JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

12 October 2011 *

In Case T-41/05,

Alliance One International, Inc., formerly Dimon Inc., established in Danville, Virginia (United States), represented initially by L. Bergkamp, H. Cogels, J. Dhont, M. Marañon Hermoso and A. Emch, and subsequently by M. Odriozola Alén, J. Folguera Crespo, P. Vidal Martínez, M. Barrantes Diaz and A. João Vide, lawyers,

applicant,

v

European Commission, represented initially by É. Gippini Fournier and F. Amato, and subsequently by É. Gippini Fournier, N. Khan and J. Bourke, acting as Agents,

defendant,

APPLICATION for the partial annulment of Commission Decision C(2004) 4030 final of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2 — Raw tobacco — Spain) and, in the alternative, for a reduction in the fine imposed on the applicant in that decision,

* Language of the case: English.

THE GENERAL COURT (Fourth Chamber),

composed of O. Czúcz, President, I. Labucka and K. O'Higgins (Rapporteur), Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 17 June 2009,

gives the following

Judgment

Background to the dispute

1. *Applicant and administrative procedure*

1 The applicant, Dimon Inc., now Alliance One International, Inc., is an American company established in Virginia (United States). It is the parent company of a group of more than 100 companies operating in the tobacco sector ('the Dimon group'). Its main activity is supplying processed tobacco to cigarette manufacturers. For that purpose it obtains supplies of processed tobacco from, inter alia, Agroexpansión, SA.

2 Agroexpansión is one of four undertakings established in Spain and engaged in the first processing of raw tobacco ('the processors').

3 The three other Spanish processors are Compañia española de tabaco en rama, SA ('Cetarsa'), Tabacos Españoles, SL ('Taes') and World Wide Tobacco España, SA ('WWTE').

4 Agroexpansión was originally a family business. It was incorporated in 1988 by Mr B., who was the managing director until the end of 2004. From 1994 to 1997 50 % of the share capital was held by Mr B.'s wife and 50 % by a company incorporated under Spanish law, WW Marpetrol, SA.

5 On 18 November 1997 Intabex Netherlands BV ('Intabex') acquired all the shares of Agroexpansión. At that time Intabex belonged to the Intabex group of companies, which had been acquired by the applicant in April 1997.

6 On 3 and 4 October 2001, the Commission of the European Communities, possessing information that the Spanish processors and the Spanish producers of raw tobacco had infringed Article 81 EC, carried out inspections pursuant to Article 14 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87) at the premises of three of the processors, namely Agroexpansión, Cetarsa and WWTE, and at the premises of the Asociación Nacional de Empresas Transformadoras de Tabaco ('Anetab').

7 The Commission also carried out inspections at the premises of Tobacco House AIS-BL and the European Federation of Tobacco Processors on 3 October 2001 and at those of the Federación nacional de cultivadores de tabaco ('FNCT') on 5 October 2001.

8 By letter of 16 January 2002, relying on the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) ('the Leniency Notice'), the processors and Anetab indicated to the Commission their intention to cooperate.

9 By letter of 21 January 2002, they provided certain information to the Commission.

10 Certain additional information was passed to the Commission by Agroexpansión, Cetarsa and WWTE by letters of 15 February 2002, and by Taes by letter of 18 February 2002.

11 Subsequently, the Commission sent a number of requests for information to the processors, Anetab and the FNCT, on the basis of Article 11 of Regulation No 17. It also requested information from the Spanish Ministry of Agriculture, Fisheries and Food concerning the Spanish rules governing agricultural products.

12 On 11 December 2003, the Commission initiated the procedure which gave rise to the present case and adopted a statement of objections, which it addressed to 20 undertakings or associations, including the processors, the applicant, Intabex, Anetab, FNCT and Deltafina SpA. Deltafina is an Italian company whose main activities are the first processing of raw tobacco in Italy and the marketing of processed tobacco. It belongs to the same group of companies as Taes, the ultimate head of that group being a US company, Universal Corp.

13 The undertakings and associations in question had access to the Commission's investigation file in the form of a copy on CD-ROM which had been sent to them. They submitted written observations in response to the Commission's objections.

14 An administrative hearing took place on 29 March 2004.

15 After consulting the Advisory Committee on Restrictive Practices and Monopolies and in the light of the final report of the Hearing Officer, the Commission adopted, on 20 October 2004, Decision C(2004) 4030 final relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2 — Raw tobacco — Spain) ('the contested decision'), a summary of which was published in the *Official Journal of the European Union* of 19 April 2007 (OJ 2007 L 102, p. 14).

2. *Contested decision*

16 The contested decision relates to two horizontal cartels entered into and implemented on the Spanish raw tobacco market.

17 The object of the first cartel, which involved the processors and Deltafina, was to fix each year, over the period from 1996 to 2001, the (maximum) average delivery price for each variety and grade of raw tobacco and to share out the quantities of each variety of raw tobacco that each of the processors could purchase from the producers (see, in particular, recitals 74 to 76 and 276 of the contested decision). Between 1999 and 2001, the processors and Deltafina also agreed among themselves price brackets per quality grade for each raw tobacco variety mentioned in the schedules annexed to the 'cultivation contracts', as well as 'additional conditions', namely the average minimum price per producer and the average minimum price per producer group (see, in particular, recitals 77 to 83 and 276 of the contested decision).

18 The cartel described at paragraph 17 will be referred to in this judgment as 'the processors' cartel'.

19 The second cartel identified in the contested decision involved the three agricultural unions in Spain — the Asociación agraria de jóvenes agricultores ('the ASAJA'), the Unión de pequeños agricultores ('the UPA') and the Coordinadora de organizaciones de agricultores y ganaderos ('the COAG') — as well as the Confederación de cooperativas agrarias de España ('the CCAE'). The object of that cartel was to fix each year, over the period from 1996 to 2001, the price brackets per quality grade for each raw tobacco variety mentioned in the schedules annexed to the 'cultivation contracts', as well as the 'additional conditions' applicable (see, in particular, recitals 77 to 83 and 277 of the contested decision).

20 The cartel described at paragraph 19 will be referred to in this judgment as 'the cartel of the producers' representatives'.

21 In the contested decision, the Commission found that each of those cartels constituted a single and continuous infringement of Article 81(1) EC (see, in particular, recitals 275 to 277 of the contested decision).

22 In Article 1 of the contested decision, the Commission attributed liability for the processors' cartel to the processors, to Deltafina, to the applicant and to the parent companies of WWTE, namely Standard Commercial Corp. ('SCC'), Standard Commercial Tobacco Co., Inc. ('SCTC') and Trans-Continental Leaf Tobacco Corp. Ltd ('TCLT'), and liability for the cartel of the producers' representatives to the ASAJA, the UPA, the COAG and the CCAE (collectively, 'the producers' representatives')

23 In Article 2 of the contested decision, the Commission ordered those undertakings and the producers' representatives to bring immediately to an end the infringements referred to in Article 1, if they had not already done so, and to refrain from repeating any restrictive practice having the same or a similar object or effect.

24 In Article 3 of the contested decision, the Commission imposed fines on those undertakings and on the producers' representatives, and held the applicant jointly and severally liable for payment of the fine imposed on Agroexpansión, and SCC, SCTC and TCLT for payment of the fine imposed on WWTE (see paragraphs 61 and 62 below).

3. *Addressees of the contested decision*

25 Section 2.4 of the contested decision deals with the question of the addressees (recitals 357 to 400 of the contested decision).

26 First of all, the Commission stated in that section that it had been shown that the processors and Deltafina had participated directly in the processors' cartel and the producers' representatives in the cartel of the producers' representatives and, accordingly, each of those undertakings and associations '[was] required to assume responsibility for the infringement, and [the contested decision] [was], therefore, addressed to each of them' (recitals 357 and 358 of the contested decision). In recitals 359 to 369 of that decision, the Commission specifically assessed Deltafina's role in the processors' cartel.

27 The Commission then examined the question of attributing the unlawful conduct of a subsidiary to a parent company, and observed that, here, that question arose in three cases, namely that of Agroexpansión, WWTE and Taes (recitals 370 to 400 of the contested decision).

28 In that respect, in the first place, the Commission recalled the principles which in its view are applicable in this area (recitals 371 to 374 of the contested decision).

29 In particular, it stated as follows:

— in order to determine whether a parent company is to be regarded as liable for the unlawful conduct of its subsidiary, it needs to be established that the subsidiary 'does not decide independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by the parent company' (Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraphs 132 and 133);

— according to settled case-law, where the subsidiary is wholly owned by the parent company, it can legitimately be assumed that the parent company in fact exercises decisive influence over its subsidiary's conduct (Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraph 50; Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 29; Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* ('*PVC II*') [1999] ECR II-931, paragraphs 961 and 984);

— such an assumption can be confirmed by 'specific factors arising in individual cases';

— in the case of subsidiaries which are not wholly owned, the Court of Justice has ruled that a parent company can influence its subsidiary's policy if it holds the majority of the capital of that subsidiary at the time when the infringement is committed (*Imperial Chemical Industries* v *Commission*, paragraph 136) or where it is 'constantly' informed about the subsidiary's practices and directly determines its conduct (*AEG-Telefunken* v *Commission*, paragraph 52);

— according to settled case-law, the term 'undertaking' must be understood in competition law as designating an economic unit for the purposes of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal (Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 66, referring to Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11).

30 In the second place, before considering in greater detail the case of Agroexpansión and that of WWTE, in recital 375 of the contested decision the Commission stated as follows:

'In the present case, three of the four Spanish processors of raw tobacco are controlled (to the extent of 100 % or 90 %) by US multinationals. There are other factual elements that confirm the presumption that the conduct of Agroexpansión and WWTE has to be ascribed to their respective parent companies. In these cases, the two companies — the parent company and the subsidiary — must be regarded as being jointly responsible for the infringements established in [the contested d]ecision.'

31 In recital 376 of the contested decision, the Commission went on to state:

'On the other hand, following the issuing of the Statement of Objections and the hearing of the parties, it has become apparent that the evidence in the file could not warrant a similar conclusion in respect of Universal['s] … and Universal Leaf [Tobacco Co. Inc.'s] shareholdings in Taes and Deltafina. In fact, apart from the corporate link between the parents and their subsidiaries, there is no indication in the file of any material involvement of Universal … and Universal Leaf in the facts which are being considered in [the contested d]ecision. It would therefore not be appropriate

to address them a decision in this case. The same conclusion would apply, *a fortiori*, to Intabex in so far as its 100 % shareholding in Agroexpansión was purely financial.'

32 In recitals 377 to 386 of the contested decision, the Commission considered the case of Agroexpansión and of the Dimon group.

33 The Commission observed inter alia that, from the second half of 1997, Agroexpansión was wholly controlled by the applicant through the latter's wholly-owned subsidiary, Intabex (recital 377 of the contested decision). The Commission concluded from this that it could legitimately be assumed that, at least from that date, the applicant exercised decisive influence over the conduct of Agroexpansión (recital 378, first sentence, of the contested decision). The Commission added that other facts in its file — described in recital 379 of the contested decision — confirmed the 'presumption [that the applicant] was in a position to exert decisive influence' (recital 378, second sentence, of the contested decision). In recital 380 of the contested decision, the Commission stated that it could be seen from the above that '[the applicant] was informed of its subsidiary's practices that are the subject-matter of this Decision and of the circumstances in which they were carried out and that, since [the applicant] held all of its subsidiary's capital after 1997, it was in a position to exert influence over its subsidiary's conduct'. In recital 382 of that decision, the Commission stated that '[t]he specific facts which Agroexpansión brought to the attention of [the applicant] in their correspondence should have caused Dimon, either [to react immediately, doing what was necessary to distance itself] from any possible infringement of competition rules or by [requiring] Agroexpansión's management to put an end to any potentially anticompetitive behaviour', before noting that 'no such course of action was eventually pursued by [the applicant]'.

34 Moreover, in recital 381 of the contested decision, the Commission rejected the arguments that the applicant had put forward in its reply to the statement of objections in order to demonstrate that Agroexpansión conducted itself independently on the market.

35 Lastly, the Commission rejected the applicant's claim that the Commission had breached the principle of non-discrimination by holding the applicant liable for the unlawful conduct of its subsidiary, whereas the Commission had not done the same in the case of Cetarsa's parent company, namely Sociedad estatal de participaciones industriales ('Sepi'). As justification for that difference in treatment, the Commission relied on the fact that, contrary to the assertions made by the applicant, '[the Commission's] file [did] not contain any direct communication between Cetarsa and Sepi in relation to the subject-matter of this case'; that 'the interest of Sepi in Cetarsa appear[ed] to be eminently financial, not unlike the link between Intabex and Agroexpansión'; that 'Cetarsa (unlike Agroexpansión) concentrate[d] within itself all the tobacco processing business of the Sepi group and, for the same reason, appear[ed] to be operated as a separate business'; and, lastly, that 'Cetarsa [was] not fully owned by Sepi' (recital 384 of the contested decision).

36 The Commission concluded from those various factors that the applicant '[had to] be held jointly responsible together with Agroexpansión for the latter's conduct as established by [the contested decision] for the period from the second half of 1997 until 10 August 2001' (recital 386 of the contested decision).

37 In recitals 387 to 400 of the contested decision the Commission considered the case of WWTE. It found that from 1995 until May 1998, WWTE was jointly controlled by SCC (through SCTC and TCLT) and by the chairman of WWTE and his family, and set out a number of particulars from its file which, it claimed, show that, during the same period, SCC 'and/or its subsidiaries' had exercised effective influence over the conduct of WWTE in Spain (recital 391 of the contested decision). With regard to the period from May 1998 until the date of the contested decision, the Commission relied on a number of factors which, it claimed, demonstrated that, either directly

or through SCTC and TCLT, SCC had exclusive control of WWTE and exercised decisive influence over its commercial policy. The Commission added that '[t]he arguments which SCC has deployed in its reply to the Statement of Objections [did] not warrant any different conclusion in this respect' (recital 399 of the contested decision). In the light of those various factors, the Commission found that, at least since 1996, 'SCC and/or its subsidiaries SCTC and TCLT' exercised decisive influence over WWTE's commercial policy and that therefore they had to be held jointly and severally liable for WWTE's practices and be included among the addressees of the contested decision (recital 400 of the contested decision).

4. *Determination of the amount of the fines*

38 In recitals 404 to 458 of the contested decision the Commission examined the question of the fines to be imposed on the addressees thereof.

39 The amounts of the fines were fixed by the Commission in accordance with the gravity and duration of the infringements at issue, those being the two criteria explicitly mentioned in Article 23(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) and Article 15(2) of Regulation No 17, which, according to the contested decision, was applicable at the time of those infringements (recitals 404 and 405 of the contested decision).

40 In fixing the amount of the fine imposed on each of the addressees, the Commission applied the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9,

p. 3; 'the Guidelines'), without expressly referring to them. In the contested decision, the Commission also assessed whether, and to what extent, the addressees met the requirements laid down in the Leniency Notice.

Starting amount of the fines

41 First of all, in recital 414 of the contested decision, the Commission characterised the infringements as 'very serious', having examined, in recitals 408 to 413 thereof, their nature, their actual impact on the market, the size of the relevant geographic market and the size of the relevant product market.

42 Next, in recital 415 of the contested decision, the Commission took the view that 'the specific weight of each of the undertakings involved and the real effect of its unlawful behaviour' should be 'considered so that the deterrent effect of the fine imposed on each undertaking can be proportionate to its contribution to the illegal conduct to be sanctioned'.

43 The Commission distinguished between the processors' cartel (recitals 416 to 424 of the contested decision) and that of the producers' representatives (recitals 425 to 431 of the contested decision).

44 As regards the processors' cartel, the Commission considered, in the first place, that 'fines should be scaled down in consideration of their contribution to the illegal conduct and the market position enjoyed by each party involved' (recital 416 of the contested decision).

45 In this respect, the Commission stated that 'Deltafina should receive the highest starting amount for its prominent market position as main purchaser of Spanish processed tobacco' (recital 417 of the contested decision).

46 With regard to the Spanish processors, the Commission considered that their 'contribution' to the illegal conduct '[could] be broadly taken as having been similar' (recital 418 of the contested decision). The Commission considered, however, that their respective different sizes and market shares should be taken into account and, on that basis, divided them into three categories.

47 Thus, the Commission placed Cetarsa in the first category, described as a category 'of its own', on the ground that it was 'by far the leading Spanish first processor' and should, therefore, receive the highest starting amount (recital 419 of the contested decision). It placed Agroexpansión and WWTE in the second category, pointing out that each had a market share of approximately 15 % and should receive the same starting amount (recital 420 of the contested decision). Lastly, Taes was placed in the third category, on the ground that it had a market share of only 1.6 % and should therefore receive the lowest starting amount (recital 421 of the contested decision).

48 In the second place, in order to ensure that the fine had sufficient deterrent effect, the Commission considered that it was appropriate to apply a multiplier of 1.5 — an increase of 50 % — to the starting amount determined for WWTE and a multiplier of 2 — an increase of 100 % — to the starting amount for Agroexpansión (recital 423 of the contested decision). The Commission considered that it was appropriate to take account of the fact that, despite their relatively small market share on the Spanish raw tobacco purchasing market, these two processors belonged to multinational groups of considerable economic and financial strength, and that, 'moreover', they had operated 'under the decisive influence of their respective parent companies' (recital 422 of the contested decision).

49 In the light of those various factors, in recital 424 of the contested decision, the Commission set the starting amounts of the fines for the processors and Deltafina as follows:

— Deltafina: EUR 8 000 000;

— Cetarsa: EUR 8 000 000;

— Agroexpansión: EUR 1 800 000 x 2 = EUR 3 600 000;

— WWTE: EUR 1 800 000 x 1.5 = EUR 2 700 000;

— Taes: EUR 200 000

50 As regards the cartel of the producers' representatives, the Commission considered that it was appropriate to impose on each of them only a symbolic fine of EUR 1 000 (recitals 425 and 430 of the contested decision). It justified its position by reference to the fact that 'the legal framework surrounding the collective negotiation of standard agreements could engender a considerable degree of uncertainty as to the legality of the producer representatives['] and processors' conduct in the specific context of their collective negotiation of standard agreements' (recital 428 of the contested decision), relying on certain elements mentioned in recital 427 of the contested decision. It also observed that 'the existence and the results of the negotiations on standard contracts were generally well in the public domain and … no authority [had] ever questioned their compatibility with either Community or Spanish law before these proceedings started' (recital 429 of the contested decision).

Basic amount of the fines

51 In recitals 432 and 433 of the contested decision, the Commission examined the question of the duration of the infringement of which the processors and Deltafina were accused. It set that duration at five years and four months, which amounted to an infringement of long duration. Therefore the Commission increased the starting amount of the fine imposed on each of the processors and on Deltafina by 50 %.

52 Accordingly, the basic amounts of the fines were set as follows:

— Deltafina: EUR 12 000 000;

— Cetarsa: EUR 12 000 000;

— Agroexpansión: EUR 5 400 000;

— WWTE: EUR 4 050 000;

— Taes: EUR 300 000;

— the ASAJA: EUR 1 000;

— the UPA: EUR 1 000;

— the COAG: EUR 1 000;

— the CCAE: EUR 1 000 (recital 434 of the contested decision).

Aggravating and attenuating circumstances

53 The basic amount of the fine imposed on Deltafina was increased by 50 % for aggravating circumstances, on the ground that that undertaking was the leader of the processors' cartel (recitals 435 and 436 of the contested decision).

54 In respect of attenuating circumstances, the Commission observed, in recital 437 of the contested decision, that '[t]he same factors considered under recitals 427 to 429 [of the contested decision could] apply to the processors' conduct only in respect of their public negotiation and conclusion of standard contracts (including negotiations on price brackets and additional conditions) with producers' representatives'.

55 In recital 438 of the contested decision, the Commission added that, as regards the 'secret' agreements on (maximum) average delivery prices and shareout of quantities of each variety of raw tobacco concluded by the processors, their conduct had '[gone]

significantly beyond the scope of the relevant legal framework and the scope of public negotiations and agreements with producer representatives'. However, it acknowledged that 'the public negotiations between producer representatives and processors [had] determined, at least to some extent, the material framework (especially in terms of opportunities to negotiate between themselves and adopt a common position) within which processors [had been able to] develop, aside from the common position they would take in the context of public negotiations, their secret strategy on (maximum) average delivery prices and quantities'.

56 In the light of the factors referred to in paragraphs 54 and 55 above, the Commission decided to reduce by 40 % the basic amount of the fines imposed on the processors and Deltafina (recital 438 of the contested decision). The basic amount of the fine imposed on the applicant was thus set at EUR 3 240 000 (recital 439 of the contested decision).

Maximum limit of the fine laid down in Article 23(2) of Regulation No 1/2003

57 In recitals 440 to 447 of the contested decision, the Commission examined whether it was appropriate to adjust the resulting basic amounts for the various addressees so that they did not exceed the 10 % limit of turnover laid down in Article 23(2) of Regulation No 1/2003.

58 In recital 441 of the contested decision, the Commission stated that, where the companies involved belong to a group and it was established that the parent companies exercised decisive influence over them and that, consequently, those parent companies are jointly and severally liable for payment of the fines imposed on the subsidiary, the

worldwide turnover of the group must be taken into account in order to determine the maximum limit referred to above.

59 Having reiterated, in recital 442 of the contested decision, that the applicant was jointly and severally liable for payment of the fine imposed on Agroexpansión, the Commission found, in recital 446 of that decision, that the amount of that fine should not be adjusted, given that the applicant's consolidated turnover amounted to USD 1 271 700 000 in 2003. The amount of Agroexpansión's fine prior to application of the Leniency Notice was therefore set at EUR 3 240 000 (recital 447 of the contested decision).

Application of the Leniency Notice and final amount of the fines

60 In recitals 448 to 456 of the contested decision, the Commission dealt with the application of the Leniency Notice in the case of the processors and Deltafina. It reduced the fine of Agroexpansión by 20 % in accordance with the first indent of Section D(2) of the Leniency Notice (recital 454 of the contested decision).

61 In accordance with Article 23(2) of Regulation No 1/2003, the Commission set the amounts of the fines as follows:

— Deltafina: EUR 11 880 000;

— Cetarsa: EUR 3 631 500;

— Agroexpansión: EUR 2 592 000;

— WWTE: EUR 1 822 500;

— Taes: EUR 108 000;

— the ASAJA: EUR 1 000;

— the UPA: EUR 1 000;

— the COAG: EUR 1 000;

— the CCAE: EUR 1 000 (recital 458 of the contested decision).

62 The applicant was held jointly and severally liable for payment of the fine imposed on Agroexpansión, and SCC, SCTC and TCLT jointly and severally liable for payment of the fine imposed on WWTE (recital 458 and Article 3 of the contested decision).

Procedure and forms of order sought

63 On 21 January 2005, SCC, SCTC and TCLT brought an action for annulment of the contested decision (Case T-24/05) and WWTE brought an action for a reduction in the fine imposed on it by that decision (Case T-37/05).

64 On 22 January 2005, Agroexpansión also brought an action for a reduction in the fine imposed on it by the contested decision (Case T-38/05).

65 By application lodged at the Registry of the Court on 28 January 2005, the applicant brought the present action.

66 By letter lodged at the Registry of the Court on 1 August 2005, the applicant applied for the present case to be joined with Cases T-24/05, T-37/05 and T-38/05.

67 By letter lodged at the Registry of the Court on 7 September 2005, the Commission informed the Court that it considered that joinder of the four cases would not enable the procedure to be significantly more effective and that it would leave it to the Court to decide whether it was appropriate to grant the application for joinder.

68 The Court did not grant the application for joinder.

69 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of its Rules of Procedure, requested the Commission to reply to certain questions. The Commission complied with the request within the prescribed period.

70 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 17 June 2009.

71 The applicant claims that the Court should:

— annul Articles 1, 3 and 5 of the contested decision in so far as they refer to it;

— in the alternative, reduce the amount of the fine imposed by the Commission on Agroexpansión and, on a joint and several basis, on the applicant;

— order the Commission to pay the costs.

72 The Commission contends that the Court should:

— dismiss the application, except for the third plea, which should be partially upheld;

— order the applicant to bear its own costs and a proportion of the costs of the Commission or, in the alternative, order each party to bear its own costs.

Law

73 In the application, the applicant puts forward four pleas in support of the action, alleging:

— first, an infringement of Article 81(1) EC, Article 23(2) of Regulation No 1/2003 and the principle of proportionality;

— second, a breach of the principles of proportionality and personal liability;

— third, a breach of the principles of proportionality and personal liability, and of Article 23(2) of Regulation No 1/2003;

— fourth, an infringement of the principle of the protection of legitimate expectations.

74 At the hearing, the applicant put forward an additional plea, alleging infringement of the obligation to state reasons.

75 The first, second and fifth pleas are essentially relied on in support of the claim for partial annulment of the contested decision. The third and fourth pleas are relied on in support of the claim for alteration of that decision.

76 The fifth plea will be examined after the first plea, and the third plea will be examined after the fourth plea.

1. *First plea in law: infringement of Article 81(1) EC and of Article 23(2) of Regulation No 1/2003 and of the principle of proportionality*

Arguments of the parties

77 The applicant submits that the Commission manifestly erred in finding that it exercised a decisive influence over Agroexpansión during the period of the infringement and in finding it therefore jointly and severally liable for the infringement. Accordingly, in the applicant's submission, the Commission was not entitled, first, to address the contested decision to it and, second, to rely on its overall turnover when applying the upper limit of 10 % of turnover laid down in Article 23(2) of Regulation No 1/2003.

78 In support of its submissions, in the first place, the applicant submits that it is clear from the case-law and past decisions of the Commission that the mere fact that a parent company owns the entire share capital of its subsidiary is not sufficient to attribute liability to it for the unlawful conduct of that subsidiary. It must also be demonstrated that that parent company participated directly in the unlawful practices in question, is responsible for implementing them, attended cartel meetings or was directly involved in the infringement, for example, by giving instructions to its subsidiary to commit the infringement. The applicant relies in particular on paragraphs 28 and 29 of *Stora Kopparbergs Bergslags* v *Commission*, paragraph 29 above.

79 In the second place, the applicant claims that the matters put forward by the Commission in recital 379 of the contested decision do not demonstrate that it exercised decisive influence over Agroexpansión's conduct. In particular, it disputes the Commission's claim that it was informed of the unlawful practices in question.

80 In this respect, first, the applicant denies having received the 'activity reports' and 'field reports' mentioned in that recital. It states that although those reports were systematically translated into English, this was to facilitate the management duties of one of the members of Agroexpansión's board of directors., Mr T., who did not speak Spanish. It disputes the assertion that Mr T. was appointed a director of Agroexpansión's board in order to represent the interests of the Dimon group on that board, and states that he was actually temporarily suspended from all his duties in the Dimon group as a result of an action brought by the applicant against the former shareholders of Intabex.

81 Second, the applicant refutes the claim, in the same recital, that there are numerous examples of letters from Agroexpansión to the applicant informing it of the unlawful practices in question. In particular, the fax of 14 December 1998 from Mr B., the managing director of Agroexpansión, was addressed not to the applicant but to Mr D., an 'employee of the finance department of Dimon International, Inc', and contains only information on a contract between Agroexpansión and Deltafina concerning the sale of processed tobacco. As regards the email of 30 October 2000 from Mr B. to Mr S., its main purpose was to inform Mr S. of the risk of a strike by the tobacco producers. Moreover, according to the applicant, Mr S. was employed not by the applicant but by Dimon International Services. Furthermore, he was responsible for the coordination of sales of processed tobacco in Europe and was not a board member or an officer of any company belonging to the Dimon group. The same considerations apply to the email of 9 May 2001 from Mr B. to Mr S.

82 Third, as regards the other letters mentioned in recital 379 of the contested decision, the applicant submits that none of them referred directly or indirectly to the unlawful practices in question or to Agroexpansión's policy for purchasing raw tobacco in Spain.

83 In the third place, the applicant claims that Agroexpansión has always acted as an autonomous legal entity on the Spanish raw tobacco purchasing market and determined its own commercial policy itself.

84 In support of that claim, the applicant, having recalled that Agroexpansión had a 'local management', relies on the following factors:

— on 18 November 1997, when the applicant acquired all the shares of Agroexpansión through Intabex, it was decided that the managers of Agroexpansión would be retained in their existing positions, and in particular its founding shareholder and managing director (until December 2004), Mr B.;

— in accordance with a 'management agreement' concluded on the same date between Agroexpansión and Mr B. ('the management agreement'), only Mr B. could conclude contracts for the purchase of raw tobacco and formulate and implement Agroexpansión's raw tobacco purchasing policy;

— Mr B's decisions concerning the purchase of raw tobacco were not subject to prior approval or subsequent ratification by Agroexpansión's board of directors;

— Mr B. is the only member of Agroexpansión's board to have attended the meetings with the other processors or producers of raw tobacco;

— none of the four board members of Agroexpansión was simultaneously a member of the applicant's board or management bodies;

— the applicant gave no orders or instructions to Agroexpansión in connection with those meetings or with Agroexpansión's purchasing policy;

— the applicant never put in place any machinery for controlling Agroexpansión's purchasing activities;

85 The Commission contends that the first plea should be rejected.

86 In the first place, the Commission states that it is clear from the case-law and the Commission's past decisions, that, where a parent company holds all the shares of its subsidiary, it may be presumed that it in fact exercises decisive influence over the subsidiary's commercial conduct and, therefore, that it may be held liable for the infringement by the subsidiary. The Commission is not therefore obliged to adduce additional evidence. The Commission states that the parent company can rebut that presumption by adducing sufficient evidence demonstrating that its subsidiary in fact acts independently on the market.

87 In the second place, the Commission does not accept that in the present case the applicant showed that it acted independently on the market. The Commission submits that the fact that Agroexpansión has a dedicated local management is not in itself sufficient to establish that that local management acted independently, and observes that the management agreement provides that Mr B. was to be subject to the 'methods' and 'procedures' laid down by Agroexpansión's board.

88 In the third place, the Commission submits that documents in its file confirm that the applicant did, in fact, exercise decisive influence over Agroexpansión's conduct. It claims, inter alia, that Mr T. was appointed to Agroexpansión's board of directors in order to represent the interests of the Dimon group on that board, and that it is not credible, in view of the importance of his tasks within that group, that he never informed the applicant of the 'activity reports' and 'field reports' mentioned in recital 379 of the contested decision. The Commission adds that, apart from those reports, it is apparent from various letters referred to in that recital that the applicant was kept informed by Agroexpansión of the unlawful practices in question. Lastly, other documents, mentioned in the same recital, clearly show that the applicant exercised decisive influence over certain key commercial activities of Agroexpansión, such as the negotiation and implementation of contracts with Cetarsa and Deltafina, and that it was informed by its subsidiary of the conditions of purchase and regulatory framework in the raw tobacco sector in Spain.

Findings of the Court

89 It should be observed that competition law refers to the activities of 'undertakings' (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 59) and that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 112).

90 The case-law has also made clear that, in the same context, the concept of an undertaking must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (Case C-217/05 *Confederación*

Española de Empresarios de Estaciones de Servicio [2006] ECR I-11987, paragraph 40, and Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 85).

91 Where such an economic entity infringes the rules of competition, it falls to that entity, in accordance with the principle of personal responsibility, to answer for that infringement (see, to that effect, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 145; Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78; and Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 39).

92 As regards the question whether, in those circumstances, a legal person who is not the perpetrator of the infringement may none the less be penalised, it is clear from settled case-law that the conduct of a subsidiary may be attributed to the parent company in particular where that subsidiary, despite having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (*Imperial Chemical Industries* v *Commission*, paragraph 29 above, paragraphs 132 and 133; Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 44; and Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 15), regard being had in particular to the economic, organisational and legal links between those two legal entities (see, by analogy, *Dansk Rørindustri and Others* v *Commission*, paragraph 89 above, paragraph 117, and *ETI and Others*, paragraph 91 above, paragraph 49).

93 In such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law mentioned in paragraphs 89 and 90 above. Consequently, it is not because of a relationship between the parent company and its subsidiary in instigating the infringement or, *a fortiori*, because the parent company is involved in the infringement, but because they constitute a single undertaking for the purposes of Article 81 EC that the

Commission is able to address a decision imposing fines to the parent company (Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraph 58).

94 It is also apparent from the case-law that the Commission cannot merely find that the parent company is in a position to exercise decisive influence over the conduct of its subsidiary, but must also check whether that influence was actually exercised (see, to that effect, *Imperial Chemical Industries* v *Commission*, paragraph 29 above, paragraph 137, and *AEG-Telefunken* v *Commission*, paragraph 29 above, paragraph 50).

95 In the specific case where a parent company has a 100 % shareholding in a subsidiary which has infringed the competition rules, the parent company is able to exercise decisive influence over the conduct of the subsidiary (see, to that effect, *Imperial Chemical Industries* v *Commission*, paragraph 29 above, paragraphs 136 and 137) and there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary (see, to that effect, *AEG-Telefunken* v *Commission*, paragraph 29 above, paragraph 50, and *PVC II*, paragraph 29 above, paragraphs 961 and 984).

96 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to avail itself of the presumption that the parent exercises decisive influence over the commercial policy of the subsidiary. The Commission will then be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see, to that effect, *Stora Kopparbergs Bergslags* v *Commission*, paragraph 29 above, paragraph 29).

97 While it is true that at paragraphs 28 and 29 of *Stora Kopparbergs Bergslags* v *Commission*, paragraph 29 above, the Court of Justice referred not only to the fact that the parent company owned 100 % of the capital of the subsidiary but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the General Court had based its reasoning, and not to make the application of the presumption referred to in paragraph 95 above subject to the production of additional indicia relating to the actual exercise of influence by the parent company (Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 57).

98 Lastly, it should be made clear that the presumption arising from 100 % ownership of the capital can apply not only in cases where there is a direct relationship between the parent company and its subsidiary, but also in cases such as the present one, where that relationship is indirect, through an intermediate subsidiary.

99 Furthermore, it must be borne in mind that, according to Article 23(2) of Regulation No 1/2003, the Commission may by decision impose on undertakings which have infringed Article 81(1) EC fines which may not exceed 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement. The same provision was to be found in Article 15(2) of Regulation No 17.

100 According to settled case-law relating to Article 15(2) of Regulation No 17, the turnover referred to in those provisions concerns the overall turnover of the undertaking concerned (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 119; Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 367, and Joined Cases T-67/00, T-68/00, T-71/00

and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 533). That undertaking is the undertaking to which the infringement was attributed and which was therefore declared responsible (Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 181, and Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 116).

101 The concept of 'preceding business year' set out in Article 23(2) of Regulation No 1/2003 must be understood as referring to the business year preceding the adoption of the Commission decision, except in specific situations where the turnover of that last business year does not provide any useful indication as to the actual economic situation of the undertaking concerned and the appropriate level of fine to impose on that undertaking (see, to that effect, Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraphs 25, 29 and 30), which is not the case here.

102 It follows that the question which arises in this plea is whether the Commission was justified in finding that, in the present case, the undertaking concerned consisted of Agroexpansión and the company at the head of the group to which that company belonged, namely the applicant. If the answer to that question is in the affirmative, it leads to the conclusion, in the light of the principles recalled in paragraphs 99 to 101 above, that the Commission was right, in recitals 442 and 446 of the contested decision, to take account of the applicant's consolidated turnover in 2003 when applying the 10 % limit of turnover referred to above.

103 For the purposes of examining that question, first of all it is necessary to determine what tests the Commission applied in the contested decision in order to attribute liability to a parent company for the infringement on the part of its subsidiary, and whether they are consistent with the principles laid down in this area by the case-law and, then, to ascertain whether the Commission correctly applied those tests in concluding that Agroexpansión and the applicant constituted a single economic unit.

The tests used by the Commission in the contested decision in order to attribute liability to a parent company for the infringement on the part of its subsidiary

104 It is apparent from the contested decision that, in order to attribute liability to a parent company for the infringement on the part of its subsidiary and, accordingly, to include the parent company, along with the subsidiary, among the addressees of that decision and to declare it jointly and severally liable for payment of the fine imposed on that subsidiary, the Commission adopted the following reasoning.

105 The Commission took as its starting point the premiss that such attribution is possible where the parent company and its subsidiary form a single economic unit and, as a consequence, constitute a single undertaking for the purposes of Article 81 EC (see recital 374 of the contested decision).

106 The central feature on which the Commission relied in order to establish that the parent company and its subsidiary are in such a situation is the subsidiary's lack of independence in deciding upon its own conduct on the market (see recital 371 of the contested decision), since that lack of independence is the corollary of the exercise by the parent company of 'decisive influence' over the conduct of the subsidiary (see recitals 18, 372, 373, 378, 380, 381, 383, 391, 392, 397, 399, 400, 422 and 441 of the contested decision).

107 In this respect, the Commission considered that it was not sufficient merely to find that the parent company was able to exercise decisive influence over the conduct of its subsidiary: it also had to be shown that such influence had in fact been exercised (see, inter alia, recitals 18, 376, 384, 391, 392, 397, 399 and 400 of the contested decision).

108 Thus, in particular, it is apparent from recital 384 of the contested decision that, although the Commission considered that it was not appropriate to attribute liability to Sepi for the infringement committed by Cetarsa, despite the fact that it held nearly 80 % of Cetarsa's capital, that was because there was no firm evidence in its file that Cetarsa did not decide independently upon its own conduct on the market.

109 Similarly, it is apparent from recital 18 of the contested decision that the reason that the Commission did not hold Universal or Universal Leaf, its wholly-owned subsidiary, liable for the unlawful conduct of Taes, in which Universal Leaf held a 90 % stake, is that the Commission did not have enough evidence that those companies did in fact exercise decisive influence over Taes.

110 The Commission sought to apply those same principles in the case of WWTE's parent companies in respect of the period before May 1998. Thus, initially, the Commission sought to show that those parent companies, together with WWTE's chairman and two members of his family, had joint control of WWTE, thereby suggesting that those parent companies were in a position to exercise decisive influence over the conduct of that company (see recitals 388 to 391 of the contested decision). Relying on a number of factors set out in recital 391 of the contested decision, the Commission then endeavoured to establish that those parent companies in fact exercised such influence over WWTE's conduct (see recitals 391, 392 and 400 of the contested decision).

111 Moreover, the Commission observed that, in the particular case where a subsidiary is wholly owned by the parent company, it can be assumed, according to the case-law, that the parent company in fact exercises decisive influence over its subsidiary's conduct (see recital 372 of the contested decision).

112 However, in the present case, in order to attribute liability for the infringement on the part of subsidiaries to the parent companies, which found themselves in such a situation, the Commission chose not to rely on that presumption alone, but also to base its findings on evidence designed to establish that those parent companies in fact exercised decisive influence over their subsidiary and, accordingly, to support that presumption (see, inter alia, recitals 372, 375, 376 and 378 of the contested decision).

113 Thus, recital 18 of the contested decision makes it expressly clear that, although the Commission did not hold Deltafina's ultimate and intermediate parent companies — Universal and Universal Leaf — liable for the unlawful conduct of their subsidiary, despite the fact that they controlled Deltafina 100 %, the reason was that the Commission did not have enough evidence that those companies in fact exercised decisive influence over that subsidiary. Recital 376 of the contested decision should also be understood in this way, even if it is drafted somewhat ambiguously. In particular, whilst it is true that the Commission states in that recital that there is 'no indication' in its file 'of any material involvement of Universal … and Universal Leaf in the facts which are being considered in [the contested decision]', when read together with recital 18 of the decision and in the context of that decision, that statement cannot be interpreted as meaning that the reason that the Commission did not hold those two parent companies — or any other parent company — liable was their lack of involvement in the infringement.

114 Likewise, recital 18 of the contested decision expressly makes it clear that the reason that the Commission did not hold Intabex liable for the unlawful conduct of Agroexpansión, even though it controlled Agroexpansión 100 %, is that there was not sufficient evidence that Intabex had in fact exercised decisive influence over Agroexpansión, its involvement in the latter being purely financial (see also recital 376 of the contested decision).

115 By contrast, it is precisely because, in the period after May 1998, there was allegedly such evidence in the case of the parent companies of WWTE, together with the fact that those parent companies held all, or (for a few months only) virtually all WWTE's capital, which led the Commission to attribute liability for the infringement to those parent companies (see, inter alia, recitals 375, 393, 396 and 398 of the contested decision).

116 The Commission sought to apply the same method in the applicant's case. Thus, in order to declare the applicant liable for Agroexpansión's unlawful conduct from the second half of 1997, it did not merely rely on the presumption arising from the fact that, from that time, it held all Agroexpansión's capital (see recitals 375, 377 and 378 of the contested decision), but it also took account of certain additional elements which demonstrate that it in fact exercised decisive influence over the conduct of that company (see recitals 375 and 378 to 380 of the contested decision).

117 That can be inferred, in particular, from the second sentence of recital 378 of the contested decision, although it is stated therein that those additional elements confirm that the applicant was 'in a position' to exercise such influence (see paragraph 33 above). It is true that, as the Commission itself acknowledges in its reply to a written question put by the Court, that sentence might have been 'phrased in a clearer manner'. However, when read together with recitals 372 and 377 of the contested decision, and with the first sentence of recital 378 of that decision, it can be understood only in the sense described in paragraph 116 above.

118 Lastly, the Commission examined whether the arguments submitted by the subsidiaries concerned (and/or by their parent companies) contained in their reply to the statement of objections and aimed at establishing that they acted independently on the market could succeed (see, inter alia, recitals 381 and 399 of the contested decision). Thus, the Commission rejected as inconclusive the arguments put forward

by the applicant and observed, in particular, that 'the existence of a dedicated local management running its Spanish subsidiary [did] not rule out the possibility for [the applicant] to exercise decisive influence over the same subsidiary' (recital 381 of the contested decision).

119 It should be pointed out that the Commission adopted the method set out in paragraphs 105 to 107, 111 and 112 above not only with the ultimate parent companies, but also with the intermediate parent companies, as is demonstrated — in respect of those intermediaries — by the cases of Universal Leaf, Intabex, SCTC and TCLT.

120 It should be added that that method — without prejudice to the question as to whether it was correctly applied in the case of the applicant (which will be considered below) — is entirely consistent with the principles laid down in this area by the case-law and re-stated in paragraphs 89 to 98 above.

121 It is true that, this being the specific case where a parent company has a 100 % shareholding in a subsidiary which has infringed the competition rules, the Commission did not rely solely on the presumption affirmed by the case-law (see paragraphs 95 and 96 above) in order to show that the parent company in fact exercised decisive influence over the commercial policy of the subsidiary, but also took into account other factual elements tending to confirm that such influence was actually exercised.

122 However, by proceeding in that manner, the Commission — while observing fully the fundamental concept of 'economic unit' which underlies all the case-law concerning the attribution of liability for infringements to the legal persons which constitute a single undertaking — merely raised the standard of proof required for it to consider that the condition relating to the actual exercise of decisive influence was fulfilled.

123 It should be borne in mind that, where, in a case concerning an infringement involving several different undertakings, the Commission adopts, within the framework laid down by the case-law, a certain method for determining whether it is appropriate to attribute liability both to the subsidiaries which materially committed that infringement and to their parent companies, it must — save in specific circumstances — rely for such determination on the same criteria in the case of all those undertakings. The Commission is bound by the principle of equal treatment, which, according to settled case-law, requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309). Moreover, it is clear that the Commission shares that point of view when, in recital 384 of the contested decision, it states that 'the fact that the specific circumstances which may lead [the Commission] to hold a parent company liable for the behaviour of its subsidiary may vary from one instance to the other cannot as such constitute a breach of the principle of non-discrimination, as long as the principles of liability are consistently applied'.

The existence of a single economic unit between the applicant and Agroexpansión

124 It is appropriate to examine whether the Commission correctly applied the tests set out in paragraphs 105 to 107, 111 and 112 above in order to conclude that Agroexpansión and the applicant constituted a single economic unit from the second half of 1997 and, accordingly, to hold the applicant jointly and severally liable for the infringement and for payment of the fine, and also to include it amongst the addressees of the contested decision.

125 It is not in dispute that, during the period from 18 November 1997 until the date of adoption of the contested decision, the applicant held a 100 % shareholding in Agroexpansión through Intabex. It cannot therefore be contested that, throughout that period, the applicant was in a position to exercise decisive influence over the conduct of Agroexpansión (see paragraph 95 above).

126 It is therefore necessary to ascertain whether, as regards that period, the Commission's contention that a decisive influence was in fact exercised by the applicant is also borne out.

127 In this respect, it must be recalled that, in the contested decision, in the case of the subsidiaries wholly owned by their parent companies, the Commission chose not to rely on the presumption referred to in paragraphs 95, 96 and 111 above in order to attribute to them liability for the infringement committed by those subsidiaries, but also took account of additional evidence demonstrating that decisive influence was in fact exercised (see paragraphs 112 to 117 above).

128 It is therefore appropriate to examine whether the factors relied on by the Commission in the contested decision, together with the fact that Agroexpansión was wholly owned by the applicant, establish to the requisite legal standard that, during the relevant period, the applicant in fact exercised decisive influence over the conduct of Agroexpansión. Those factors are set out in recital 379, and footnotes 303 to 305 of that decision. They essentially concern various reports and letters from Agroexpansión which, according to the Commission, were intended for the applicant.

129 If the answer is in the affirmative, it will be necessary to ascertain whether the applicant's claims, as set out in paragraphs 83 and 84 above, are such as to cast doubt on that conclusion.

— The 'activity reports' and the 'field reports'

130 The Commission relies on a number of 'activity reports' and 'field reports' drawn up by Agroexpansión, and observes inter alia that they frequently referred to the unlawful practices in question. Those reports, 14 in all and covering the period from December 1998 to May 2001, are listed in footnote 303 of the contested decision.

131 First of all, the Court points out that those reports contain detailed information, not only on various aspects of Agroexpansión's commercial activities, such as the raw tobacco buying campaigns (quantities purchased, purchase prices etc.), the quantities of raw tobacco processed and the contracts with Cetarsa for the threshing of a part of its tobacco, regulatory developments in the tobacco sector and on the meetings within Anetab and with the agricultural unions and producer groups, but also — as is made clear in recital 379 of the contested decision — on the unlawful practices in question.

132 Next, it should be noted that it is apparent from the documents in the file that the reports in question were prepared by Mr B. and were addressed to members of Agroexpansión's board.

133 On this last point, it must be pointed out that, on the same day that it acquired a 100 % shareholding in Agroexpansión, the applicant — acting through its wholly-owned subsidiary, Intabex, whose involvement in Agroexpansión was purely financial — replaced three of the four members of Agroexpansión's board, in particular appointing two persons (Mr G. and Mr T.) to that board who were already carrying out other duties within the Dimon group at that time. Thus, at that time, Mr G. was also executive director of Compañia de Filipinas, SA, a subsidiary of Intabex whose headquarters were in Spain and which was active in the production of black tobacco, and Mr T.

was also employed by Dimon International Services and was a board member of that company (until August 1998).

134 In that context, the importance of Mr T.'s functions within the Dimon group should be particularly stressed. Not only was he a member of Agroexpansión's board throughout the period following the applicant's purchase of Agroexpansión, and a board member of Dimon International Services until August 1998, but he also sat on the board of two other companies in the Dimon group, namely Intabex Holding Worldwide, SA (from 1998 to 1999) and LRH Travel Ltd (until November 2000). Moreover, as the applicant stated in its reply to the statement of objections, Mr T. was responsible for 'contribut[ing] to the integration of the Intabex group into the Dimon group'. Additionally, as will be explained in greater detail in paragraph 152 below, it is apparent from several letters in the file that Agroexpansión consulted Mr T. on questions relating to its commercial activities, or sought his agreement prior to adopting certain important decisions. In the light of those factors, the Commission was justified in taking the view that Mr T. acted on behalf of the applicant, head of the Dimon group, and played the role of an intermediary between the applicant and Agroexpansión. Mr T.'s alleged dispute with the applicant, which purportedly led the applicant to relieve him of his duties as a board member of Dimon International Services in August 1998, is not such as to call into question that conclusion. Indeed, after August 1998, Mr T. not only continued to be employed by that company, but also to be a member of the boards of Agroexpansión, Intabex Holding Worldwide and LRH Travel.

135 The elements set out in paragraphs 132 to 134 above show that, through the members that it appointed to the board of Agroexpansión and, in particular, Mr T., the applicant intended to supervise Agroexpansión's activities and ensure that they would develop in accordance with the commercial policy of the Dimon group. Accordingly, even if, formally, the 'activity reports' and 'field reports' in question were sent to those members and not directly to the applicant itself, the Commission was justified in

finding, in recital 380 of the contested decision, that that company was informed of the content of those reports and, in particular, of the unlawful practices in question. That finding is supported by the fact, noted in recital 379 of the contested decision, that those reports were systematically translated from Spanish into English, which is the applicant's working language.

136 Lastly, it must be observed that it is common ground that the applicant, who was indisputably in a position to exercise decisive influence over Agroexpansión's conduct (see paragraphs 95 and 125 above), never raised any objections to the unlawful practices of which it was aware nor did it take any measures aimed at preventing its subsidiary's continuing involvement in the infringement, notwithstanding the risk of legal proceedings or claims for damages from third parties to which it was exposing itself by conducting itself in that manner (see also recital 382 of the contested decision). The Commission could reasonably infer from this that the applicant tacitly approved of that involvement and conclude that such conduct amounted to additional evidence that SCC exercised decisive influence over the conduct of its subsidiary.

— The exchange of correspondence between Agroexpansión and the applicant

137 The Commission also relies on correspondence allegedly exchanged between Agroexpansión and the applicant, and notes that some of it referred to the unlawful practices in question, some of it related to contracts for processing tobacco or selling processed tobacco that the applicant had concluded with Cetarsa and Deltafina, whilst yet more related in more general terms to the buying conditions for raw tobacco and the regulatory framework in Spain.

138 As regards the letters in the first category mentioned in paragraph 137 above, the Commission refers, in recital 379 of the contested decision, by way of example, to recitals 168 and 179 and footnotes 217 and 229 of that decision.

139 In this respect, first of all, it must be stated that those letters do in fact refer to the unlawful practices in question.

140 Thus, contrary to the applicant's claim, the fax of 14 December 1998 from Mr B. to Mr D. (of Dimon International, a subsidiary of the Dimon group established in the United States), mentioned in recital 168 of the contested decision, did not relate exclusively to a contract between Agroexpansión and Deltafina concerning the sale of processed tobacco, but likewise to those practices. That is clear from the third paragraph of that fax, in which Mr B. states as follows:

'As soon as I get the prices [from] the four companies I will let you know although I can [already tell] you that the problems that seemed so serious while you were visiting us in Spain have vanished, as all the companies have been around the agreed [ESP] 87/kg ([ESP] 2/3, more or less), … these prices [being] the official [prices], although we suppose Cetarsa has made some other payments to the growers like ourselves.'

141 It should be pointed out that, contrary to what the applicant suggests, Mr D. was not merely an employee of the finance department of Dimon International, but was also inter alia a member of the applicant's board.

142 Recital 179 of the contested decision refers to a report by Mr B. of 5 May 1998, which was addressed to Mr T., and a copy of which Mr B. had sent the day before by fax to the two other members of the Agroexpansión board. It should be noted that, in

that report, which describes the progress of the 1998 campaign for the purchase of tobacco, it is stated in particular that 'Agroexpansión has made a major contribution to the firms' reaching a number of agreements on avoiding the price war that characterised [the previous] year'; that 'the prices have been negotiated with the unions and the [groups of tobacco producers]'; that, 'for the first time … war between the firms [has been avoided] and each of them has been able to buy the quantities it wished' and that 'the negotiations with [those groups] have been difficult but all the firms maintained their points of view in a serious manner and in a spirit of cooperation'. It is also explained in that report that Agroexpansión and WWTE agreed to buy the same quantities of tobacco as in the previous year and that the processors agreed to pay advances to the producer groups of ESP 35 per kg for the Virginia and ESP 45 per kg for the Burley varieties. Lastly, reference is made to the 'desirability of other agreements between the processors in the future'. In the light of those elements, it cannot be disputed that the report of 5 May 1998 was referring to the unlawful practices in question.

143 The same is true of the email from Mr B. to Mr S. of 30 October 2000, to which footnote 217 of the contested decision refers. In that email, Mr B. starts by recalling that, during a meeting organised within the framework of Anetab, the processors had discussed a price rise sought by the producer groups and unions and unanimously agreed not to accept it. He then goes on to state that, during a meeting held with all those groups and unions, the processors maintained their position and informed them clearly that they did not agree to the rise of 20 % sought.

144 It is stated in the email from Mr B. to Mr S. of 9 May 2001 mentioned in footnote 229 of the contested decision that the processors met at Anetab's headquarters 'to prepare discussions on prices with the growers', and that clearly referred to the fact that the processors were agreeing on the purchase prices of raw tobacco.

145 Next, as in the case of the aforementioned 'activity reports' and 'field reports', the Court considers that the Commission was justified in taking the view, in recital 380 of the contested decision, that the applicant was informed of the content of the documents mentioned in paragraphs 140 to 144 above and, therefore, of the unlawful practices in question, even if, formally, they were not addressed to it.

146 Thus, as regards the report dated 5 May 1998 that Mr B. sent to Mr T. (see paragraph 142 above), it has already been explained in paragraph 134 above that Mr T. acted on behalf of the applicant and played the role of an intermediary between the applicant and Agroexpansión. As regards the fax of 14 December 1998 (see paragraph 140 above), which had been sent to Mr D. of Dimon International, it is sufficient to recall in particular that the latter was a member of the applicant's board.

147 The emails of 30 October 2000 and 9 May 2001 (see paragraphs 143 and 144 above) were sent to Mr S. Contrary to the applicant's contention, Mr S. was not simply an employee of Dimon International Services, but held a high-level position within the Dimon group, so that, as in the case of Mr T., the Commission was entitled to consider that he acted on behalf of the company at the head of that group, namely the applicant. Thus, Agroexpansión stated in its reply to the statement of objections which the applicant attached to the application, that, since 2000, Mr S. 'held a coordinating position for operations in Europe'. In addition, in Agroexpansión's reply of 18 March 2002 to a request for information from the Commission, which the latter forwarded to the Court following a written question put to the Commission by way of measures of organisation of procedure (see paragraph 69 above), Agroexpansión stated that Mr S. carried out the duties of 'Regional Director of the Dimon group in Europe'. Moreover, in the annual financial report for the tax year ending on 30 June 2001 it submitted to the U.S. Securities Exchange Commission, the applicant stated that,

since March 1999, Mr S. had held the position of 'Senior Vice President-Regional Director Europe' with the applicant.

148 Certain information in the email of 9 May 2001 and in Mr S.'s reply to that email further confirms the importance of Mr S.'s role within the Dimon group. Thus, in that email, Mr B. also informed Mr S. of a meeting that he had had with the chairman of Deltafina, on the fringes of the meeting held at Anetab's headquarters, in order to discuss two issues which Mr B. described as 'very important' and indicated to Mr S. that the chairman of Deltafina would call Mr S. as soon as possible to secure agreement on that issue. By email of the same date, Mr S. replied to Mr B. that he had just spoken to the chairman of Deltafina and that they had agreed to meet very soon. Mr S. also advised Mr B. that he agreed to Mr B.'s proposals in relation to the aforementioned issues.

149 Lastly, the Commission could reasonably infer from the lack of any reaction by the applicant to Agroexpansión's involvement in the infringement, despite having been informed of it in the manner set out above, that it tacitly approved of its subsidiary's unlawful conduct, and was entitled to consider that such conduct amounted to additional evidence that the applicant exercised decisive influence over the conduct of its subsidiary (see paragraph 136 above).

150 The correspondence in the second of the categories mentioned in paragraph 137 above is identified in footnote 304 of the contested decision. It essentially consists of faxes or emails between Mr B., on the one hand, and Mr T. or Mr S., on the other hand. For the reasons already set out in paragraphs 134, 147 and 148 above, Mr T. and Mr S. must be regarded as having acted on behalf of the applicant.

151 Some of the correspondence concerns a contract of September 1998 renegotiated in 2001, under the terms of which some of Agroexpansión's tobacco processing operations were subcontracted to Cetarsa. It is clear from that correspondence that that

contract was concluded by Mr B. in the name and on behalf of the applicant, and that the applicant, through Mr T. and Mr S., in fact exercised decisive influence over the negotiations of that contract.

152 Thus, in a fax of 9 September 1998 to Mr T., Mr B., having stated that he had recently had several meetings with Cetarsa to try to settle '[the applicant's] pending issues', expressly requested Mr T.'s agreement on some of the contractual conditions mentioned in the minutes of one of those meetings attached to that fax. It should be noted that, in those minutes, Mr B. is expressly identified as the applicant's representative. Similarly, it should be pointed out that, in a fax of 14 September 1998, Mr B. informs Mr T. that, 'following [Mr T.'s] indications', he met again with Cetarsa and that modifications were made to the agreements to be signed with Cetarsa, in respect of which he sought Mr T.'s agreement. In a fax of 15 September 1998, Mr B. informed Mr T. that he had communicated to Cetarsa the proposed modification that Mr T. had sent to Mr B. the previous day and that Cetarsa had made a counteroffer. Mr B. requested Mr T. to let him know whether that counteroffer should be accepted. Lastly, it should be noted that, in the final version of the agreement concluded with Cetarsa, which Mr B. faxed to Mr T. on 18 September 1998, the applicant is expressly identified as one of the two parties to the agreement and Mr B. as its representative.

153 Similarly, the Court observes that, in an email of 3 April 2001, Mr B. informed Mr S. of the progress of the renegotiation of the contract referred to in paragraph 152 above, expressing the fear that Cetarsa would require the same conditions from the applicant as it had agreed with Mr M., the chairman of Deltafina, in the context of a contract concluded in parallel with Deltafina on behalf of Universal and requesting, therefore, Mr S. to make contact with Mr M. It is apparent from an email of the following day from Mr S. to Mr B. that Mr S. had in fact tried to contact Mr M.

154 Lastly, it must be noted that, in an email of 7 March 2001, Mr B. reports to Mr S. about a meeting that, 'as agreed in Camberley' (the headquarters of Dimon International Services in the United Kingdom), he had the previous day with a Cetarsa representative during which they discussed inter alia certain aspects of the agreement being renegotiated with that representative.

155 Other correspondence in the second of the categories mentioned in paragraph 137 above concerns a contract by which Deltafina was to purchase a large quantity of processed tobacco from Agroexpansión. Thus, in a fax of 14 September 1998, Mr T. asked Mr B. to clarify certain prices and other terms agreed in that contract. By fax of the same date, Mr B. provided those clarifications to Mr T. Similarly, in the fax of 14 December 1998 mentioned in paragraph 140 above, Mr B., in addition to referring to the unlawful practices in question, replied to a question that Mr D. — who was a member of the applicant's board — had put to him regarding the implementation of that contract. Lastly, the email of 9 May 2001 mentioned in paragraphs 144 and 147 above establishes not only that the applicant was informed of those practices, but in addition that it exercised influence over the commercial relations between Agroexpansión and Deltafina.

156 Lastly, as regards the third type of correspondence mentioned in paragraph 137 above, that correspondence is listed in footnote 305 of the contested decision.

157 It consists of emails from Mr B. to Mr S. which, as the Commission states in recital 379 of the contested decision, relate in more general terms to the buying conditions for raw tobacco and the regulatory framework in Spain. That correspondence is relevant in so far as it shows that, through Mr S., the applicant closely followed the situation on the Spanish market.

158 The applicant's argument that the correspondence examined in paragraphs 150 to 157 above has no connection with purchases of raw tobacco is irrelevant. The independence of a subsidiary in relation to its parent company must not be assessed solely by reference to the subsidiary's activity in the area of the products concerned by the infringement. As has already been pointed out in paragraph 92 above, in order to determine whether a subsidiary decides independently upon its own conduct on the market, account must be taken of all the relevant factors relating to the economic, organisational and legal links between the subsidiary and the parent company, which may vary from case to case and which cannot, therefore, be exhaustively listed.

— The arguments adduced by the applicant to show that Agroexpansión acted independently on the market

159 First of all, the Court would point out that the applicant bases a large part of its reasoning on the argument that the decisive influence that a parent company must exercise in order to have liability attributed to it for the infringement committed by its subsidiary must relate to activities which are directly linked to that infringement, in this instance the purchase of raw tobacco. However, for the reasons set out in paragraphs 92 and 158 above, that argument cannot be accepted.

160 Thus, the applicant's claim that it never put in place any machinery for controlling Agroexpansión's raw tobacco purchasing activities cannot suffice to establish that Agroexpansión acted independently on the market. The same is true of its claim that it never gave any orders or instructions to Agroexpansión in connection with Agroexpansión's purchasing policy or the meetings with the other processors or with the producers. Those claims are even less conclusive given that, as is apparent from the documents examined in paragraphs 150 to 155 above, the applicant, through Mr T. or Mr S., actively intervened in other aspects of Agroexpansión's commercial policy,

namely the sub-contracting of certain raw tobacco processing operations and the sale of processed tobacco.

161 Next, the fact that Mr B. and the other managers of Agroexpansión were retained in their existing positions when Agroexpansión was acquired by Intabex does not in itself show that Agroexpansión acted independently on the market. That state of affairs was the result not of an independent decision by Agroexpansión, but of a deliberate choice by the applicant itself, as it stated in its reply to the statement of objections, justifying that choice by its inexperience in the area of the purchase of raw tobacco in Spain, and by the language barrier.

162 Furthermore, whilst it is true that the management agreement confers extensive powers on Mr B. with respect to the management of Agroexpansión and, in particular, to purchases of raw tobacco, the fact remains that it provides expressly in Article 1(1) thereof that Mr B. was required to comply, inter alia, with 'the methods and procedures imposed on him by the Board of Directors [of Agroexpansión]'. Moreover, Article 1(2) of the management agreement obliges Mr B. to 'inform [the Board of Directors] regularly and in detail about the development of the company's activities and [to] prepare and submit on the dates and in the format indicated to him such reports as the Board of Directors might request'. It is therefore clear that, in carrying out his duties, including those relating to purchases of raw tobacco, Mr B. remained subject to the control of Agroexpansión's board and to the instructions that that board might issue to him. Moreover, when questioned on that matter by the Court at the hearing, the applicant expressly acknowledged that, as was the case for any other company in Spain, Agroexpansión's board had the power to reject, amend or annul decisions of its director general. The fact, if proved, that, in practice, that board never did so or laid down 'methods' or 'procedures' such as those referred to above does not alter the fact that, contrary to the applicant's contention, Mr B. did not enjoy

complete freedom of action in the management of the company or even in respect of the company's policy for purchasing raw tobacco. It should be added that the conferring of powers on Mr B. in the management agreement was by no means exceptional and did not make Agroexpansión different from other companies incorporated under Spanish law, contrary to what the applicant would have us believe. Indeed, it is quite common for the board of a company not to concern itself with the day-to-day management activities of the company.

163 In the light of the finding in paragraph 135 above that the applicant supervised Agroexpansión's activities through the members that it appointed to the board of Agroexpansión and in particular Mr T., the arguments based on the management agreement and the powers conferred on Mr B. are unconvincing. More generally, the Court shares the view of the Commission that the fact that Agroexpansión has a dedicated local management does not prove, in itself, that that company decides upon its conduct on the market independently of its parent company. Thus, although, admittedly, Agroexpansión was in such a situation in the present case, the fact remains that it acted under the applicant's supervision and that the applicant even had an active role in certain aspects of its commercial policy (see, inter alia, paragraphs 150 to 155 above).

164 Lastly, as regards the applicant's argument that none of the four board members of Agroexpansión was simultaneously a member of the applicant's board or management bodies, the Court would point out that, although an overlap of executives between a parent company and its subsidiary constitutes evidence of the actual exercise of decisive influence, it cannot be inferred from the absence of such an overlap that that subsidiary acts independently on the market. It should be added that, as was explained in paragraph 133 above, two of the four members of Agroexpansión's board appointed by the applicant when it acquired Agroexpansión through Intabex were already carrying out other important duties within the Dimon group.

165 It follows from all the foregoing that the Commission was entitled to conclude that Agroexpansión and the applicant were a single economic unit from 18 November 1997 and, accordingly, to hold the applicant jointly and severally liable for the infringement and for payment of the fine, and to include it amongst the addressees of the contested decision.

166 In the light of the principles recalled in paragraphs 99 to 101 above, the Court concludes that the Commission was also entitled to rely on the applicant's consolidated turnover in 2003, the year preceding that of the adoption of the contested decision, in order to calculate the upper limit of 10 % laid down in Article 23(2) of Regulation No 1/2003.

167 The first plea in law must therefore be rejected as unfounded.

2. *The fifth plea, alleging infringement of the obligation to state reasons*

Arguments of the parties

168 At the hearing, the applicant put forward a new plea, alleging infringement of the obligation to state reasons. In support of that plea, first of all, it claims that it is not apparent from the contested decision that the elements referred to in recital 379 thereof were intended to support the presumption of actual exercise of decisive influence arising from its 100 % ownership of Agroexpansión's capital. In reality, those elements concern the possibility of exercising such influence. Next, it contends that it is not clear from the contested decision that the Commission considered that the

reports and correspondence sent to Mr T. were intended for the applicant. Lastly, in its pleadings, in order to establish that latter fact, the Commission relied on a document which was not set out in the contested decision, namely a fax of 29 April 1998 from Mr B. to Mr T.

169 The Commission contends that the fifth plea should be rejected as inadmissible on the ground that it is a new plea and, in any event, as unfounded.

Findings of the Court

170 It must be stated that it was only at the hearing that the applicant raised, for the first time, a plea alleging infringement of the obligation to state reasons. However, that does not mean that the Court cannot examine it in the present case. In an action for annulment a plea alleging failure to state or failure sufficiently to state the reasons on which an act is based is a matter of public policy which may, or even must, be raised by the Courts of the European Union of their own motion and which, in consequence, may be invoked by the parties at any stage of the proceedings (see, to that effect, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 125).

171 According to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations.

It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited therein, and *Hoek Loos* v *Commission*, paragraph 100 above, paragraph 58).

172 It is also settled case-law that, where a decision taken in application of Article 81 EC relates to several addressees and raises a problem with regard to liability for the infringement, it must include an adequate statement of reasons with respect to each of the addressees, in particular those of them who, according to the decision, must bear the liability for the infringement (Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211, paragraph 26, and Case T-330/01 *Akzo Nobel* v *Commission* [2006] ECR II-3389, paragraph 93).

173 In the present case, it is apparent from the summary of the part of the contested decision relating to the addressees thereof, as set out in paragraphs 27 to 37 above, and from the findings made in paragraphs 104 to 119 above that, in that decision, the Commission provided an adequate statement of reasons as to why it had decided to attribute liability for Agroexpansión's infringement to the applicant. The Commission thus set out, by reference to the case-law of the Court of Justice and the General Court, the principles that it intended to apply in order to establish those addressees. More specifically, as regards the applicant, first of all, the Commission observed that, from the second half of 1997, it held all the capital of Agroexpansión. The Commission then found that it was established that the applicant had in fact exercised decisive influence over Agroexpansión's conduct, relying, in this respect, not only on the presumption arising from the ownership of all of the subsidiary's capital, but also on

certain additional elements supporting that actual exercise. Lastly, the Commission found that none of the arguments adduced by the applicant in its reply to the statement of objections supported a conclusion to the contrary.

174 It is true that the second sentence of recital 378 of the contested decision might give rise to confusion; that recital states that the additional elements described in the following recital confirm 'this presumption in respect of the fact that [the applicant] was in a position to exert decisive influence'. However, as has already been explained in paragraph 117 above, it is apparent from a reading of recitals 372 and 377 in conjunction with the first sentence of recital 378 of the contested decision that, in reality, those elements were intended to support the presumption that a parent company in fact exercises decisive influence over the conduct of its subsidiary when it holds all the capital of that subsidiary. The applicant is even less justified in claiming that it could not understand the contested decision as having that meaning given that, in the application, it expressly disputes that those elements confirm that it exercised decisive influence over Agroexpansión. The object of the presumption established by the case-law referred to in recital 372 of the contested decision and recalled in paragraphs 95 and 96 above is clearly the actual exercise of that influence and not the possibility of exercising such influence.

175 Moreover, neither can the applicant seriously claim that it could not understand that the Commission was of the view that Mr T. should be regarded as acting as an intermediary for the applicant before acquainting itself with the Commission's pleadings. First, most of the documents expressly identified in footnotes 303 and 304 of the contested decision and which the Commission describes, in that decision, as having been sent to the applicant were addressed to Mr T. Second, both in its reply to the statement of objections and in the application, the applicant submitted detailed observations on the role and duties of Mr T. within the Dimon group, paying particular attention to the fact that he had never been a member of its board, its management bodies or its staff.

176 Lastly, as regards the fax of 29 April 1998 from Mr B. to Mr T., it is sufficient to note that it has not been used by the Court as evidence to validate the Commission's finding that the applicant in fact exercised decisive influence over Agroexpansión's conduct, that circumstance being demonstrated to the requisite legal standard by the evidence mentioned in recital 379 of the contested decision (see paragraphs 128 and 130 to 158 above).

177 It follows that the fifth plea must be rejected as unfounded.

3. *Second plea in law: breach of the principles of proportionality and personal liability*

Arguments of the parties

178 In the framework of the second plea, which the applicant raises as an alternative to the first, the applicant submits that the Commission breached the principles of proportionality and personal liability by holding it responsible for the infringement by Agroexpansión without having shown that the applicant had directly participated in it, for example by giving specific instructions to that subsidiary or supervising its participation in the cartel. It states that in order that liability for the unlawful conduct of a subsidiary be attributed to the parent company, it is not sufficient for the latter to have received 'isolated information' in relation to restrictive practices carried out by its subsidiary. It is necessary, at the very least, to show that the parent company was kept informed 'on a periodical and regular basis' or 'in [detailed] form' of that infringement.

179 Referring to its arguments in relation to the first plea, the applicant repeats that it was not aware of messages allegedly sent to it by Agroexpansión and containing information on the latter's purchasing policy or material evidence of the unlawful practices in question.

180 The Commission considers that the second plea is essentially a repetition of the first and that it must be rejected for the same reasons.

Findings of the Court

181 First of all, the applicant's argument that the Commission failed to show that it had participated directly in the infringement, for example by giving instructions to its subsidiary to commit the infringement or by supervising that subsidiary's participation in the cartel, must be rejected. As has already been stated in paragraph 93 above, it is not because of a relationship between the parent company and its subsidiary in instigating the infringement or, *a fortiori*, because the parent company is involved in the infringement, but because they constitute a single undertaking for the purposes of Article 81 EC that the Commission is able to address a decision imposing fines to the parent company.

182 Next, it should be recalled that, in order to attribute liability to the applicant for the infringement on the part of Agroexpansión, the Commission relied not only on the presumption of actual exercise of decisive influence arising from the 100 % ownership of the subsidiary's capital, but also on certain additional elements demonstrating that the applicant in fact exercised such influence. Those elements consist of various reports and correspondence from Agroexpansión which establish that the applicant, through Mr T., Mr S. or Mr D., was not only informed of the unlawful practices in question, but also — which the applicant omits to mention in this plea — intervened in certain commercial relations between its subsidiary and Deltafina or Cetarsa and

closely followed the situation on the Spanish market (see paragraphs 130 to 158 above).

183 Lastly, it cannot seriously be claimed that only 'isolated information' on the unlawful practices in question was sent to the applicant. Reference is made to those practices in Agroexpansión's activity reports of February, March, April and October 1999, and of January, May, September and November 2000, in Agroexpansión's field report of May 2001, in the fax of 14 December 1998 from Mr B. to Mr D. (see paragraph 140 above), in the report of 5 May 1998 by Mr B. (see paragraph 142 above) and in the emails of 30 October 2000 and 9 May 2001 from Mr B. to Mr S. (see paragraphs 143 and 144 above).

184 In the light of the foregoing considerations, the second plea must be rejected as unfounded. Consequently, the claim seeking the partial annulment of the contested decision must be rejected.

4. *Fourth plea: breach of the principle of the protection of legitimate expectations*

Arguments of the parties

185 The applicant claims that Agroexpansión ceased to take part in the infringement as soon as the Commission intervened and complains that the Commission infringed its legitimate expectations by omitting to apply, in accordance with point 3 of the Guidelines and the Commission's past decisions, that attenuating circumstance when determining the amount of the fine.

186 The applicant submits that the Commission is obliged to take into account such attenuating circumstance save where there has been a deliberate infringement of the competition rules.

187 Moreover, in the reply, it states that it did not terminate the infringement before the date on which the Commission first intervened, but on the same day that the Commission intervened, namely on 3 October 2001.

188 The Commission contests the applicant's arguments.

189 In the rejoinder, referring to the applicant's assertion that the infringement did not end until 3 October 2001 (see paragraph 187 above), the Commission asks the Court to apply a further increase of 5 %, in respect of the duration of the infringement, to the starting amount of the fine, arguing that on that basis the applicant's participation in the infringement lasted more than five years and six months.

Findings of the Court

190 It should be noted that the Commission must, in principle, comply with the terms of its own Guidelines when determining the amount of fines. However, the Guidelines do not state that the Commission must always take account separately of each of the attenuating circumstances listed in Section 3 of the Guidelines and it is not obliged to grant an additional reduction on such grounds automatically; the appropriateness of any reduction of the fine in respect of attenuating circumstances must be examined comprehensively on the basis of all the relevant circumstances. The adoption of the Guidelines has not rendered irrelevant the previous case-law under which the

Commission enjoys a discretion as to whether or not to take account of certain matters when setting the amount of the fines it intends imposing, by reference in particular to the circumstances of the case. Thus, in the absence of any binding indication in the Guidelines regarding the attenuating circumstances that may be taken into account, it must be concluded that the Commission has retained a degree of latitude in making an overall assessment of the extent to which a reduction of fines may be made in respect of attenuating circumstances (see Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 473 and the case-law cited).

191 Under the third indent of Section 3 of the Guidelines, 'termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks)' is an attenuating circumstance.

192 However, according to settled case-law, the termination of the infringement can, logically, constitute an attenuating circumstance only if there are reasons to suppose that the undertakings concerned were encouraged to cease their anti-competitive conduct by the interventions in question, the situation in which the infringement has already come to an end before the date on which the Commission first intervenes not being covered by that provision in the Guidelines (Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraphs 328 and 329, upheld on appeal in Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 158).

193 In the present case, the infringement ceased on 10 August 2001, namely before the Commission's initial investigations on 3 October 2001. As is apparent from recital 432 of the contested decision, although the processors stated that their cartel had ceased to exist on 3 October 2001, the Commission took 10 August 2001 to be the date on which the infringement ended on the ground that the 'latest evidence' in its

possession was a meeting of 10 August 2001, mentioned in recital 260 of the contested decision. The fact that the infringement ceased on that date cannot therefore constitute an attenuating circumstance for the purpose of determining the amount of the fine.

194 It should be added that, even if the Commission had taken the view that the infringement had ceased on the same day that it carried out its initial investigations, it would have been entirely justified in not applying the attenuating circumstance claimed by the applicant. A reduction of the fine by reason of the termination of an infringement as soon as the Commission intervenes cannot be automatic but depends on an appraisal of the circumstances of the case by the Commission, in the exercise of its discretion. In that regard, the application of the third indent of Section 3 of the Guidelines in favour of an undertaking will be particularly appropriate where the conduct in question is not manifestly anti-competitive. Conversely, its application will be less appropriate, as a general rule, where the conduct is clearly anti-competitive, on the assumption that it is proven (Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, paragraph 138, and Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 281).

195 In the present case, there can be no doubt that Agroexpansión's conduct was anti-competitive. The processors' cartel, the object of which was the fixing of prices and market sharing (see recitals 278 to 317 of the contested decision), corresponds to a classic and particularly serious type of infringement (see recitals 409 to 411 of the contested decision) of competition law and conduct which the Commission has found to be unlawful time and time again since it first became active in the field. Moreover, the fact that there was a secret aspect to the cartel confirms that Agroexpansión was fully aware of the unlawful nature of its conduct.

196 It follows that the fourth plea must be rejected as unfounded.

197 The Court takes the view that it is not appropriate to grant the Commission's request that a further increase of 5 %, in respect of the duration of the infringement, be applied to the starting amount of the fine determined for Agroexpansión. In stating that the infringement had come to an end on 3 October 2001, and not on 10 August 2001, the applicant did not so much intend to contest the Commission's assessment of the duration of the infringement as reply to an argument made by the Commission in the defence, according to which the taking into account of the latter date as the date on which the infringement ended had already had a favourable effect on the applicant's position.

5. *Third plea in law: breach of the principles of proportionality and personal liability, and of Article 23(2) of Regulation No 1/2003*

Arguments of the parties

198 In the third plea, put forward in the alternative to the first, the applicant, referring to recital 386 of the contested decision, submits that it should not have been held liable for the infringement by Agroexpansión in respect of the period prior to 18 November 1997 and that the fine ought to be reduced accordingly.

199 The applicant submits that, as regards that period, the fine should have been calculated without applying any multiplier for deterrence to the starting amount of the fine, since, at that time, Agroexpansión did not belong to a multinational.

200 So far as the period from 18 November 1997 to 10 August 2001 is concerned, the applicant submits that the fine should be calculated by subtracting from the amount imposed on Agroexpansión by Article 3 of the contested decision the amount exclusively attributable to Agroexpansión in respect of the period prior to 18 November 1997.

201 The Commission acknowledges that the amount of the fine for which the applicant is held jointly and severally liable with Agroexpansión should be less than the total fine imposed on the latter. However, it rejects the applicant's argument that the fine should be calculated by excluding the application of the multiplier for the purpose of deterrence in respect of the period prior to 18 November 1997. The Commission considers that the applicant should be held jointly and severally liable with Agroexpansión for the payment of the fine as to EUR 2 332 800, while Agroexpansión should remain liable for the full amount of EUR 2 592 000 (of which EUR 259 200 exclusively). The Commission arrives at the figure of EUR 2 332 800 by taking account of the fact that the applicant can be held liable for the infringement only for a period of approximately three years and nine months, and thus by increasing the starting amount of the fine, for the applicant, by only 35 %.

Findings of the Court

202 The Court notes that, as is undisputed and is apparent from recital 386 of the contested decision, the applicant could not be held liable for the infringement on the part of Agroexpansión in respect of the period prior to 18 November 1997, since it is only from that date onwards that it formed an economic unit with Agroexpansión and thus an undertaking within the meaning of Article 81 EC. Since the joint and several liability for payment of a fine can cover only the period of the infringement during which the parent company and the subsidiary constituted such an undertaking, the Commission was not justified in requiring the applicant to pay jointly and severally, with Agroexpansión, the total amount imposed on Agroexpansión, that is

EUR 2 592 000, namely an amount which relates to the entire infringement period. Consequently, the third plea in law must be upheld.

6. *Determination of the final amount of the fine*

203 It is therefore necessary to alter the contested decision in so far as it holds the applicant jointly and severally liable, with Agroexpansión, for payment of the total amount of the fine determined for Agroexpansión.

204 In the exercise of its unlimited jurisdiction, the Court considers it appropriate to calculate the part of that amount that the applicant must pay jointly and severally with Agroexpansión by adopting the reasoning suggested by the Commission in its pleadings, namely by applying the method and criteria that it applied, in the contested decision, when setting the fines to be imposed on the addressees thereof (see paragraphs 38 to 61 above).

205 Thus, in the first place, it is appropriate to take as a basis the same starting amount as that used for Agroexpansión, namely EUR 3 600 000.

206 First, the fact that the applicant cannot be held liable for the infringement in respect of the period prior to 18 November 1997 does not affect the classification of the infringement as 'very serious' (recitals 408 to 414 of the contested decision).

207 Second, that fact also has no effect on the taking into account of the 'specific weight' of each undertaking and of the impact of its unlawful conduct on competition (recital 415 of the contested decision).

208 That fact does not alter the finding that the 'contribution' by the processors to the unlawful practices in question was broadly similar (recital 418 of the contested decision).

209 Nor can it call into question the division of the processors into three categories and the placing of Agroexpansión in the second of those categories (providing for a starting amount of EUR 1 800 000), since that division and placing were carried out in the light of the share of each of the processors on the Spanish raw tobacco purchasing market in 2001, the last year of the infringement (recitals 419 to 421 of the contested decision).

210 Third, as regards the multiplier of 2 applied to the starting amount of Agroexpansión's fine for the purpose of deterrence, its application remains justified in the context of this calculation since it is based on the size and overall resources of the undertaking concerned in 2003, the year preceding that of the adoption of the contested decision (recitals 422 and 423 of the contested decision). As was established above during the examination of the first plea, in 2003, Agroexpansión and the applicant together formed a single economic entity and, thus, such an undertaking.

211 In this respect, the Court would point out that the fact that the size and global resources of the undertaking concerned are taken into consideration in order to ensure that the fine has sufficient deterrent effect is explained by the impact sought on that

undertaking, and the sanction must not be negligible in the light, especially, of its financial capacity. In order to be able to measure the deterrent nature of a fine with respect to an undertaking which has been found liable for an infringement, account cannot therefore be taken of the situation as it stood at the beginning of the infringement. That may result in a fine which is far too low to be sufficiently deterrent, in the case where the turnover of the undertaking concerned has increased in the meantime, or in a fine which is higher than necessary to be deterrent, in the case where the turnover of the undertaking concerned has decreased in the meantime.

212 In the second place, however, since the applicant can be held liable for the infringement only for the duration of approximately three years and nine months, in respect of the period between 18 November 1997 and 10 August 2001, the starting amount of EUR 3 600 000 must be increased by 35 %, and not by 50 % as in the case of Agroexpansión, in respect of the duration of the infringement. Accordingly, for the purposes of determining the amount of the fine for the payment of which the applicant has been held jointly and severally liable with Agroexpansión, account must be taken of a basic amount of EUR 4 860 000.

213 In the third place, the fact that the applicant cannot be held liable for the infringement in respect of the period prior to 18 November 1997 does not affect the reduction of 40 % of the basic amount of the fine in respect of attenuating circumstances (recitals 437 to 439 of the contested decision). The basic amount to be taken into consideration must therefore be set at EUR 2 916 000. In the light of the turnover of the undertaking concerned in 2003, there is no need to adjust that amount so that it complies with the 10 % limit of turnover laid down in Article 23(2) of Regulation No 1/2003.

214 In the fourth place, with respect to the application of the Leniency Notice, the Court would point out that, in its judgment delivered today in Case T-38/05 *Agroexpansión* v *Commission* [2011] ECR II-7005, the Court considered it appropriate to grant

Agroexpansión, on the basis of its cooperation, a further reduction of 5 % in addition to the reduction of 20 % already granted in the contested decision. In the present case, it is also therefore appropriate to apply a reduction of 25 % to the aforementioned amount of EUR 2 916 000.

215 It follows from all the foregoing considerations that it is appropriate to set at EUR 2 187 000 the part of the fine imposed on Agroexpansión for the payment of which the applicant is held jointly and severally with Agroexpansión.

216 The application must be dismissed as to the remainder.

Costs

217 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads, order costs to be shared.

218 In the present case, as the action has been partly successful, the Court will make an equitable assessment of the case in holding that the applicant is to bear nine tenths of its own costs and to pay nine tenths of the costs incurred by the Commission, and that the Commission is to bear one tenth of its own costs and to pay one tenth of those incurred by the applicant.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Sets the part of the fine imposed on Agroexpansión, SA in Article 3 of Commission Decision C(2004) 4030 final of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2 — Raw tobacco — Spain), for the payment of which Alliance One International, Inc. is held jointly and severally liable with Agroexpansión, at EUR 2 187 000;**

2. **Dismisses the action as to the remainder;**

3. **Orders Alliance One International to bear nine tenths of its own costs and to pay nine tenths of the costs incurred by the European Commission, and the Commission to bear one tenth of its own costs and to pay one tenth of those incurred by Alliance One International.**

Czúcz Labucka O'Higgins

Delivered in open court in Luxembourg on 12 October 2011.

[Signatures]

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