OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 21 October 2003 [1]

I — Introduction

1. This case concerns the review of the judgment of the Court of First Instance of 12 July 2001 in Joined Cases T-202/98, T-204/98 and T-207/98 [2] ('the contested judgment').

2. The background is formed by the proceedings leading to the contested judgment and in which a complaint was made of anti-competitive conduct by sugar manufacturers and sugar traders in the United Kingdom (except for Northern Ireland). For further information, particularly as to the situation on the British markets for retail and industrial sugar during the period relevant to the proceedings, reference is made to the contested judgment.

3. On 14 October 1998, the Commission adopted 'Commission Decision 1999/210/EC ... relating to a proceeding pursuant to Article 85 of the EC Treaty'. [3] The decision was addressed to British Sugar plc, Tate & Lyle plc, Napier Brown & Co. Ltd and James Budgett Sugars Ltd, and contained the determination that those undertakings had infringed Article 85(1) of the EC Treaty (now Article 81(1) EC) by participating in an agreement and/or a concerted practice, the purpose of which was to restrict competition on the British markets for retail and industrial sugar by coordinating their pricing policies.

4. In the case of British Sugar, which is the appellant in these proceedings ('the appellant'), the Commission makes the accusation in its decision that, between 20 June 1986 and 2 July 1990, the appellant coordinated its pricing policy by informing the other addressees about sugar price increases which it was seeking. The fine imposed on the appellant by the decision amounts to ECU 39 600 000.

5. Three of the addressees of the decision, including the appellant, brought an action

1 — Original language: German.

2 — *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035

3 — OJ 1999 L 76, p. 1.

before the Court of First Instance. The appellant's action was dismissed and it was ordered to pay the costs.

6. On 21 September 2001, the appellant lodged an appeal against that judgment at the Registry of the Court of Justice.

II — Forms of order sought and pleas in law on appeal

7. The appellant seeks a declaration:

(1) that the agreement/concerted practice was not capable of affecting trade between Member States; or, alternatively,

(2) that the fine imposed was disproportionate,

and further seeks an order in the following terms:

(1) that the judgment of the Court of First Instance be set aside; and

(2) the contested decision be annulled in whole, or alternatively in part; or, alternatively,

(3) Articles 3 and 4 of the contested decision be annulled or the fine reduced; and

(4) that the Commission pay the appellant's costs incurred in relation to the appeal and in relation to Case T-204/98, including those relating to the proceedings for interim relief.

The Commission contends:

(1) that the Court of Justice should dismiss the appeal as partly inadmissible and partly unfounded, or, in the alternative, dismiss it as unfounded in its entirety;

(2) that the appellant should be ordered to pay the Commission's costs in these proceedings.

8. According to its notice of appeal, the appellant relies on two pleas in law. In its *first* plea, it argues that, in interpreting Article 85(1) of the Treaty, the Court of First Instance misinterpreted the essential requirement that trade be affected between Member States. In its *second* plea, it argues that, in assessing the fine, the Court of First Instance overlooked the fact that it was disproportionate and the fact that, in determining it, the structure of the British sugar market was not sufficiently taken into account.

III — Analysis

A — *The first plea on appeal: Effect on trade between Member States (Article 85(1) of the Treaty)*

1. Arguments of the parties

9. The *appellant* refers first to paragraph 80 et seq. of the contested judgment, in which, with reference to a consistent line of case-law,[4] the Court of First Instance gives its reasons for holding that the concerted practice complained of was of such a kind as to affect trade between Member States (Article 85(1) of the Treaty), even though it was concerned only with the coordination of pricing policy on the British sugar market.

10. The appellant argues that the Court of First Instance misinterpreted the relevant case-law[5] on the likelihood of trade between Member States being affected, and misapplied it to the present case.

11. More particularly, the appellant argues that, in paragraph 81 of the contested judgment, the Court of First Instance refers to circumstances that were extraneous to the concerted practices themselves. The Court of First Instance based its argument solely on the intention of the appellant and the intention of Tate & Lyle to restrict imports into the national sugar markets. Those intentions, however, bore no relation

4 — Case 5/69 *Völk* [1969] ECR 295; Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* [1993] ECR I-1307; Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117; Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739; Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission* [1996] ECR II-1201; Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289; and Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711.

5 — Case 73/74 *Groupement des fabricants de papiers peints and Others* v *Commission* [1975] ECR 1491.

to the agreements/concerted practices complained of. Nor, moreover, in the case of the appellant, could Tate & Lyle's intention be used as evidence for the likelihood of trade between Member States being affected, as this was a motivation that was independent of its own intention. Furthermore, it was undisputed that, at the relevant time, imports of sugar had taken place, as the Court of First Instance itself found in paragraph 80 of the contested judgment. That proves, the appellant submits, that the general intention to prevent sugar imports cited by the Court bore no relation to the concerted practice complained of.

12. The appellant, with reference to the case-law of the Court of Justice and of the Court of First Instance, [6] further complains that, in paragraph 83 et seq. of the contested judgment, the Court of First Instance failed to take account of the fact that the potential effect on trade between Member States had to be 'appreciable'. A merely speculative, contrived or remote possibility is, the appellant submits, not sufficient.

13. The appellant also complains that, in the contested judgment, the Court of First Instance regarded the retail and industrial sugar markets as a single import market in order to justify its conclusion that the concerted practice complained of was likely to affect trade between Member States. The Court of First Instance thereby erred in law by failing to take account of the fact that, for practical reasons (e.g. transport costs, labelling and presentation), there are virtually no imports in the British market for packaged retail sugar.

14. The *Commission* argues that the Court of First Instance made no error in law by holding, in the contested judgment, that trade between Member States might be affected.

15. It is, the Commission submits, clear from the case-law [7] that, when assessing the likelihood of trade between Member States being affected in the case of agreements/concerted practices extending over the whole territory of the Member State, all the circumstances must be taken into account. Facts extraneous to the agreements/concerted practices themselves can therefore be taken into account, and it is irrelevant what contribution an individual participating undertaking may have had or what intentions it may have been pursuing in that regard. [8]

6 — Case 22/71 *Beguelin* [1971] ECR 949; Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135; Case 22/78 *Hugin Kassaregister and Others* v *Commission* [1979] ECR 1869; Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* [1998] ECR II-3141.

7 — Joined Cases 228/82 and 229/82 *Ford* v *Commission* [1984] ECR 1129; Case 56/65 *Société Technique Minière* [1966] ECR 235; *Bagnasco*, cited in footnote 6 above; and *Compagnie maritime belge*, cited in footnote 4 above.

8 — Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155.

16. In paragraph 80 et seq., the contested judgment accordingly fulfilled the requirements set out in consistent case-law for there to be a likelihood of trade between Member States being affected by referring to the circumstances of the anti-competitive concerted practice in its entirety (territorial scope; market position of the participants; fundamental susceptibility of the market to imports; general intention of the participants to prevent imports).

17. With regard to the general intention of the appellant and Tate & Lyle to prevent imports, the Commission argues that, according to the case-law of the Court of Justice, [9] it is not a question of whether the adverse effect on trade between Member States forms the subject-matter of a concerted practice of which complaint has been made. It is sufficient that the effects of a concerted practice make such an adverse effect seem possible. As the Court of Justice held in *Belasco*, [10] that is the case with a pricing cartel that covers the whole of the national territory, because the members of the cartel can hold on to their market share only if they defend themselves against competition from other Member States.

18. Concerning the requirement that the adverse effect on trade between Member States be appreciable, the Commission argues that the appellant has misunderstood the contested judgment. The Court of First Instance did not determine in paragraph 84 of the contested judgment, of which the appellant complains, that an agreement/concerted practice covering the whole territory of a Member State and thus reinforcing the screening-off of the national market carries an inference that the potential adverse effect is also appreciable, [11] but it did make that determination in paragraph 78, in line with the case-law of the Court of Justice. [12] There is no threshold value for appreciability. Rather, the Commission argues, the general rule is that the smaller the amount of trade between Member States is, the greater the inference that the potential adverse effect upon it is appreciable. [13]

19. In answer to the appellant's criticism of the way in which the markets for retail and industrial sugar were considered together, the Commission replies that, even if they had been considered separately, no other assessment in relation to the appreciable nature or otherwise of the adverse effect on trade between Member States would have been possible. The prerequisites (fundamental susceptibility to imports, participants' share of the markets in question of around 90%) were also present in the case of those two partial markets.

9 — *Société Technique Minière,* cited in footnote 7 above.

10 — Cited in footnote 4 above.

11 — Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851.

12 — *Bagnasco*, cited in footnote 6 above.

13 — *SPO*, cited in footnote 4 above.

2. Assessment

20. The first plea on appeal concerns the interpretation of the expression 'may affect trade between Member States' within the meaning of Article 85(1) of the Treaty. The question is raised whether the Court of First Instance was right to assume: (a) that the concerted practice complained of might affect trade between Member States, and (b) that such adverse effect could have been appreciable.

(a) Whether trade between Member States might have been affected

21. In paragraph 79 of the contested judgment, the Court of First Instance relies on 'settled case-law', according to which 'the fact that a cartel relates only to the marketing of products in a single Member State is not sufficient to exclude the possibility that trade between Member States might be affected. Since the market concerned is susceptible to imports, the members of a national price cartel can retain their market share only if they defend themselves against foreign competition.'

22. In my opinion, the Court of First Instance's assumption that, in this case, trade between Member States might have been affected is unexceptionable. The reasoning in the given form does, however, seem to me to be abbreviated and therefore not immediately illuminating.

23. From paragraph 79 of the contested judgment onwards, the Court of First Instance relied, on the one hand, citing the judgment of the Court of Justice in *Belasco*, [14] on the general statement that 'members of a national price cartel can retain their market share only if they defend themselves against foreign competition', and, on the other, on the general intention of one of the participating undertakings to prevent imports of sugar.

24. This reasoning is, in my opinion, not immediately convincing, as stated above, because, when considering whether trade between Member States might be affected, a general distinction must be made between pricing cartels and market-sharing cartels.

25. Pricing cartels normally serve to safeguard particularly high prices, and are therefore, in principle, liable rather to cause or increase imports than adversely to affect them. Accordingly, in the case-law, it is assumed only in the case of market-sharing cartels that they screen off the relevant

14 — Cited in footnote 4 above.

markets from competitors from other Member States and thus *per se* have an effect on trade between Member States. [15] In the case of pricing cartels, on the other hand, the Court of Justice holds them likely to affect trade between Member States only if the pricing cartel in question was accompanied by related measures or such measures were at least probable. [16] In the absence of such related measures, the Court has, in individual cases, also relied, for example, on the argument that particular services, which were the subject-matter of a pricing cartel, were international in character [17] (services of customs agents or accountants), or that the participants in the cartel were undertakings which 'operated on that market throughout the common market'. [18]

26. In the case of this pricing cartel on the British sugar market, as the decision shows, there has only been the disputed information policy. There have been no related measures to strengthen the cartel, and neither has it been claimed that such measures in one form or another were necessary or likely. Nor are there any indications of other features, either of the product or of the participating undertakings, which point to a likelihood that this pricing cartel might affect trade between Member States. In this respect, the Court of First Instance based its reasoning rather on the 'major preoccupation' of the appellant and Tate & Lyle to limit the level of imports.

27. The appellant challenges that, by casting doubt on whether there was a causal connection between its anti-import policy and its participation in the pricing cartel. I share the appellant's view to the extent that the assumption which the Court of First Instance makes in coming to this generalisation is not compelling from an economic standpoint.

28. As stated above, a national price cartel is aimed fundamentally at maintaining particularly high domestic prices. A price cartel aimed at preventing imports, on the other hand, tries to keep domestic prices at the low level necessary for that purpose. The view of the Court of First Instance — as expressed in paragraph 81 of the contested judgment — appears to be that this must have been a pricing cartel which was designed, at the same time, to serve *both* the usual interest of participants in the highest possible prices *and* the interest of

15 — Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411; Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545.

16 — Case 8/72 *Cementhandelaren* v *Commission* [1972] ECR 977; *Groupement des fabricants de papiers peints*, cited in footnote 5 above; *Belasco*, cited in footnote 4 above.

17 — *Commission* v *Italy*, cited in footnote 12 above — customs agents, and Case C-309/99 *Wouters* [2002] ECR I-1577 — accountants.

18 — *John Deere*, cited in footnote 11 above, at paragraph 119.

the appellant and Tate & Lyle in the lowest possible prices. The Court does not go into any further detail on that point, however.

29. If there had been concrete price agreements in this case, the Commission, and later the Court of First Instance, would have been able to determine relatively easily by reference to the concrete level of the prices fixed what common pricing policy such an agreement was serving: either the agreement would have served to secure the *highest* attainable prices on the domestic market — in which case the likely conclusion would have been that there was no likelihood of trade between Member States being affected — or it would have served to secure the *highest possible* prices (i.e. prices which, while being higher than the market price, were at the same time low enough not to endanger the defence against imports) — in which case the conclusion would have been that there was such a likelihood.

30. As the Court of First Instance has determined in the contested judgment, however, there has been no agreement in this case to fix a particular price level. The appellant merely informed its competitors in some detail about its prices on the British sugar market.

31. An information policy of this kind is eminently suited to maintaining a general, highest-possible level of prices, that is to say high domestic prices while taking account of the anti-import price threshold. In this particular case of a pricing cartel in the form of a unilateral price information policy, the Court of First Instance is therefore right in the result when it determines — albeit perhaps in somewhat too abbreviated a form — that the aforesaid 'major preoccupation' of preventing imports was the feature which revealed the appellant's information policy as a concerted practice likely to affect trade between Member States.

32. In relation to the accusation that the Court of First Instance wrongly assumed that the concerted practice complained of might affect trade between Member States, the first plea on appeal must therefore be dismissed as *unfounded*.

(b) Whether the adverse effect on trade between Member States was appreciable

33. In paragraph 84 of the contested judgment, the Court of First Instance relied on its own case-law, [19] to the effect that 'the

19 — *Hercules Chemicals*, cited in footnote 4 above, at paragraph 279.

Commission is not required to demonstrate that an agreement or concerted practice has an appreciable effect on trade between Member States. All that is required by Article 85(1) of the Treaty is that anti-competitive agreements and concerted practices should be capable of having an effect on trade between Member States'. In paragraph 85 of the contested judgment, the Court directly concludes therefrom that 'the Commission was therefore right to hold that the agreement complained of was capable of having an influence on intra-Community trade'. The Court thus gives no reasoning in paragraph 85 of the contested judgment as to why the *possible* effect on trade between Member States *could have been appreciable* in this case.

34. I nevertheless take the view that, on the basis of the submissions of the present appellant and having regard to consistent case-law, the Court of First Instance did not make any error of law in its decision.

35. In paragraph 84 of the contested judgment, the Court of First Instance correctly held, with reference to its earlier case-law there cited, that there was no need for proof that an agreement/concerted practice *did in fact appreciably affect* trade between Member States. Proof of actual adverse effects is also logically impossible in connection with the concept of 'possible adverse effects'.

36. As a matter of principle, however, that does not remove the requirement to show reasoning as to how far the potential effects in question are, at least *by their nature, likely to be appreciable*. The Court of First Instance did not give that reasoning, but limited itself in paragraph 83 et seq. of the contested judgment to refuting the appellant's argument that there must be adverse effects which are in fact appreciable.

37. Paragraph 75 of the contested judgment, in which the submissions of the present appellant before the Court of First Instance are reproduced, does not show, however, that, in the proceedings before the Court, the appellant in any way argued that the concerted practice complained of was, as such, not likely to have an appreciable effect on trade between Member States. In the proceedings before the Court, the submissions of the present appellant were thus clearly limited to complaining that the decision proceeded on the assumption that there had in fact been an appreciable effect.

38. With regard to the likelihood of there being an appreciable effect, the arguments of the appellant in the present proceedings thus contain a new standpoint that was not put forward in that way in the proceedings before the Court of First Instance. To that extent, therefore, the plea on appeal is *inadmissible* under Article 113(2) of the Rules of Procedure. [20]

20 — Case C-450/98 P *IECC* v *Commission* [2001] ECR I-3947, at paragraph 36.

3. Result

39. The *first* plea on appeal, in which the appellant complains that the Court of First Instance misinterpreted the likelihood of trade between Member States being affected, for the purposes of Article 85(1) of the EC Treaty (now Article 81(1) EC), by wrongly assuming that the concerted practice complained of was likely to affect trade between Member States and that that effect could have been appreciable, is therefore partly *inadmissible* and, as to the rest, *unfounded*. The first plea on appeal must therefore be dismissed.

B — *The second plea on appeal: Proportionality of the fine and the need to take market structure into account when assessing the amount of the fine*

1. Arguments of the parties

40. The appellant complains of paragraph 98 et seq. of the contested judgment, in which, it claims, the Court of First Instance failed to take account of the fact that, in assessing the amount of the fine, the Commission disregarded (a) the principle of proportionality and (b) the particular structure of the British sugar market.

41. Concerning disregard of the proportionality principle when assessing the amount of the fine, the appellant argues as follows:

The appellant maintains that, in classifying the breach of competition law as 'serious', the Court of First Instance erred in law by failing to take account of the fact that no concrete minimum price agreements could be proven and the fact that the concerted practice complained of did not have any actual effects on prices or on trade between Member States. Instead, in paragraph 103 of the contested judgment, the Court merely held that the Commission already took account of those aspects by categorising the infringement as 'serious' rather than 'very serious'.

The appellant further argues that, in paragraph 106 of the contested judgment, the Court of First Instance erred in law by failing to take account of the absence of effects in relation to the duration of the breach of competition law. According to the Guidelines, the increase when assessing the basic amount of the fine in the case of infringements of long duration is to be considerably strengthened 'with a view to imposing effective sanctions on restrictions which *have had* a harmful *impact* [21] on consumers over a long period'. If, however,

21 — Emphasis added.

as in this case, there has been no such impact, no increase for duration can be imposed.

Finally, the appellant complains that, in the decision, the fine was raised by a total of 75% for aggravating circumstances, which the Court of First Instance failed to take into account in paragraph 108 et seq. of the contested judgment. As a general proposition, the appellant argues that, since in its case none of the factors set out in paragraph 108 of the contested judgment were present, an uplift for aggravating circumstances leading to a fine of ECU 39.6 million in total should be regarded as altogether disproportionate.

42. Concerning failure to take account of the particular structure of the British sugar market when assessing the amount of the fine, the appellant argues as follows: The appellant maintains that, in paragraph 113 of the contested judgment, the Court of First Instance assumed that the appellant's information policy, of which complaint was made, was likely to restrict competition which was already limited on account of the particular structure of the British sugar market. By so doing, the Court of First Instance failed to take the particular structure of the sugar market into account in this case, in contrast with the more lenient line taken by the Court of Justice in *Suiker Unie*. [22]

43. The *Commission* argues that the second plea on appeal is inadmissible, or, in the alternative, unfounded.

44. As to the inadmissibility of the second plea, the Commission argues:

The appellant is challenging only some of a number of grounds on the strength of which the Court of First Instance confirmed the amount of the fine, and, on that basis, it is demanding a full re-examination of the decision by the Court of Justice. That would involve the Court of Justice substituting its assessment of the facts for that of the Court of First Instance, which — as was established in *Baustahlgewebe* [23] — is inadmissible in appeal proceedings.

45. Should the Court of Justice hold the second plea on appeal to be admissible, the Commission makes the following argument on the merits:

Concerning the gravity of the infringement of competition law, the Commission

22 — Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663.

23 — Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417.

explains its decision by reference to the Guidelines and argues that the appellant's role as inciter of the breach of competition law was taken into account not from the point of view of 'gravity' when assessing the basic amount, but as an 'aggravating circumstance' in relation to uplifting factors. The Court of First Instance understood that in paragraph 100 et seq., and rightly confirmed it. In general terms, moreover, the Guidelines were not intended as a statutory text and do not contain any precise tariffs for fines.

In relation to the duration of the infringement of competition law, the Commission argues that Article 15(2) of Regulation No 17[24] cites the gravity and the duration of an infringement as independent aspects when assessing the fine, so that the duration of an infringement can be taken into account even if it had no actual effect on competition.

Concerning the general complaint that the amount of the fine was disproportionate, the Commission argues that the appellant has not added anything to its earlier submissions on the individual aspects in relation to which it complains (such as, for example, gravity and duration).

24 — Regulation No 17: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

46. As for taking into account the particular structure of the British sugar market, the Commission argues that the Court of First Instance rightly understood the judgment in *Suiker Unie*,[25] since in that judgment the Court of Justice clearly laid down that a pricing cartel on the sugar market of a Member State is to be assessed differently from the market-sharing cartel that was at issue in that case.

2. Assessment

47. The second plea on appeal is inadmissible. The Commission has rightly referred to consistent case-law in that respect.

48. The Court of Justice and the Court of First Instance have repeatedly held that 'the gravity of infringements must be determined by reference to numerous factors such as, in particular, the particular circumstances of the case, its context and the dissuasive element of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up'.[26] In addition, the Commission has a

25 — Cited in footnote 22 above.

26 — Order of the Court of Justice in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, at paragraph 54; Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *LVM and Others* v *Commission* [2002] ECR I-8375; Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165.

discretion when determining the amount of individual fines, and is not obliged to apply a precise mathematical formula in that respect.

49. In its judgment in *Baustahlgewebe*,[27] the Court of Justice held:

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

As regards the allegedly disproportionate nature of the fine, it ... is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law ... This complaint must therefore be declared inadmissible in so far as it seeks a general re-examination of the fines ...'

50. In these proceedings, the appellant has not put forward anything to support the view that the Court of First Instance has not taken account of all factors in a legally correct manner. In particular, in paragraph 113 of the contested judgment, of which the appellant complains, the Court of First Instance gave due consideration to the case-law of the Court of Justice in *Suiker Unie*, in that it drew attention to the differences from the present set of facts, and assessed those differences in a legally correct manner.

51. Nor has the appellant even claimed that, in the contested judgment, the Court of First Instance did not go into all the arguments for a possible reduction of the fine that were submitted in the proceedings before it. In particular, in paragraph 106 of the contested judgment, the Court considered the submissions of the present appellant as to taking into account the absence of market effects of the conduct complained of.

27 — Cited in footnote 23 above, at paragraph 128 et seq.

52. As the second plea on appeal is therefore wholly inadmissible, there is no further need to consider whether that plea is well founded.

3. Result

53. The *second* plea on appeal, in which the appellant complains that the Court of First Instance failed to take into account that, in determining the amount of the fine, the Commission disregarded (a) the proportionality principle and (b) the particular structure of the British sugar market, must therefore be dismissed as *inadmissible*.

C — *The admissibility of the appeal in relation to the claim for complete or partial annulment of the decision*

54. The *Commission* argues that the appeal is inadmissible in so far as it seeks annulment of the decision 'in whole' or annulment of 'Articles 3 and 4'. As the Court of Justice held in *AssiDomän*,[28] the Court of Justice can, in the context of a claim for annulment under Article 173 of the EC Treaty (now, after amendment, Article 230 EC), concern itself only with those parts of a decision which concern the applicant. The appeal must therefore be dismissed as inadmissible in so far as it refers not to the appellant itself but to the other addressees of the decision.

55. The sections of the second part of the appeal to which the Commission here objects are directed primarily at an application of the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, according to which the Court of Justice may itself give final judgment in the matter. However, without prejudice to any other considerations, a precondition for that is that the appeal must be well founded (first sentence of the first paragraph of Article 61 of the Statute).

56. As explained above, however, on the strength of the pleas in law made on appeal, the appeal should be dismissed in its entirety. There is therefore no need to determine whether the appeal is inadmissible in so far as it seeks to have the decision 'in whole' or 'Articles 3 and 4' annulled.[29]

28 — Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, at paragraph 53.

29 — In general, however, similar considerations would apply as in paragraph 53 of the judgment in *AssiDomän*, cited in footnote 28 above.

IV — Conclusion

57. For the above reasons, I propose that the Court of Justice should:

— dismiss the appeal;

— order the appellant to pay the costs.