While there is a disagreement as to the correct reference year, the annual figures are uncontested. but even if British Sugar's view as to the correct reference year was correct, the fact remains that there was a substantial increase during the relevant period and that in the last year which was substantially affected by the agreement and/or concerted practice, namely 1989/90, imports reached a peak of 153 000 tonnes, which was followed - after the termination of the anti-competitive conduct - by a slide over the following years to 108 000 tonnes in 1993/94 (399).

(181) Thirdly, there is disagreement about what caused the increase in imports. The Commission concludes that the most likely cause for the import increase was the increase of market prices in Great Britain engendered by the agreement and/or concerted practice. Alternative explanations offered by the parties are not convincing. In particular, it does not suffice to state that the import increase after 1986 was only a return toward previous levels of imports. Irrespective of whether the increase involved a return to previous levels, there must nevertheless have been an underlying reason for this increase. After imports had fallen during the price war from 1984 to 1986, the most plausible explanation for the subsequent increase is that it was the consequence of the parties' coordinated strategy of higher pricing which followed that price war, all the more so since after the termination of the anti-competitive conduct import quantities decreased substantially. In so far as Tate & Lyle, Napier Brown and James Budgett deny their responsibility by pointing to British Sugar's price leadership, the Commission refers to what is has already said (400).

(182) As to retail sugar in particular, the Commission position is neither purely speculative nor inconsistent with its previously expressed views. On the basis of the standards set by the Court, the issue is whether the scenario already described by the Commission (401) is, with a sufficient degree of probability, a possible consequence of the anti-competitive conduct. The most prominent instance in which the Court of Justice dismissed any possibility of an effect on trade is the Hugin v. Commission case (402) concerning the application of Article 86. In that case, the Court made a detailed analysis of the sector in question and came to the conclusion that, owing to economic and technical factors peculiar to this sector, an effect on trade could be ruled out under all circumstances. The activities of the company in question had never extended beyond one single Member State, trade between Member States in the relevant product had never existed, and for technical reasons could be ruled out even if market conditions had been entirely free and not subject to restrictive practices.

(183) In this case the circumstances are quite different. Firstly, it is true that there are barriers to entry which make trade in packaged retail sugar between Great Britain and other Member States more difficult. However, there is obviously no logical reason which would prevent such trade from ever taking place. Secondly, as far as the import of industrial sugar and the subsequent repackaging for retail sale is concerned, the fact that Napier Brown did exactly this until 1998 shows that it is a realistic possibility. Thirdly, the elements with which the Commission has put together the scenario described above, in particular supermarkets' tendency to exercise their strong buying power and retail sugar traders' wish to diversify their sources of supply, are firmly based in fact.

D. ARTICLE 85(3)

(184) The agreement and/or concerted practice outlined above has not been notified. By virtue of Article 4(1) of Regulation No 17, therefore, on procedural grounds alone no exemption can be granted. Furthermore, even were it to have been notified, the Commission considers, on the basis of the facts currently available to it, there for reasons of substantive law no exemption could in any event be, or have been, granted. In particular, the Commission is not aware of any elements that could lead to the conclusion that the agreement and/or concerted practice contributed to the improvement of the production or distribution of goods or to the promotion of technical or economic progress, nor has it any grounds for believing

that any of the other three conditions for the granting of an individual exemption are met.

IV. INAPPLICABILITY OF REGULATION No 26

(185) Article 2(1) of Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (403), as amended by Regulation No 49 (404), provides for derogation from the application of Article 85(1) Treaty of certain agreements, decisions and concerted practices in the agricultural sector. For Article 2 (1) of Regulation No 26 to apply, the agreement, decision or concerted practice must relate to a product listed in Annex II to the Treaty. Sugar is such a product. However, this does not mean that the agreement and/or concerted practice to which this Decision refers is excluded from the application of Article 85(1). None of the criteria for the application of any of the three alternative grounds for derogation set out in Article 2(1) of Regulation No 26 are met. This is all the more true since the Court has stated that Article 2 of Regulation No 26, as it provides for derogation from the general rule laid down in Article 85(1) of the Treaty, must be interpreted strictly (405).

(186) Turning to the first ground for derogation provided for in Article 2(1) of Regulation No 26 (referring to agreements, decisions or concerted practices which 'form an integral part of a national market organisation`), it is sufficient to point out that long before the relevant agreement and/or concerted practice started in 1986, provision was made, beginning with Council Regulation (EEC) No 1009/67, for the termination of national sugar market regimes by the establishment within the Community of a common organisation of the market for sugar. That first regulation was superseded successively by Regulation (EEC) No 3330/74 and (EEC) No 1111/77; the Council Regulation presently in force is Regulation (EEC) No 1785/81 (406), as last amended by Regulation (EC) No 1148/98 (407). Given that the national sugar market regimes had been terminated and the common organisation of the sugar market established when the agreement and/or concerted practice being the subject to this procedure took place, that agreement and/or concerted practice cannot logically be considered as having formed an integral part of a national market organisation.

(187) The second ground for derogation provided for in Article 2(1) of Regulation No 26 (referring to agreements, decisions or concerted practices which are 'necessary for attainment of the objectives set out in Article 39 of the Treaty`) only applies if the application of Article 85(1) of the Treaty were to jeopardise the attainment of all five (408) objectives laid down in that Article 39. This is not the case here.

For the sugar sector, the means of attaining the objectives of the common agricultural policy are laid down in Regulation (EEC) No 1785/81 and its implementing Regulations. They include the creation of national production quotas, quaranteed prices, levies and refunds, coupled with a system for eliminating the effect of exchange rate fluctuation on the free movement of the product between Member States. The coordination of pricing policy as described in this Decision is inconsistent with this system. These are, moreover, measures which are likely to affect trade and influence prices to the detriment of consumers. These restriction of competition cannot therefore be said to be necessary for the attainment of any of the objectives set out in Article 39 of the Treaty.

(188) Finally, the conditions of the third ground for derogation (as set out in the second sentence of Article 2(1) of Regulation No 26) are similarly not fulfilled, This is because none of the four parties subject to this Decision can be identified as a farmer, farmers' association or association of such associations within the meaning of that provision (409).

V. ARTICLE 3 OF REGULATION No 17

(189) The agreement and/or concerted practice set out above was formally terminated by Tate & Lyle on 2 July 1990 when the chairman and chief executive of the company ordered an end to all contacts with competitors of the kind which are the subject of this procedure (410). This was confirmed in Tate & Lyle's letter of 16 July 1990 to the OFT, a copy of which was sent to the member of the Commission in charge of competition. The Commission does not have evidence that any of the four parties has continued the anti-competitive conduct beyond 2 July 1990.

VI. ARTICLE 15(2) OF REGULATION No 17

(190) Under Article 15(2) of Regulation No 17 the Commission may by decision impose on undertakings fines ranging from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10 % of the global turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently they infringe Article 85(1) of the Treaty. In fixing the amount of the fine, regard is to be had to

both the gravity and the duration of the infringement.

A. INTENTION

(191) The Court of Justice has consistently held that in order for an infringement to be regarded as having been committed intentionally, it is not necessary for the companies in question to have known that they infringed Article 85 or to have been aware that they were transgressing the prohibition laid down by that provision. It is sufficient that they could not have been unaware that the conduct concerned had the object or effect of restricting competition in the Common Market with actual or potential effect on trade between Member States (411).

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

B. GRAVITY OF THE INFRINGEMENT

(193) In this case the characteristics of the infringement were as follows.

The agreement and/or concerted practice pursued the object of restricting competition by coordinating pricing policy on the horizontal level. The cartel operated in relation to a market which was highly concentrated. The participant in the infringement accounted, in the industrial sugar section, for over 90 % and, in the retail sugar section, for approximately 89 % of the relevant market (412).

However, while the collusion consisted in a collaborative strategy of higher pricing, there is not sufficient evidence to state that minimum prices, or prices to be charged to specific customers, were jointly fixed. Moreover, although it is by no means out of the question that an actual restrictive effect on competition and an actual effect on trade between Member States resulted from the parties' behaviour, the Commission does not rely on the demonstration of such effects. Furthermore, the geographic scope of the relevant market was confined to Great Britain.

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

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

(196) The participation of British Sugar, on account of its share of the relevant markets for industrial and retail sugar and due to its position as price leader, was essential to the operation of the cartel.

For these reasons, in calculating the fine to be imposed on British Sugar, the Commission considers it appropriate to fix an amount of ECU 18 million with regard to the gravity of the infringement.

(197) Tate & Lyle, on account of its share of the relevant markets for industrial and retail sugar, was the second most important member of the cartel.

For these reasons, in calculating the fine to be imposed on Tate & Lyle, the Commission considers it appropriate to fix an amount of ECU 10 million with regard to the gravity of the infringement.

(198) The merchants Napier Brown and James Budgett did not participate in the key meeting of 20 June 1986, at which the principles for the future anti-competitive conduct were set. Napier Brown and James Budgett joined the cartel only several months later, and from then onwards only participated in the infringement concerning industrial sugar. Moreover, owing to the fact that Napier Brown and James Budgett were dependent on supplies from the two domestic sugar producers (British Sugar and Tate & Lyle) for a significant part of the sugar which they sold in their capacities as principal or as nominal merchants (413), their influence

on the relevant market and their scope for exercising power on that market was limited.

For these reasons, in calculating the fines to be imposed on Napier Brown and James Budgett, the Commission considers it appropriate to fix an amount of ECU 1,5 million for each of the two companies with regard to the gravity of the infringement.

C. DURATION OF THE INFRINGEMENT

(199) With respect to British Sugar and Tate & Lyle, the infringement concerning industrial sugar as well as retail sugar lasted from 20 June 1986, when the first meeting was held between those companies, until 2 July 1990 when Tate & Lyle terminated the agreement and/or concerted practice in question. With respect to Napier Brown and James Budgett, the infringement regarding industrial sugar lasted from late 1986 until 2 July 1990 when the agreement and/or concerted practice in question was terminated (414).

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

(201) The amount imposed to take account of the gravity of the infringement should therefore be increased by ECU 7,2 million in the case of British Sugar, by ECU 4 million in the case of Tate & Lyle, by ECU 0,5 million in the case of Napier Brown and by ECU 0,5 million in the case of James Budgett.

(202) The basic amounts are therefore set at ECU 25,2 million for British Sugar, at ECU 14 million for Tate & Lyle, at ECU 2 million for Napier Brown and at ECU 2 million for James Budgett.

D. AGGRAVATING AND ATTENUATING FACTORS

1. The common organisation of the sugar market

(203) No mitigation stems from the fact that, owing to the common organisation of the sugar market, the scope for competition on this market is in practice to a certain extent restricted as a consequence of regulatory intervention, as was pointed out by the Court in its Suiker Unie judgment (415). In its analysis of the scope for competition in the sugar market, the Court observed that the common sugar organisation in particular provided for a price support system, the collection of an import levy, the grant of export refunds and the fixing of national production quotas. The Court stated that the system of national quotas prevented the free allocation of production, as well as any large overall increase in production, and that this restriction, together with the relatively high transport costs, affected one of the essential elements in competition, namely the supply, which consequently affected the volume and pattern of trade between Member States (416). However, the Court stressed that, notwithstanding these restrictions, in practice a residual field of competition was left and that this field was subject to the Community competition rules (417). In this connection, the Court expressly mentioned price competition because the prices set by the Community system were not sales prices for dealers, users and consumers, and consequently allowed producers some freedom to determine their sales prices. The Court also pointed to evidence of tough negotiations taking place in relation to sales prices (418).

(204) In its assessment of the level of fines imposed by the Commission decision (419), the Court stated that the Commission had not sufficiently taken into account the limitations on the scope of competition caused by the common organisation of the sugar market, and the Court further stated that this organisation helped to ensure that sugar producers continued to behave in an uncompetitive manner. However, the Court confined the possibility for reduction of fines imposed for such uncompetitive behaviour to practices engendered by and worsening the already existing anti-competitive features of that system, such as the partitioning and protection of national or regional markets by controlling supplies coming from other Member States as well as the other forms of import and export restrictions which were at issue in that case (420).

Moreover, the Court went on to expressly underline that the damage which users and consumers suffered as a result of these anti-competitive practices was limited, in view of the fact that the parties had not engaged in any concerted or improper increase in their sales prices (421). Therefore, any extension of the possibilities for mitigation, such as to cover pricing collusion, cannot be defended under the principles expounded in the Suiker Unie judgment. The strict interpretation of the possibilities for mitigation allowed by the Suiker Unie judgment also follows from the fundamental rule that exceptions to general rules have to be construed narrowly (422).

(205) In contrast to the Suiker Unie case, the present case is about behaviour which had the

object of restricting price competition in the relevant market by means of pricing coordination. The agreement and/or concerted practice pursuing this object was not engendered or facilitated by the common sugar market organisation, nor can it be said to have merely aggravated the inherently anti-competitive features of that system. Pricing coordination is a practice alien to that system. It is collusive and anti-competitive conduct concerning sales prices applied to dealers, users and consumers. Such sales prices constitute a particularly important competition parameter which the Court has expressly mentioned as forming part of the residual field of competition remaining in the sugar market which the Community competition rules are designed to protect. Moreover, with particular regard to the market for white granulated sugar in Great Britain, it has been shown (423) that the Community sugar market organisation always left ample scope for such price competition, as is evidenced not only by the occurrence of the price war itself, but also by the conditions prevailing after the ending of that price war.

2. British Sugar

(206) With regard to aggravating circumstances, the following elements have to be taken into account.

(207) British Sugar was the instigator of the agreement and/or concerted practice and, throughout the relevant period, it remained the driving force behind the infringement. This conclusion is in particular borne out by the fact that the key meeting of 20 June 1986, which set the principles for the future anti-competitive conduct, was convened on British Sugar's initiative.

(208) British Sugar acted in a manner contrary to the clear wording contained in its compliance programme, which it announced to the Commission in October 1986 and introduced in December 1986. As is clear from the Napier Brown Decision (424), the introduction of the same compliance programme was taken into account as a mitigating factor in fixing the fine in that decision, as a result of which British Sugar benefited from a significant reduction of the fine by comparison with the amount which would have been imposed in the absence of the programme. As was set out in detail (425), the compliance programme covered the whole range of the company's obligations under Article 85 and 86, and specifically mentioned agreements and/or concerted practices concerning pricing. Moreover, British Sugar promised in its compliance programme to take every step to ensure compliance with the Community competition rules, even to go beyond its strict legal obligations and avoid any doubtful behaviour, and to pass this message on to every level of the company's hierarchy. The infringement found in this Decision shows that this promise has not been fulfilled.

(209) The same company is now found to have infringed Article 85 by engaging in collusive behaviour. This latter behaviour had already commenced two years before the end of the Napier Brown procedure (426) and it went on for another two years after the adoption of the Napier Brown Decision on 18 July 1988. Both infringements of the Community competition rules by British Sugar occurred on the same relevant market, both as regards the product and as to the geographical extent of the market, namely the market for retail and industrial white granulated sugar in Great Britain. Moreover, it has to be recalled that both Article 85 and Article 86 serve the common aim laid down in point (g) of Article 3 of the Treaty, of establishing a system ensuring that competition in the internal market is not distorted (427).

(210) In conclusion, the aggravating factors mentioned justify an increase of 75 %, namely ECU 18,9 million in the basic amount for British Sugar.

(211) The Commission acknowledges that the infringement was committed by a British Sugar management which was replaced soon after the relevant period, and that the present parent company, Associated British Foods (ABF), acquired British Sugar only after the relevant period (in January 1991). However, for the purpose of assessing the nature and the gravity of the infringement, only British Sugar's behaviour in the relevant period is material. Liability is to be attached to British Sugar as a company, not to the managers of the company, nor to the parent company at any point in time during or after the relevant period.

The fact that ABF will possibly have to bear a part or the whole of the economic burden of the fine imposed on British Sugar is not relevant to the Commission's assessment of the level at which the fine should be set. The rule is that the purchaser of a company acquires it together with all its liabilities, including any liability arising from the infringement of Community competition law.

E. COMMISSION NOTICE ON THE NON-IMPOSITION OR REDUCTION OF FINES IN CARTEL

CASES (428)

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

1. All four parties

(213) In the written replies to the revised statement of objections, which the Commission received in February 1996, none of the four parties has substantially contested the facts on which the Commission bases the allegations set out in that statement of objections (429). All four parties have therefore fulfilled the substantive requirements set out under the second indent of point D.2. of the notice. Since this happened before the Notice was published on 18 July 1996, the Notice is to be applied by analogy.

(214) In fixing that amount by which the fine is to be reduced within the range provided for by point D. of the notice, the Commission has taken into account that the parties' admission of the facts is no more than the logical consequence of the fact that, in this particular case, the initial statement of objections was replaced by a revised statement of objections which took account of the parties' contestation of certain facts, and that it confined the allegations to those which could be sustained with the high degree of factual proof required by the Court of Justice. Consequently, by an analogous application of the second indent of point D.2. of the notice, the fines which would have been imposed on British Sugar, Napier Brown and James Budgett in the absence of their cooperation with the Commission have been reduced by 10 % for each of those companies (representing ECU 4,4 million for British Sugar, ECU 0,2 million for Napier Brown and ECU 0,2 million for James Budgett).

2. Tate & Lyle in particular

As concerns Tate & Lyle, the following additional circumstances have been taken into account:

(215) Tate & Lyle has cooperated with the Commission, in particular by sending the two self-incriminating letters of 16 July 1990 (430) and of 29 August 1990 (431). Since this cooperation took place before publication of the notice on 18 July 1996, the notice is to be applied by analogy.

(216) Tate & Lyle has met the conditions set out under points (a), (b) and (c) of Section B: Tate & Lyle brought the infringement to the Commission's attention at a time when the Commission did not know of the agreement and/or concerted practice and therefore had not taken any investigative steps. Moreover, by the self-incriminating letters of 16 July 1990 and 29 August 1990, Tate & Lyle was the first of the parties to adduct decisive evidence of the cartel's existence. Finally, Tate & Lyle put an end to its involvement in the illegal activity no later than the time when it disclosed this activity to the Commission. In fact, the Chairman and Chief Executive of Tate & Lyle ordered an end to the agreement and/or concerted practice on 2 July 1990, which was shortly before Tate & Lyle informed the Commission of the existence of the cartel at a meeting with the Commission responsible for competition on 5 July 1990, and by a copy of its letter of 16 July 1990 to the OFT.

(217) However, after the initial revelations, Tate & Lyle did not maintain continuous and complete cooperation with the Commission throughout the investigation. Therefore, the substantive requirements of point (d) of Section B are not fulfilled. Consequently, Tate & Lyle cannot benefit from favourable treatment according to an analogous application of section B or of section C of the Notice.

(218) Tate & Lyle's cooperation therefore falls under the first indent of point D.2. of the Notice. In view of the fact that Tate & Lyle disclosed the agreement and/or concerted practice

at a time when the Commission was still entirely ignorant of the matter, and with due regard to the particular value of the information provided in the two self-incriminating letters mentioned above, and moreover taking into account that Tate & Lyle also fulfilled the substantive requirements under the second indent of point D.2. of the Notice as described above (432), the Commission considers it appropriate to grant Tate & Lyle, under an analogous application of section D, a reduction of50 % (representing ECU 7 million) of the fine that would have been imposed if it had not cooperated,

HAS ADOPTED THIS DECISION:

Article 1

British Sugar plc, Tate & Lyle plc, Napier Brown & Company Ltd and James Budgett Sugars Ltd have infringed Article 85(1) by participating in an agreement and/or concerted practice the object of which was to restrict competition by the coordination of the parties' pricing policy on the market for industrial sugar in Great Britain.

In the case of British Sugar plc and Tate & Lyle plc this participation lasted from 20 June 1986 until 2 July 1990.

In the case of Napier Brown & Company Ltd and James Budgett Sugars Ltd the participation lasted from late 1986 until 2 July 1990.

Article 2

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

Article 3

A fine of ECU 39,6 million is hereby imposed on British Sugar plc in respect of the infringement referred to in Articles 1 and 2.

A fine of ECU 7 million is hereby imposed on Tate & Lyle plc in respect of the infringement referred to in Articles 1 and 2.

A fine of ECU 1,8 million is hereby imposed on Napier Brown & Company Ltd in respect of the infringement referred to in Article 1.

A fine of ECU 1,8 million is hereby imposed on James Budgett Sugars Ltd in respect of the infringement referred to in Article 1.

Article 4

The fines imposed under Article 3 shall be payable in ECU within three months of the date of notification of this Decision to the following bank account of the European Commission: 310-0933000-43, Banque Bruxelles Lambert, Agence Européenne, Rond-Point Schuman 5, B-1040 Brussels.

After the expiry of that period, interest shall automatically be payable at the rate charged by the European Central Bank for transactions in ECU on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, namely 7,50 %.

Article 5

This Decision is addressed to:

- British Sugar plc, Oundle Road, Peterborough PE29QY, United Kingdom,

- Tate & Lyle plc, Sugar Quay, Lower Thames Street, London EC3R 6DQ, United Kingdom,

- Napier Brown & Company Ltd, International House, 1 St. Katharine's Way, London E1 9UN, United Kingdom,

- James Budgett Sugars Ltd, Beacon House, Rainsford Road, Chelmsford, Essex CM1 2PY, United Kingdom.

This Decision shall be enforceable pursuant to Article 192 of the Treaty.

Done at Brussels, 14 October 1998.

For the Commission

Karel VAN MIERT

Member of the Commission

Notes

(1) OJ 13, 21.2.1962, p. 204/62.

(2) OJ 127, 20.8.1963, p. 2268/63.

(3) British Sugar is often addressed to under the following abbreviations which also occur in this Decision: BS = British Sugar; BSC = 'British Sugar Company`.

(4) Tate & Lyle is often addressed to under the following abbreviations which also occur in this Decision: T & L = Tate & Lyle; TLS = 'Tate & Lyle Sugars`, see also recital 9.

(5) See recital 58.

(6) See also recital 59.

(7) Council Regulation (EEC) No 793/82 (OJ L 94, 21.4.1972, p. 1), and Commission Regulation (EEC) No 2103/77 (OJ L 246, 27.9.1977, p. 12).

(8) Paragraph 4.30, page 23, of the Monopolies and Mergers Commission ('MMC`) report 'Tate & Lyle plc and British Sugar plc. A report on the proposed merger`, (HMSO Cmd 1435 of February 1991), (hereinafter 'the third MMC report`) gives a breakdown of the total UK sales of UK produced sugar into the different types for the year 1998/89: granulated sugar: 73,2 %, liquid sugar: 17 %; speciality sugars 8 %; other types; 1,9 %.

(9) For fuller details of the 3 different types of sugar see paragraphs 2.62 to 2.73 of the MMC report 'Tate & Lyle plc and Ferruzzi Finanziaria SpA and S & W Berisford plc. A report on the existing and proposed mergers` (HMSO Cmd 89 of February 1987) (hereinafter 'the second MMC report`) and paragraphs 4.30 to 4.32 of the third MMC report.

(10) Protocol 3 on ACP sugar annexed to the ACP-EEC Lomé Convention, signed on 28 February 1975, and contained in Protocol 8 of the fourth ACP-EEC Convention, signed at Lomé on 15 December 1989.

(11) All the parties to the present proceedings have agreed with this assessment. See also the second MMC report at paragraphs 2.31 to 2.35 and the third MMC report at paragraph 7.7.

(12) Both beet growers and sugar processors also contribute to the cost of financing the sugar scheme through production levies.

(13) The tender system on the basis of which export refunds are granted operates in the following way. The Commission issues an invitation to tender for export refunds. Exporters may only bid for white sugar export refunds. The bid must specify the quantities to be exported and the level of refund which the processor considers necessary to achieve its sales objectives. After having received all the tenders, the Commission will calculate the maximum amount of refund to be paid. All tenderers under this maximum receive an export licence and the refund they indicated. They are obliged to export the amount of sugar they were tendering for. As part of the export refund, the successful tenderers receive a flat sum to cover the costs of transport to the Community harbour of export (fobbing costs). The Commission uses the refund system as an instrument to keep the internal market in balance and to support domestic market prices. The Commission will issue an invitation to tender when it considers that the level of sugar in the internal market is in excess of consumption plus a certain amount of stock. In practice, a tender takes place every week. Some 98 % of the A/B sugar surplus is disposed of this way. Even though the average price achieved via the refund system may at times be marginally below the effective support price, most Community refiners prefer this to sales into intervention because this latter option means in practice that the seller must itself store the sugar in silos that are normally required for next season's crop. Of the approximately 16 million tonnes of sugar annually produced in the Community in recent years, about 3 million tonnes have been 'sold into restitution` each year.

(14) On 13 February 1989 it changed its name to Berisford International plc.

(15) For further information about British Sugar, reference is made to paragraphs 3.26 to 3.36 of the third MMC report.

(16) See James Budgett's written reply to the initial statement of objections, page 24. See also transcript of investigations carried out on 27 May 1994 under Article 14(2) of Regulation No 17 at Tate & Lyle (Annex 1 to the revised statement of objections), page 6, and transcript of investigations carried out on 25 May 1994 under Article 14(2) of Regulation No 17 at British Sugar (Annex 2 to the revised statement of objections), page 12.

(17) See James Budgett's written reply to the initial statement of objections, page 25.

(18) For a description of the role of the sugar merchants, reference is also made to paragraphs 4.38 to 4.40 of the third MMC report.

(19) Source: Internal statistics of Directorate-General VI (Agriculture) of the Commission.

(20) See recital 3 of this Decision.

(21) Market shares in Great Britain do not differ to an appreciable extent. British Sugar and Tate & Lyle have continuously and constantly held high market shares in the period concerned by this Decision.

(22) These figures have been provided by Tate & Lyle and include liquid and speciality sugars. British Sugar calculated figures on a different basis, considering only granulated sugar. The resultant differences in market shares are immaterial for the purposes of this Decision. According to British Sugar, it had a market share of between 55,9 % and 58,6 % during the period in question, Tate & Lyle had between 33,1 % and 36,7 %, and imports increased from 5,3 % in 1986/87 to 9,2 % in 1989/90.

(23) From 1986/87 to 1989/90, in thousand tonnes white sugar equivalent, imports from Denmark increased from 34 to 60, imports from France increased from 7 to 42, and imports from Ireland increased from 38 to 48. Worksheet of DG VI of the Commission of the European Communities as quoted in British Sugar's written reply to the initial statement of objections in table 5 on page 33 and as reproduced as table 7 after page 63 of British Sugar's written reply to the revised statement of objections.

(24) See British Sugar's written reply to the initial statement of objections at paragraphs 61, 105 and British Sugar's written reply to the revised statement of objections at paragraph 164.

(25) Commission Decision 88/518/EEC of 18 July 1988 (Case No IV/30.778 Napier Brown - British Sugar) (OJ L 284, 19.10.1988, p. 41).

(26) Second MMC report, paragraphs 16.25, 16.62 and third MMC report, paragraphs 7.25, 7.26.

(27) See recitals 64 and 65 of this Decision and the second MMC report at paragraph 16.27.

(28) The third MMC report, paragraphs 4.59 and 7.28.

(29) From the table at recital 14 and the analysis made under recitals 20 and 21 below it can be seen that during the period in question, when as a consequence of British Sugar's initiative prices increasing, imports into the UK from other Member States increased significantly. See Tate & Lyle's written reply to the initial statement of objections paragraphs 3.35 to 3.48, volume I. Appendix II to Tate & Lyle's letter to the Office of Fair Trading of 29 August 1990 (Annex 3 to the revised statement of objections).

(30) See the third MMC report paragraphs 7.28, 4.59. In the initial statement of objections sent in this case the Commission argued that these practices, in which British Sugar participated, infringed Articles 85(1) and 86. However, taking account of the written replies of the companies in question and of the evidence presented at the oral hearing in relation to the initial statement of objections, the Commission concluded that there was not sufficient evidence to demonstrate that Articles 85(1) or 86 were infringed by these practices.

(31) See transcript of investigations at Tate & Lyle on 27 May 1994 (Annex 1 to the revised statement of objections, page 7), and Tate & Lyle's letter of 16 July 1990 (Annex 5 to the revised statement of objections) quoted in recital 36 below.

(32) See also Tate & Lyle's written reply to the initial statement of objections, paragraph 3.31, volume I.

(33) Tate & Lyle's's written reply to the initial statement of objections, paragraph 2.6, volume I, and British Sugar written reply to the initial statement of objections, paragraph 88.

(34) British Sugar's written reply to the initial statement of objections, paragraph 85.

(35) The third MMC report, paragraph 7.27.

(36) The third MMC report, paragraph 7.25.

(37) Paragraphs 86 and 92 of British Sugar's written reply to the initial statement of objections, paragraph 3.2.2 of James Budgett's written reply to the initial statement of objections and paragraph 61 of its written reply to the revised statement of objections.

(38) British Sugar's written reply to the initial statement of objections, paragraph 70.

(39) See statistics on the United Kingdom sugar market quoted above under recital 14.

(40) Napier Brown's written reply to the revised statement of objections, at paragraph 34. Figures set out in Annex A of Napier Brown's response to the initial statement of objections.

(41) James Budgett's written reply to the revised statement of objections, at paragraph 60.

Figures stated in table 6 of James Budgett's response to the original statement of objections and in Annex 4 of its response to the revised statement of objections.

(42) See recital 5 of this Decision.

(43) See paragraph 9 of the first MMC report, paragraphs 16.24 and 16.39 of the second MMC report and paragraph 7.18 of the third MMC report. See also paragraph 100 of British Sugar's written reply to the initial statement of objections and paragraphs 32 to 33 of its written reply to the revised statement of objections. See furthermore paragraphs 2.4 and 2.16 of Tate & Lyle's written reply to the initial statement of objections and point statement of objections and point paragraph 20 of its written reply to the revised statement of objections.

(44) See paragraph 7.18 of the third MMC report.

(45) See recitals 59, 60 to 65, 74, 86, 87 and 88 of this Decision.

(46) This is not disputed by the merchants: see Napier Brown's written reply to the initial statement of objections at paragraphs 30 and 55, and furthermore paragraph 17 of its written reply to the revised statement of objections. See also James Budgett's written reply to the initial statement of objections at paragraph 6.4, and furthermore paragraph 79 of its written reply to the revised statement of objections.

(47) See recital 16 of this Decision; British Sugar's written reply to the initial statement of objections at paragraphs 61 and 105, and British Sugar's written reply to the revised statement of objections at paragraph 164.

(48) See recital 19 of this Decision.

(49) See recitals 59, 60 to 65, 74 and 86 to 88 of this Decision.

(50) Third MMC report, paragraph 1.4.

(51) Napier Brown Decision, see footnote 25.

(52) In English in the original text.

(53) In English in the original text.

(54) Napier Brown Decision, see footnote 25.

(55) Letter of 29 August 1990 from Tate & Lyle to the United Kingdom Office of Fair Trading (Annex 3 to the revised statement of objections) at point 1.

(56) See footnote 55.

(57) In English in the original text.

(58) Memorandum of arrangement, dated 15 April 1991, between British Sugar and Tate & Lyle (Annex 4 to the revised statement of objections).

(59) In English in the original text.

(60) The list of meetings is attaches to Tate & Lyle's letter to the OFT of 29 August 1990 (Annex 3 to the revised statement of objections).

(61) In this respect, the three companies support the Commission's account of facts by expressly confirming or at least implicitly accepting it when presenting their defence. See British Sugar's written reply to the initial statement of objections at paragraphs 11 et seq. and its written reply to the revised statement of objections at paragraphs 1 et seq.; Napier Brown's written reply to the initial statement of objections at paragraphs 31 to 33 and its written reply to the revised statement of objections at paragraph 10; James Budgett's written reply to the initial statement of objections at paragraphs 3.4 to 4.4 and its written reply to the revised statement of objections at paragraph 3.

(62) Letter of 16 July 1990 from Tate & Lyle to the Director-General of the Office of Fair Trading (Annex 5 to the revised statement of objections).

(63) In English in the original text.

(64) Representative of British Sugar. Minutes of the oral hearing following the initial statement of objections, page 103.

(65) In English in the original text.

(66) Transcript of the investigations of 25 May 1994 at British Sugar (Annex 2 to the revised statement of objections), page 3.

(67) In English in the original text.

(68) James Budgett's written reply to the Commission's request for information of 9 June 1994 under Article 11 of Regulation No 17 (Annex 6 to the revised statement of objections),

point A.1.

(69) Transcript of investigations carried out at Tate & Lyle on 27 May 1994 (Annex 1 to the revised statement of objections), page 2.

(70) Transcript of investigations carried out at Tate & Lyle on 27 May 1994 (Annex 1 to the revised statement of objections), page 2.

(71) In English in the original text.

(72) Tate & Lyle's written reply to the revised statement of objections, at section 4, paragraph 33.

(73) Tate & Lyle's written reply to the revised statement of objections, at section 4, paragraph 33.

(74) In English in the original text.

(75) See paragraph 38.

(76) Written reply to the revised statement of objections, paragraph 11.

(77) At paragraph 30(a) of the revised statement of objections.

(78) See point (a) of paragraph 29 of this Decision.

(79) In English in the original text.

(80) Paragraph 3.18, volume I of Tate & Lyle's written reply to the initial statement of objections.

(81) In English in the original text.

(82) Paragraph 61, volume II of Tate & Lyle's written reply to the initial statement of objections. See also Tate & Lyle's letter to the OFT dated 16 July 1990 (Annex 5 to the revised statement of objections) quoted at paragraph 36. See also the letter dated 19 October 1990 (Annex 7 to the revised statement of objections).

(83) In English in the original text.

(84) Minutes of oral hearing following the initial statement of objections, page 104. See also minutes of the oral hearing following the revised statement of objections on 18 and 19 April 1996, page 11.

(85) In English in the original text.

(86) British Sugar's written reply to the revised statement of objections, paragraph 41. Representative of British Sugar, minutes of the oral hearing following the revised statement of objections on 18 and 19 April 1996, page 11.

(87) At paragraph 4.4.6.

(88) In English in the original text.

(89) James Budgett's written reply to the revised statement of objections, at paragraph 24.

(90) In English in the original text.

(91) James Budgett's written reply to the revised statement of objections, paragraph 30.

(92) Transcript of investigations carried out on 27 May 1994 at Tate & Lyle (Annex 1 to the revised statement of objections), page 2.

(93) In English in the original text.

(94) Transcript of investigations of 25 May 1994 at British Sugar (Annex 2 to the revised statement of objections), page 14.

(95) Written reply to the revised statement of objections, paragraph 48.

(96) Transcript of the investigations carried out at Tate & Lyle on 27 May 1994 (Annex 1 to the revised statement of objections), page 3.

(97) In English in the original text.

(98) Transcript of the investigations (Annex 1 to the revised statement of objections), page 5.

(99) Transcript of the investigations (Annex 1 to the revised statement of objections), page 3.

(100) In English in the original text.

(101) Tate & Lyle's responses, dated 15 January 1991, to hand-written questionnaire, (Annex 13 to the revised statement of objections).

(102) In English in the original text.

(103) At section, 4, paragraph 36.

(104) In English in the original text.

(105) At section 4, paragraph 36.

(106) In English in the original text.

(107) Tate & Lyle's letter to the OFT dated 16 July 1990 (Annex 5 to the revised statement of objections), page 4.

(108) In English in the original text.

(109) Transcript of investigations on 25 May 1994 at British Sugar (Annex 2 to the revised statement of objections), page 7.

(110) In English in the original text.

(111) At paragraph 12.

(112) In English in the original text.

(113) Tate & Lyle's letter to the OFT of 29 August 1990 (Annex 3 to the revised statement of objections), page 3.

(114) In English in the original text.

(115) At paragraphs 19 to 23.

(116) In English in the original text.

(117) In English in the original text.

(118) At paragraphs 27 to 29.

(119) In English in the original text.

(120) Transcript of investigations at Tate & Lyle on 27 May 1994 (Annex 1 to the revised statement of objections), page 4.

(121) In English in the original text.

(122) Transcript of investigations at Tate & Lyle on 27 May 1994 (Annex 1 to the revised statement of objections), page 4.

(123) Transcript of investigations at Tate & Lyle on 27 May 1994 (Annex 1 to the revised statement of objections), page 9.

(124) At section 4, paragraph 36.

(125) In English in the original text.

(126) Written statement of 12 December 1990 of Tate & Lyle (Annex 14 to the revised statement of objections).

(127) In English in the original text.

(128) Transcript of the investigations at Tate & Lyle on 27 May 1994 (Annex 1 to the revised statement of objections), page 9.

(129) Transcript of the investigations at Tate & Lyle on 27 May 1994 (Annex 1 to the revised statement of objections), page 4.

(130) In English in the original text.

(131) Tate & Lyle's letter to the OFT dated 16 July 1990 (Annex 5 to the revised statement of objections), page 4.

(132) In English in the original text.

(133) See, for example, paragraph 41; transcript of the investigations carried at Tate & Lyle on 27 May 1994 (Annex 1 to the revised statement of objections), page 3.

(134) James Budgett's written reply to the revised statement of objections, at paragraph 4.7 on page 64.

(135) In English in the original text.

(136) James Budgett's written reply to the revised statement of objections, at paragraph 4.7 on page 64.

(137) In English in the original text.

(138) Napier Brown's written reply to the revised statement of objections, paragraph 12.

(139) Transcript of investigations on 27 May 1994 at British Sugar (Annex 2 to the revised

statement of objections), page 12.

(140) In English in the original text.

(141) Tate & Lyle's letter to the OFT of 29 August 1990 (Annex 3 to the revised statement of objections), pages 3 and 4.

(142) In English in the original text.

(143) Forwarded to the Commission by letter of 7 August 1990 (Annex 8 to the revised statement of objections)

(144) Letter of 16 July 1990 from Tate & Lyle to the Director-General of the Office of Fair Trading (Annex 5 to the revised statement of objections), see recital 36.

(145) James Budgett's written reply to the initial statement of objections at paragraph 4.3.2, and Napier Brown's written reply to the initial statement of objections at paragraph 33.

(146) In English in the original text.

(147) In English in the original text.

(148) James Budgett & Son Limited - Business strategy 1987-1990 (Annex 9 to the revised statement of objections).

(149) In English in the original text.

(150) Agenda of board meeting on 2 August 1990 of James Budgett (Annex 10 to the revised statement of objections).

(151) In English in the original text.

(152) Internal note of 29 June 1987 of De Danske Sukkerfabrikker (Annex 11 to the revised statement of objections).

(153) Translation from Danish.

(154) Memorandum of 1 March 1989 to R.A. Shirtcliff (T & L's chief executive) and C. Rutherford (divisional director in T & L, sales and marketing) from F. R. Smith (General Manager in T & L, industrial products) entitled 'Subject: 1990-Pricing` (Annex 12 to the revised statement of objections).

(155) In English in the original text.

(156) For details see recital 6.

(157) British Sugar's written reply to the revised statement of objections, tables 2 to 6.

(158) Protocol of the oral hearing on 18 and 19 April 1996, pages 26 to 27.

(159) See recital 31.

(160) OFT News Release No 54/96 of 11 December 1996.

(161) For fuller details of the different sweeteners available, and their particular characteristics, see paragraphs 2.59 to 2.75 of the second MMC report.

(162) The common agricultural policy sugar scheme is described in recitals 4 to 7.

(163) See also recital 8.

(164) Judgment of 16 December 1975 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, Suiker Unie and others v. Commission, [1975] ECR 1663, 1914, paragraph 16.

(165) Suiker Unie judgment, see footnote 168; at paragraph 17.

(166) Suiker Unie judgment, see footnote 168; at paragraph 24.

(167) See British Sugar's written reply to the initial statement of objections, paragraph 92.

(168) See also recitals 16 to 21 on imports into the United Kingdom and Great Britain.

(169) See recital 16.

(170) At paragraph 16.62.

(171) See the third MMC report paragraphs 4.59 and 7.28.

(172) This conclusion is supported by the second MMC report, at paragraph 16.27.

(173) See transcript of investigations at Tate & Lyle on 27 May 1994 (Annex 1 to the revised statement of objections), page 12.

(174) See Case 41/69, ACF Chemiefarma NV v. Commission, [1970] ECR 661, at paragraph 112, as referred to in the judgment of 24 October 1991, Case T-1/89 Rhône-Poulenc v. Commission [1991] ECR II-867, at paragraph 120.

(175) Judgment of 14 July 1972 in Case 48/69, ICI v. Commission, [1972] ECR 619, at paragraph 64.

(176) ICI judgment, see footnote 179; at paragraphs 65, 66 and 67.

(177) Suiker Unie judgment, see footnote 168; at paragraphs 173 and 174. As confirmed by the Rhône-Poulenc judgment, see footnote 178; at paragraph 121.

(178) Rhône-Poulenc judgment, see footnote 178; at paragraphs 125, 126 and 127. Also, Case T-13/89, ICI v. Commission, [1992] ECR II-1021, 1116, paragraphs 259 to 261.

(179) For the subject matter of this infringement see recitals 72 et seq.

(180) As defined in recital 66.

(181) As defined in recitals 67 to 69.

(182) See in particular recitals 44 to 45.

(183) As to the reassuring value for British Sugar see for example recital 46 this Decision.

(184) Joined Cases 56 and 58/64, Consten and Grundig, [1966] ECR 299, at p. 342; see also the opinion of Judge Vesterdorf, acting as Advocate-General in the Rhône-Poulenc case, see footnote 178; at page 942.

(185) Tate & Lyle's written reply to the revised statement of objections, at section 4, paragraph 93.

(186) See recital 33 of this Decision.

(187) See its written reply to the revised statement of objections, at paragraph 2.

(188) At paragraphs 78 to 83 of its written reply to the revised statement of objections.

(189) At paragraphs 110 to 120 of its written reply to the revised statement of objections.

(190) Rhône-Poulenc judgment, see footnote 178.

(191) At section 4, paragraphs 51 to 53.

(192) Tate & Lyle's written reply to the initial statement of objections, at paragraph 3.5, volume I.

(193) In English in the original text.

(194) Tate & Lyle's written reply to the revised statement of objections, at section 1, paragraph 1.4.

(195) In English in the original text.

(196) Tate & Lyle's written reply to the initial statement of objections, at paragraph 3.7, volume I, Tate & Lyle's written reply to the revised statement of objections, at section 1, paragraph 1.6.

(197) In English in the original text.

(198) Tate & Lyle's written reply to the revised statement of objections, at section 2, paragraph 2.5.

(199) Tate & Lyle's written reply to the revised statement of objections, at section 4, paragraph 55.

(200) At paragraphs 8 and 17.

(201) At paragraphs 73 to 79.

(202) At paragraph 54 of its written reply to the revised statement of objections.

(203) British Sugar at paragraphs 11 and 53; Tate & Lyle at section 4, paragraphs 20 and 53; Napier Brown at paragraph 29; James Budgett infra.

(204) See recitals 72 and 74 of this Decision.

(205) Jugdment of the Court of Justice of 13 February 1979 in Case 85/76 Hoffmann-La Roche v. Commission [1979] ECR 461, at paragraph 123.

(206) In its judgment of 21 August 1996 (see recital 58 of this Decision), the UK Restrictive Practices Court comes to the same conclusion.

(207) See recitals 66 to 71 of this Decision.

(208) See recitals 72 to 74 of this Decision.

(209) At recitals 91 to 92.

(210) Rhône-Poulenc judgment, see footnote 178; at paragraphs 126 and 127; see also this

Decision at recital 70.

(211) See recital 10.

(212) Cited under recitals 30, 44, 50.

(213) See recital 66 of this Decision.

(214) See recital 30 of this Decision.

(215) See recitals 31 and 58 of this Decision.

(216) See recital 66 of this Decision.

(217) See recital 51 of this Decision.

(218) See recital 72 of this Decision.

(219) See recital 53 of this Decision.

(220) See recital 56 of this Decision.

(221) Rhône-Poulenc judgment, see footnote 178.

(222) Rhône-Poulenc judgment, see footnote 178; at paragraphs 121 to 124.

(223) Suiker Unie judgment, see footnote 168; at paragraphs 172 to 176.

(224) Rhône-Poulenc judgment, see footnote 178; at paragraph 123.

(225) Rhône-Poulenc jugdment, see footnote 178; at paragraphs 122, 123 and 124.

(226) British Sugar's written reply to the initial statement of objections, at paragraph 148.

(227) British Sugar's written reply to the revised statement of objections, paragraph 41.

(228) Written reply to the revised statement of objections, at paragraph 37, table 10.

(229) Written reply to the revised statement of objections, at paragraph 43.

(230) Written reply to the revised statement of objections, at paragraph 8.

(231) British Sugar's written reply to the revised statement of objections, at paragraph 10.

(232) Written reply to the revised statement of objections, at paragraphs 10 and 125.

(233) British Sugar's written reply to the revised statement of objections, at paragraph 125.

(234) British Sugar's written reply to the initial statement of objections, at paragraph 206; British Sugar's written reply to the revised statement of objections, at paragraph 10.

(235) British Sugar's written reply to the revised statement of objections, at paragraph 49.

(236) British Sugar's written reply to the initial statement of objections, at paragraph 183, including Appendix 19 and graphs H and J; British Sugar's written reply to the revised statement of objections, at paragraph 49.

(237) British Sugar's written reply to the initial statement of objections, at paragraph 203, including Appendix 10.

(238) British Sugar's written reply to the initial statement of objections, paragraphs 204 to 207.

(239) British Sugar's written reply to the revised statement of objections, at paragraph 51.

(240) British Sugar's written reply to the initial statement of objections, at paragraph 189.

(241) In English in the original text.

(242) British Sugar's written reply to the initial statement of objections, at paragraph 192.

(243) In English in the original text.

(244) British Sugar's written reply to the revised statement of objections, at paragraph 52.

(245) British Sugar's written reply to the revised statement of objections, at paragraph 122.

(246) British Sugar's written reply to the revised statement of objections, at paragraph 123.

(247) British Sugar's written reply to the revised statement of objections, at paragraph 125.

(248) British Sugar's written reply to the revised statement of objections, at paragraph 126.

(249) Transcript of the investigations held at Tate & Lyle on 27 May 1994 (Annex 1 to the revised statement of objections), page 8.

(250) Tate & Lyle's written reply to the initial statement of objections, paragraphs 3.15 to 3.18 and 3.25, volume I; Tate & Lyle's written reply to the revised statement of objections, at section 4, paragraph 60.

(251) Tate & Lyle's written reply to the revised statement of objections, at section 2, paragraphs 2.2 and 2.3.

(252) Tate & Lyle's written reply to the revised statement of objections, at section 1, point 1.4.

(253) In English in the original text.

(254) Tate & Lyle's written reply to the initial statement of objections, at paragraph 3.5, volume I.

(255) In English in the original text.

(256) Tate & Lyle's written reply to the initial statement of objections, at paragraph 3.7, volume I; Tate & Lyle's written reply to the revised statement of objections, at section 1, paragraph 1.6.

(257) In English in the original text.

(258) Tate & Lyle's written reply to the initial statement of objections, at paragraph 1.6, volume I; see also its written reply to the revised statement of objections, at section 1, paragraph 1.6.

(259) In English in the original text.

(260) Tate & Lyle's written reply to the revised statement of objections, at section 2, paragraph 2.12.

(261) In English in the original text.

(262) Tate & Lyle's written reply to the revised statement of objections, at section 2, paragraph 2.13.

(263) In English in the original text.

(264) Tate & Lyle's written reply to the revised statement of objections, at section 2, paragraph 2.6.

(265) Tate & Lyle's written reply to the revised statement of objections, at section 2, paragraph 2.7.

(266) Tate & Lyle's written reply to the revised statement of objections, at section 1, paragraph 1.5, see also at section 2, paragraph 2.8.

(267) Napier Brown's written reply to the revised statement of objections, at paragraph 12.

(268) Napier Brown's written reply to the revised statement of objections, at paragraph 15.

(269) At paragraph 24b.

(270) James Budgett's written reply to the revised statement of objections, at paragraph 39.

(271) Cited under recital 36 (Annex 5 to the revised statement of objections, at page 4).

(272) In English in the original text.

(273) Cited under recital 36 (Annex 5 to the revised statement of objections, at page 4).

(274) In English in the original text.

(275) See recitals 31 and 58 of this Decision.

(276) In English in the original text.

(277) Consten and Grundig judgment, see footnote 188; at page 342.

(278) Rhône-Poulenc case, see footnote 178; at pages II-869 ff.

(279) Opinion of Judge Vesterdorf, acting as Advocate-General in the Rhône-Poulenc case, see footnote 178; at page II-942.

(280) See recital 97 of this Decision.

(281) Rhône-Poulenc judgment, see footnote 178; at paragraph 122.

(282) Rhône-Poulenc judgment, see footnote 178; at paragraph 123.

(283) Rhône-Poulenc judgment, see footnote 178; at paragraph 124.

(284) Rhône-Poulenc judgment, see footnote 178; at paragraph 120.

(285) ACF Chemiefarma NV judgment, see footnote 178; at paragraph 112.

(286) Rhône-Poulenc judgment, see footnote 178; at paragraphs 126 and 127.

(287) On the object of the meetings, see also recitals 72 to 74, 90 to 94 and recitals 134 to

154 of this Decision.

(288) See recitals 29(a), 30 to 46 of this Decision.

(289) See recitals 72 to 74, 90 of this Decision.

(290) See recital 90 of this Decision.

(291) See recitals 44 to 45, 72 to 73 of this Decision.

(292) See recital 41 of this Decision.

(293) Tate & Lyle's written reply to the revised statement of objections, at section 4, paragraph 36.

(294) In English in the original text.

(295) Tate & Lyle's written reply to the revised statement of objections, at section 2, paragraph 2.12.

(296) In English in the original text.

(297) See recital 47 of this Decision; British Sugar's written reply to the revised statement of objections, at paragraph 10 and 125; Tate & Lyle's written reply to the revised statement of objections, at section 2, paragraph 2.13.

(298) British Sugar's written reply to the initial statement of objections, at paragraph 189.

(299) In English in the original text.

(300) Tate & Lyle's written reply to the revised statement of objections, at section 2, paragraph 2.13.

(301) In English in the original text.

(302) Tate & Lyle's written reply to the initial statement of objections, at paragraph 1.6., volume I; and its written reply to the revised statement of objections, at section 1, paragraph 1.6.

(303) In English in the original text.

(304) Tate & Lyle's written reply to the revised statement of objections, at section 2, paragraph 2.13.

(305) In English in the original text.

(306) See recitals 72 to 74, 90 of this Decision.

(307) British Sugar's written reply to the revised statement of objections, paragraph 7.

(308) At paragraph 10 of its written reply to the revised statement of objections.

(309) Paragraph 165 of British Sugar's written reply to the initial statement of objections.

(310) In English in the original text.

(311) Paragraph 20 of British Sugar's written reply to the initial statement of objections.

(312) In English in the original text.

(313) British Sugar's written reply to the revised statement of objections, at paragraph 21.

(314) In English in the original text.

(315) British Sugar's representations during the oral hearing on 18 and 19 April 1996, page. 18.

(316) At paragraph 73 of the revised statement of objections.

(317) British Sugar's representations during the oral hearing on 18 and 19 April 1996, page 18.

(318) British Sugar's written reply to the revised statement of objections, at paragraph 22.

(319) In English in the original text.

(320) British Sugar's written reply to the revised statement of objections, at paragraph 22.

(321) British Sugar's written reply to the revised statement of objections, at paragraph 23.

(322) British Sugar's written reply to the revised statement of objections, at paragraph 25.

(323) In English in the original text.

(324) British Sugar's representations in the oral hearing on 18 and 19 April 1996, pages 18 and 19.

(325) British Sugar's written reply to the revised statement of objections, at paragraph 27.

(326) See the Commission's initial statement of objections, paragraphs 188 to 191.

(327) At paragraphs 26 and 27.

(328) Tate & Lyle's letter to the OFT dated 16 July 1990 (Annex 5 to the revised statement of objections), see also recital 139.

(329) See Mr Fowler's statement at the oral hearing on 18 and 19 April 1996, page 77.

(330) Transcript of the investigations at Tate & Lyle on 27 May 1994 (Annex 1 to the revised statement of objections) page 9.

(331) Tate & Lyle's written reply to the revised statement of objections, at section 2, paragraph 2.8, with reference to Tate & Lyle's letter of 29 August 1990 of the OFT (Annex 3 to the revised statement of objections).

(332) In English in the original text.

(333) At paragraphs 21 to 25.

(334) See recitals 44 and 45 of this Decision.

(335) At paragraphs 34 and 35.

(336) See recitals 44 and 45 of this Decision.

(337) See recitals 32 and 33 of this Decision.

(338) See recital 26 of this Decision.

(339) Protocol of the oral hearing on 18 and 19 April 1996, page 76.

(340) Protocol of the oral hearing on 18 and 19 April 1996, page 76.

(341) Protocol of the oral hearing on 18 and 19 April 1996, page 76.

(342) Tate & Lyle's letter to the OFT dated 16 July 1990 (Annex 5 to the revised statement of objections).

(343) Tate & Lyle's letter of 29 August 1990 to the OFT (Annex 3 to the revised statement of objections).

(344) Protocol of the oral hearing on 18 and 19 April 1996, page 77.

(345) In English in the original text.

(346) Tate & Lyle's letter to the OFT dated 16 July 1990 (Annex 5 to the revised statement of objections) at page 3.

(347) In English in the original text.

(348) See recital 10 of this Decision.

(349) Tate & Lyle's letter of 29 August 1990 of the OFT (Annex 3 to the revised statement of objections), cited at recital 30.

(350) Napier Brown Decision, see footnote 25.

(351) Napier Brown Decision, see footnote 25; at paragraphs 85 and 86.

(352) Napier Brown Decision, see footnote 25; at paragraph 60.

(353) See recital 26 of this Decision.

(354) See recitals 137 to 139 of this Decision.

(355) British Sugar's written reply to the initial statement of objections, at paragraph 20.

(356) In English in the original text.

(357) Representation by Mr Ridgwell, protocol of the oral hearing on 18 and 19 April 1996, page 81.

(358) In English in the original text.

(359) Representation by Mr O'Hanlon, protocol of the oral hearing on 18 and 19 April 1996, page 82.

(360) In English in the original text.

(361) Napier Brown Decision, see footnote 25; at paragraph 10.

(362) See also recital 27.

(363) In English in the original text.

(364) In English in the original text.

(365) In English in the original text.

(366) See for example: Case 56/65, Société Technique Minière [1966] ECR 235, 249; Case 5/69, Völk v. Vervaecke, [1969] ECR 295, 302, paragraphs 5 to 7; Case T-77/92, Parker Pen v. Commission, [1994] ECR II-549, 564, paragraph 39, Case T-66/89, Publishers Association v. Commission, [1992] ECR II-1995, 2016-2027, paragraph 55.

(367) Parker Pen judgment, see footnote 370; at paragraph 40; Case 99/79, Lancôme v. ETOS, [1980] ECR 2511, 2536, paragraph 24.

(368) Case 8/72, Cementhandelaren v. Commission, [1972] ECR 977, 991, paragraph 29; Case 73/74, Papiers Peints v. Commission, [1975] ECR 1491, 1513, paragraph 26.

(369) Case 246/86 Belasco v. Commission, [1989] ECR 2117, 2190 and 2191, paragraphs 37 and 38.

(370) Case T-35/92, John Deere v. Commission, [1994] ECR II-957, 1009 and 1010, paragraph 101.

(371) See recitals 16 to 21 and 62 and 63 of this Decision.

(372) See recital 65 of this Decision.

(373) See recitals 16 and 17, 64 and 65 of this Decision.

(374) Cementhandelaren judgment, see footnote 372; at paragraph 29; Papiers Peints judgment, see footnote 372; at paragraph 26.

(375) See recital 15 of this Decision.

(376) See recitals 14 and 20 of this Decision.

(377) See recital 17 of this Decision.

(378) At section 4, paragraph 9.

(379) In English in the original text.

(380) British Sugar's written reply to the revised statement of objections, at paragraph 143.

(381) British Sugar's written reply to the revised statement of objections, at paragraphs 144 to 146.

(382) British Sugar's written reply to the revised statement of objections, at paragraphs 158 to 161.

(383) British Sugar's written reply to the initial statement of objections, at paragraph 61.

(384) British Sugar's written reply to the revised statement of objections, at paragraph 164.

(385) In English in the original text.

(386) Tate & Lyle's written reply to the revised statement of objections, at section 4, paragraph 80.

(387) Napier Brown's written reply to the revised statement of objections, at paragraph 34.

(388) See procotol of the oral hearing on 18 and 19 April 1996, at page 67.

(389) In English in the original text.

(390) The figures provided by Napier Brown in Annex A to its written reply to the revised statement of objections show that in the calendar years from 1 January 1986 to 31 December 1990, Napier Brown's imports of white sugar into the UK increased by 60 %.

(391) See protocol of the oral hearing on 18 and 19 April 1996, at pages 67 and 68.

(392) James Budgett's written reply to the revised statement of objections, at paragraph 55.

(393) James Budgett's written reply to the revised statement of objections, at paragraphs 60 and 61. Figures stated in table 6 of James Budgett's response to the original statement of objections and in Annex 4 of its response to the revised statement of objections. See also Budgett's representation at the oral hearing on 18 and 19 April, at page 49.

(394) See recitals 155 to 158 and 159 to 168 of this Decision.

(395) British Sugar's written reply to the initial statement of objections, at paragraph 61.

(396) British Sugar's written reply to the revised statement of objections, at paragraph 164.

(397) See protocol of the oral hearing on 18 and 19 April 1996, page 32.

(398) See recitals 159 to 163, 167 and 168 of this Decision.

(399) Source: Interal statistics of Directorate-General VI (Agriculture) of the Commission, as

cited above under paragraph 14 and as reproduced in full (including the years up to 1993/94) in British Sugar's written reply to the initial statement of objections, as Table 5 on page 33 and in its written reply to the revised statement of objections, as Table 7 after page 63.

(400) See recitals 86 to 88 of this Decision.

(401) See recitals 167 and 168 of this Decision.

(402) Case 22/78, Hugin v. Commission, [1979] ECR 1869, 1899 to 1901, paragraphs 17 to 26.

(403) OJ 30, 20.4.1962, p. 993/62.

(404) OJ 53, 1.7.1962, p. 1571/62.

(405) Case C-399/93, Oude Luttikhuis, [1995] ECR I-4515, 4527, paragraph 23; Joined Cases T-70/92 and T-71/92, Florimex v. Commission, [1997] ECR II-693, 745, paragraph 152.

(406) OJ L 177, 1.7.1981, p. 4.

(407) OJ L 159, 3.6.1998, p. 38.

(408) Oude Luttikhuis judgment, see footnote 411; at paragraph 25.

(409) For the interpretation of the second sentence of Article 2(1) in the light of its genesis and the reasons on which Regulation No 26 is based, see Joined Cases C-319/93, C-40/94 and C-224/94, Dijkstra, [1995] ECR I-4471, 4506 and 4507, paragraphs 17 to 20.

(410) Tate & Lyle's written reply to the revised statement of objections, at section 4, paragraph 93. See also recital 76.

(411) Case 19/77, Miller v. Commission, [1978] ECR 131, 152, paragraph 18; Case T-29/92, SPO v. Commission, [1995] ECR II-289, 402, paragraphs 356 to 358; Case T-61/89, Dansk Pelsdyravlerforing, [1992] ECR II-1931, 1991 and 1992, paragraph 157; Case C-279/87, Tipp-Ex v. Commission, [1990] ECR I-261.

(412) See recitals 65 and 161 of this Decision.

(413) See recital 23 of this Decision.

(414) See also recitals 76 and 188 of this Decision.

(415) Suiker Unie judgment, see footnote 168.

(416) Suiker Unie judgment, see footnote 168, at paragraphs 13 to 17.

(417) Suiker Unie judgment, see footnote 168, at paragraph 24.

(418) Suiker Unie judgment, see footnote 168, at paragraphs 21 and 22.

(419) Commission Decision 73/109/EEC of 2 January 1973 in Case IV/26.918, European sugar industry (OJ L 140, 26.5.1973, p. 17).

(420) Suiker Unie judgment, seee footnote 168; at paragraphs 614 to 620.

(421) Suiker Unie judgment, see footnote 168, at paragraph 621.

(422) See also the Opinion of Advocate-General Cosmas of 15 July 1997 in Case C-235/92 P, Montecatini SpA v. Commission, paragraph 48; not yet published in the ECR.

(423) See in particular recitals 22 and 23, 72 to 74, 86 to 88.

(424) Napier Brown Decision, see footnote 25; paragraphs 10, 85 and 86.

(425) See recitals 27, 150 and 151.

(426) The Napier Brown procedure started with a formal complaint lodged with the Commission on 19 September 1980.

(427) Judgment of 21 February 1973, Case 6/72, Continental Can v. Commission, [1973] ECR 215, 244-245, paragraph 25; judgment of 10 July 1990, Case T-51/89, Tetra Pak Rausing SA v. Commission, [1990] ECR II-309, 356-357, paragraph 22.

(428) OJ C 207, 18.7.1996, p. 4.

(429) British Sugar's written reply to the revised statement of objections, at paragraph 16 et infra; Tate & Lyle's written reply to the revised statement of objections, at section 1(4) et infra; Napier Brown's written reply to the revised statement of objections, at paragraph 5 et infra; James Budgett's written reply to the revised statement of objections, at paragraphs 3 to 5 et infra.

(430) Tate & Lyle's letter to the OFT dated 16 July 1990 (Annex 5 to the revised statement of objections).

(431) Tate & Lyle's letter of 29 August 1990 to the OFT (Annex 3 to the revised statement of objections).

(432) See recital 212.