

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

8 September 2010*

In Case T-29/05,

Deltafina SpA, established in Orvieto (Italy), represented by R. Jacchia, A. Terranova, I. Picciano, F. Ferraro, J.-F. Bellis and F. Di Gianni, lawyers,

applicant,

V

European Commission, represented initially by É. Gippini Fournier and F. Amato, and subsequently by É. Gippini Fournier and V. Di Bucci, acting as Agents,

defendant,

* Language of the case: Italian.

APPLICATION for 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, a reduction in the fine imposed on the applicant in the decision

THE GENERAL COURT (Fourth Chamber),

composed of O. Czúcz, President, I. Labucka and K. O'Higgins (Rapporteur), Judges,
Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 June 2009,

gives the following

Judgment

Background to the dispute

- ¹ The applicant, Deltafina SpA, is an Italian company whose main activities are the first processing of raw tobacco and the marketing of processed tobacco. It is wholly owned

by the American company Universal Corp., through a wholly owned subsidiary, the American company Universal Leaf Tobacco Company Inc. ('Universal Leaf').

- 2 Universal Leaf also holds all the share capital in Tobacos Españoles, SL ('Taes'), one of the four undertakings engaged in the first processing of raw tobacco in Spain ('the processors' or 'the Spanish processors').
- 3 Reference will be made hereinafter to the group to which the various companies referred to in paragraphs 1 and 2 belong as 'the Universal Group'.
- 4 On 3 and 4 October 2001, the Commission of the European Communities, being in possession of information to the effect that the Spanish processors and producers of raw tobacco had infringed Article 81 EC, carried out investigations pursuant to Article 14 of First Council Regulation No 17 of 6 February 1962 implementing Articles [81 EC] and [82 EC] (OJ English Special Edition, Series I Chapter 1959-1962, p. 87) at the premises of three of those processors, namely Compañía española de tabaco en rama, SA ('Cetarsa'), Agroexpansión, SA and World Wide Tobacco España, SA ('WWTE') and the Asociación Nacional de Empresas Transformadoras de Tabaco ('Anetab').
- 5 The Commission also carried out investigations at the premises of the Tobacco Workers' Guild and the European Federation of Tobacco Transformers on 3 October 2001 and at the premises of the Federación nacional de cultivadores de tabaco ('FNCT') on 5 October 2001.

- 6 By letter of 6 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.
- 7 By letter of 21 January 2002, they provided certain information to the Commission.
- 8 By letter of 15 February 2002, Universal Leaf informed the Commission that it fully supported Taes' intention to cooperate in the context of the Leniency Notice. It also stated that Deltafina was engaged, together with Taes, in drafting a statement describing Taes' role and activities on the Spanish tobacco market and that it hoped that Deltafina could also benefit from the advantages conferred by the Leniency Notice.
- 9 Taes sent to the Commission the statement referred to in paragraph 8 on 18 February 2002.
- 10 Subsequently, the Commission sent a number of requests for information to the Spanish processors, Anetab and the FNCT, on the basis of Article 11 of Regulation No 17. It also requested the Spanish Ministry of Agriculture, Fisheries and Food ('the Ministry of Agriculture') to provide information on Spanish legislation on agricultural products.
- 11 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 Spanish processors, Deltafina, Universal, Universal Leaf, Anetab and the FNCT.

- ¹² The undertakings and associations in question were given access to the Commission's investigation file in the form of a copy on CD-Rom which was sent to them and submitted written observations in response to the objections raised by the Commission. Deltafina submitted its written observations on 1 March 2004.
- ¹³ A hearing, at which Deltafina participated, took place on 29 March 2004.
- ¹⁴ After consulting the Advisory Committee on Restrictive Practices and Monopolies and in the light of the final report of the Hearing Officer, on 20 October 2004 the Commission adopted 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).
- ¹⁵ The contested decision relates to two horizontal cartels entered into and implemented on the Spanish raw tobacco market.
- ¹⁶ The object of the first cartel, which involved the producers and Deltafina, was to fix each year, over the period 1996/2001, 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 in the preamble to 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 that was given in the schedules annexed to the 'cultivation contracts' and '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).

- 17 Reference will be made hereinafter to the cartel described at paragraph 16 as ‘the producers’ cartel’.
- 18 The second cartel identified in the contested decision involved the three agricultural unions in Spain, namely 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 1996/2001, the price brackets per quality grade for each raw tobacco variety that was given in the schedules annexed to the ‘cultivation contracts’ and the ‘additional conditions’ applicable (see, in particular, recitals 77 to 83 and 277).
- 19 Reference will be made hereinafter to the cartel described at paragraph 18 as ‘the cartel of the producers’ representatives’.
- 20 In the contested decision, the Commission considered that each of those cartels constituted a single and continuous infringement of Article 81(1) EC (see, in particular, recitals 275 to 277).
- 21 In Article 1 of that decision, the Commission attributed liability for the processors’ cartel to nine undertakings, including the Spanish processors and Deltafina, and liability for the cartel of the producers’ representatives to the ASAJA, the UPA, the COAG and the CCAE (collectively, ‘the producers’ representatives’).

²² In Article 2 of the contested decision, the Commission ordered those undertakings and 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 similar object or effect.

²³ The following fines were imposed in Article 3 of the contested decision:

- 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.

- ²⁴ The amount of the fine imposed on Deltafina takes account in particular of Deltafina's role as leader of the processors' cartel (recitals 435 and 436). In the light of that role, the Commission increased the basic amount of the fine by 50 % for aggravating circumstances. However, Deltafina was granted a 40 % reduction in the basic amount of the fine for attenuating circumstances (recitals 437 and 438) and a 10 % reduction in the amount of the fine for its cooperation during the administrative procedure (recitals 448 to 456).
- ²⁵ It is also apparent from Article 3 of the contested decision that the parent companies of WWTE are jointly and severally liable for payment of the fine imposed on WWTE and the parent company of Agroexpansión for payment of the fine imposed on that company.

Procedure and forms of order sought by the parties

- ²⁶ By application lodged at the Registry of the General Court on 20 January 2005, Deltafina brought the present action.
- ²⁷ Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure and, by way of the measures of organisation of procedure provided for in Article 64 of its Rules of Procedure, requested the parties to produce certain documents and put questions to them. The parties complied with those requests within the time-limit set.

28 The parties presented oral argument and their answers to the Court's questions at a hearing held on 9 June 2009.

29 The applicant claims that the Court should:

- annul the contested decision;
- in the alternative, reduce the amount of the fine;
- order the Commission to pay the costs.

30 The Commission contends that the Court should:

- dismiss the action as inadmissible in part and, in any event, wholly unfounded;
- order the applicant to pay the costs;
- failing which, order each of the parties to bear their own costs if the applicant is unsuccessful in its pleas to the same extent as the Commission or order the applicant to bear its own costs and pay part of the costs incurred by the Commission if the applicant is unsuccessful in the majority of its pleas.

Law

³¹ In support of its action, Deltafina relies on 11 pleas, alleging:

- (1) infringement of Article 81(1) EC, Article 23(2)(a) 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 the principles of legality and individual liability, as well as failure to state reasons and misuse of powers;
- (2) infringement of Article 27(1) and (2) of Regulation No 1/2003, the rights of the defence and the right to a fair hearing, essential procedural requirements and the principles of legality, legal certainty and proportionality, as well as failure to state reasons and misuse of powers;
- (3) infringement of Article 81(1) EC, Article 2 of Regulation No 1/2003, paragraph 43 of the Guidelines on the effect on trade concept contained in Articles 81 [EC] and 82 [EC] (OJ 2004 C 101, p. 81), as well as failure to state reasons;
- (4) infringement of Article 2 and Article 23(2) of Regulation No 1/2003, section 1A and section 5(d) of 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'), the principle of proportionality and the principle of 'equal treatment and penalties', as well as failure to state reasons and misuse of powers;

- (5) infringement of Article 23(3) of Regulation No 1/2003, section 1B of the Guidelines and the principle of equal treatment, as well as misuse of powers;
- (6) infringement of Article 23(3) of Regulation No 1/2003 and section 2 of the Guidelines, as well as failure to state reasons and misuse of powers;
- (7) infringement of Article 23(3) of Regulation No 1/2003 and section 3 of the Guidelines, as well as misuse of powers;
- (8) infringement of Article 23(2) of Regulation No 1/2003 and section 5(a) of the Guidelines;
- (9) infringement of Article 23(3) of Regulation No 1/2003, the preamble to and section 4 of the Guidelines, section B(e) and section D of the Leniency Notice and the principle of equal treatment, as well as failure to state reasons and misuse of powers;
- (10) infringement of Article 23(3) of Regulation No 1/2003, section 5(b) of the Guidelines and the principle of proportionality, as well as misuse of powers;

- (11) infringement of the principles of equal treatment, of non-retroactivity of penalties and the protection of legitimate expectations, as well as misuse of powers.

³² The first three pleas are relied on as main pleas and relate to the claim seeking annulment of the contested decision. The seven following pleas are put forward in the alternative and relate to the claim seeking a reduction in the amount of the fine. The last plea is raised in the further alternative, in the event that the seven previous pleas are rejected, and also seeks a reduction in the amount of the fine.

1. Admissibility of the complaints alleging misuse of powers

³³ In the various pleas on which it relies in support of its application, with the exception of the third and eighth pleas, Deltafina claims, inter alia, that the Commission misused its powers.

³⁴ According to settled case-law, the concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent indicia, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the EC Treaty for dealing with the circumstances of the case (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 24, and Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, paragraph 99).

³⁵ In the present case, it is clear that Deltafina merely relies in general terms on a series of complaints alleging misuse of powers, without providing any evidence or argument in support of those complaints or even stating what the Commission's actual purpose might be in adopting the contested decision. Those complaints, thus presented, fail to meet the requirements laid down in Article 44(1)(c) of the Rules of Procedure in that they are insufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. They must therefore be declared inadmissible (see, to that effect, Case T-352/94 *Mo och Domsjö v Commission* [1998] ECR II-1989, paragraphs 333 and 334).

2. The submissions seeking annulment of the contested decision

The first plea, alleging infringement of Article 81(1) EC, Article 23(2)(a) of Regulation No 1/2003 and the principles of legality and individual liability, as well as failure to state reasons

³⁶ The first plea relied on by Deltafina can be divided into four parts. In the first part, it criticises the Commission for holding it liable for an infringement committed on a market on which it is not present. In the second part, it claims that the conduct which, in its view, is attributed to it is not covered by Article 81(1) EC or by Article 23(2)(a) of Regulation No 1/2003. In the third part, it expresses the view that the Commission incorrectly regarded it as the leader of the processors' cartel. Lastly, in

the fourth part, it claims that the Commission failed to define the relevant market in the contested decision.

³⁷ The Court will examine the first two parts together and the third and fourth parts separately.

³⁸ As regards the complaint alleging infringement of the duty to state reasons, put forward by Deltafina in its first plea, without linking it to any one of the four parts of that plea, it is clear that it has failed to provide any argument capable of clarifying the complaint. It must therefore be rejected as inadmissible under Article 44(1)(c) of the Rules of Procedure (see paragraph 35 above).

The first and second parts of the plea, alleging, respectively, that the Commission holds Deltafina liable for an infringement committed on a market on which it is not present and that the conduct attributed to Deltafina is not covered by Article 81(1) EC or by Article 23(2)(a) of Regulation No 1/2003

— Arguments of the parties

³⁹ First, Deltafina submits that it is not active on the raw tobacco purchasing and processing market in Spain and, therefore, even if that market was the relevant market, it could not be held responsible for the conduct adopted on the market.

40 Second, Deltafina claims that it was not involved in setting up the agreements concluded between the processors and did not implement them, since it was not authorised to operate as a processor in Spain and therefore lacked standing to negotiate and conclude contracts with Spanish raw tobacco producers or to participate in sharing out quantities of raw tobacco to be purchased. It maintains that the role of ‘perpetrator or co-perpetrator of the infringements’ cannot be ascribed to it, even less that of leader of the processors’ cartel, but, at most, the role of a “person who, from both an objective and subjective standpoint, was outside the cartel but who indirectly facilitated the perpetrators” conduct by attending meetings, exchanging information and communications, mediating between the participants and preserving documents and data. Such conduct is not envisaged by Article 81(1) EC or Article 23(2)(a) of Regulation No 1/2003 and cannot therefore be subject to penalties.

41 In support of its claims, Deltafina relies on Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 — Organic peroxides) (OJ 2005 L 110, p. 44) (‘the organic peroxides decision’). It states that, in that decision, the Commission found that there had been an infringement of Article 81(1) EC on the part of a company outside the cartel concerned, namely the consultancy firm AC-Treuhand AG, on account of certain conduct on the part of that firm which was similar in some respects to the conduct of which it is accused. It points out that that consultancy firm, in spite of the fact that it played a vital role in the organisation and implementation of the cartel, which it was regarded as having ‘fostered’, had only a symbolic fine of EUR 1 000 imposed on it because of the ‘relative novelty of the issue’.

42 First, the Commission counters by saying that there is no support in the wording of that provision for Deltafina’s argument that Article 81(1) EC is not applicable to

undertakings which do not operate directly on the relevant market. What matters for the purposes of the application of that provision is that the undertaking in question has participated in an anti-competitive practice which has, at least potentially, an appreciable effect on trade between Member States.

⁴³ Second, the Commission contends that Deltafina's claim that the conduct of which it is accused is not covered by Article 81(1) EC is not only wholly unfounded but also contradicted by a number of indications set out in the application.

⁴⁴ Moreover, the Commission states that Deltafina itself is of the view that its role can be compared to that of AC-Treuhand in the case which gave rise to the organic peroxides decision and that penalties may be imposed in connection with such a role under Article 81(1) EC.

— Findings of the Court

⁴⁵ As regards the first part of the plea in question, it is accepted between the parties that in Spain, which is the relevant geographic market in the present case, Deltafina neither purchases raw tobacco from producers nor is it engaged in the first processing of raw tobacco. In Spain, Deltafina is active only at the next stage of the process, namely that of buying processed tobacco for the purpose of resale to tobacco manufacturers.

- 46 It is therefore clear that Deltafina is not present on the relevant market, namely, as will be explained at paragraph 82 below, the Spanish market for the purchase and first processing of raw tobacco.
- 47 However, it cannot be inferred from that finding that the Commission was not entitled to impose penalties on Deltafina for infringement of Article 81(1) EC.
- 48 As the Court has already held, at paragraph 122 of its judgment in Case T-99/04 *AC-Treuhand v Commission* [2008] ECR II-1501, an undertaking may infringe the prohibition laid down in Article 81(1) EC where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict competition on a specific relevant market within the common market, and that does not mean that the undertaking has to be active on that relevant market itself.
- 49 To the same effect, the Court stated, at paragraph 127 of *AC-Treuhand v Commission*, paragraph 48 above, that it cannot be ruled out that an undertaking may participate in the implementation of a restriction of competition even if it does not restrict its own freedom of action on the market on which it is primarily active. Any other interpretation might restrict the scope of the prohibition laid down in Article 81(1) EC to an extent incompatible with its useful effect and its main objective, as read in the light of Article 3(1)(g) EC, which is to ensure that competition in the internal market is not distorted, since proceedings against an undertaking for actively contributing to a restriction of competition could be blocked simply on the ground that that contribution does not come from an economic activity forming part of the relevant market on which that restriction materialises or on which it is intended to materialise. The Court concluded, at paragraph 128 of the judgment, that a reading of the term ‘agreements between undertakings’ in the light of the objectives pursued by Article 81(1) EC and by Article 3(1)(g) EC tends to confirm that the notions of a cartel and of an

undertaking which is the perpetrator of an infringement are conceptually independent of any distinction based on the sector or the market on which the undertakings concerned are active.

50 In the present case, as will be explained in greater detail at paragraphs 122 to 133 below, it is established that Deltafina actively and directly participated with the processors in a cartel the objective of which was, as it knew or could not have failed to be aware, to eliminate or restrict competition in the raw tobacco sector in Spain.

51 The Court's findings set out at paragraph 48 above is all the more relevant in the present case because, whereas AC-Treuhand, in its capacity as a consultancy firm, was not in any way active on the relevant product market, namely the organic peroxides market, as a competitor or on the side of supply or demand, Deltafina, on the other hand, as the main customer of the Spanish processors, was active on the Spanish market immediately downstream from that on which the anti-competitive practices at issue were implemented. Moreover, in Italy, Deltafina was present on the same product market in question as that in the present case.

52 It follows that the first part of the first plea must be rejected as unfounded.

53 The second part of the first plea is based on the premiss that Deltafina did not actively or directly participate in the processors'cartel to the same extent as the processors but simply facilitated its implementation'indirectly'.

- 54 As already stated at paragraph 50 above and will be established at paragraphs 122 to 133 below, that premiss is incorrect.
- 55 In any event, Deltafina's argument that undertakings which have contributed to the implementation of a cartel only in a subsidiary, accessory or passive role do not infringe Article 81(1) EC and cannot therefore be fined under Article 23(2) of Regulation No 1/2003 is also incorrect.
- 56 Thus, in *AC-Treuhand v Commission*, paragraph 48 above, the Court rejected a similar argument, after referring to the case-law concerning the conditions which the participation of an undertaking in a cartel must satisfy for it to be possible to hold that undertaking liable as a co-perpetrator of the infringement (paragraphs 129 to 136).
- 57 In particular, in that judgment, the Court pointed out that the attribution of the infringement as a whole to an undertaking which has participated in a cartel is consistent with the requirements of the principle of individual liability where two conditions are met, the first being of an objective and the second a subjective nature.
- 58 The Court stated that, according to case-law, the first condition was met, as regards the relationship between competitors on the same relevant market and the relationship between such competitors and their clients, where the participating undertaking has contributed to the implementation of the cartel, even in a subsidiary, accessory or passive role, for example by tacitly approving the cartel and by failing to report it

to the administrative authorities (*AC-Treuhand v Commission*, paragraph 48 above, paragraph 133).

59 In reaching that conclusion, the Court pointed out, first, that it is sufficient for the Commission to show that the undertaking concerned attended meetings at which anticompetitive agreements were concluded, without manifesting its opposition to such meetings, to prove to the requisite legal standard that that undertaking participated in the cartel (*AC-Treuhand v Commission*, paragraph 48 above, paragraph 130). The Court added that, in order to establish that an undertaking participated in a single agreement, made up of a series of unlawful acts over time, the Commission must prove that that undertaking intended, through its own conduct, to contribute to the common objectives pursued by the participants as a whole and that it was aware of the substantive conduct planned or implemented by other undertakings in pursuance of those objectives, or that it could reasonably have foreseen that conduct and that it was ready to accept the attendant risk. In that regard, the Court pointed out that, where an undertaking tacitly approves an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, the effect of its behaviour is to encourage the continuation of the infringement and to compromise its discovery. The Court stated that such an undertaking thereby engages in a passive form of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement. The Court pointed out that those principles apply *mutatis mutandis* in respect of meetings which are attended not only by competing producers, but also by their clients.

60 Next, the Court stated, at paragraph 131 of *AC-Treuhand v Commission*, paragraph 48 above, that, as regards the determination of the individual liability of an undertaking whose participation in the cartel is not as extensive or intense as that of the other undertakings, it is apparent from the case-law that, although the agreements and concerted practices referred to in Article 81(1) EC necessarily result from collaboration by several undertakings, all of whom are co-perpetrators of the infringement but whose participation can take different forms — according to, *inter alia*, the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged — the

mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to rule out its liability for the entire infringement, including conduct put into effect by other participating undertakings but sharing the same anti-competitive object or effect.

⁶¹ Lastly, the Court concluded, at paragraph 132 of *AC-Treuhand v Commission*, paragraph 48 above, that the fact that an undertaking did not take part in all aspects of an anti-competitive scheme, or that it played only a minor role in the aspects in which it did participate, is not material to the establishment of an infringement on its part. However, the Court added that, although the limited importance, as the case may be, of the participation of the undertaking concerned cannot therefore call into question its individual liability for the infringement as a whole, it none the less has an influence on the assessment of the extent of that liability and thus on the severity of the penalty.

⁶² As regards the second condition, the Court pointed out, at paragraph 134 of *AC-Treuhand v Commission*, paragraph 48 above, that the attribution of the infringement as a whole to the participating undertaking also depends on the manifestation of its own intention, which shows that it is in agreement, albeit only tacitly, with the objectives of the cartel. The Court stated that that subjective condition is inherent in the criteria relating to the tacit approval of the cartel and to the undertaking having failed publicly to distance itself from the content of the cartel, in that those criteria imply a presumption that the undertaking concerned continues to endorse the objectives of the cartel and to support its implementation. That condition also constitutes the justification for holding the undertaking concerned liable along with the others, since it intended to contribute through its own conduct to the common objectives pursued by the participants as a whole and was aware of the anti-competitive conduct of the other participants, or could reasonably have foreseen that conduct, and was ready to accept the attendant risk.

- ⁶³ At paragraph 136 of *AC-Treuhand v Commission*, paragraph 48 above, the Court stated that the principles set out at paragraphs 57 to 62 above apply *mutatis mutandis* to the participation of an undertaking whose economic activity and professional expertise mean that it cannot but be aware of the anti-competitive nature of the conduct at issue and thus enable it to make a significant contribution to the committing of the infringement.
- ⁶⁴ It follows from the foregoing that the second part of the first plea must also be rejected as unfounded.

The third part of the plea, alleging that the Commission incorrectly regarded Deltafina as the leader of the processors' cartel

— Arguments of the parties

- ⁶⁵ Deltafina states that the Commission incorrectly regarded it as the leader of the processors' cartel.
- ⁶⁶ In support of its assertion, it relies on the following factors, which distinguish its situation from that of other undertakings which have been regarded as the leaders of a cartel in other cases:

— it did not instigate the conduct for which the processors are criticised;

- it did not encourage — even less coerce — any undertaking to join the processors' cartel;
- it did not put pressure on any person and, in any event, did not have the power to do so;
- it played no part in the management or control of the processors' cartel, which did not, in any event, have any 'management bodies';
- its chairman, Mr M, attended only four meetings of the processors' cartel and could not have 'orchestrated its strategy';
- it could not have acted as price leader on the demand side since, as it did not operate at the same stage of the chain as the Spanish processors, it did not purchase raw tobacco from the producers;
- it never had legal or de facto power to take any sanctions or retaliatory measures against members of the processors' cartel whose conduct was not in line with joint actions.

⁶⁷ Moreover, Deltafina disputes the Commission's claim that the role of leader attributed to it was taken into account in the contested decision only as an

aggravating circumstance. It maintains that that role is in fact the only allegation made against it.

⁶⁸ First of all, the Commission replies that, even if it was mistaken in regarding Deltafina as the leader of the processors' cartel, that could not absolve it of all liability for the infringements which are imputed to it but could, at most, lead to a reduction in the amount of the fine. The fact that Deltafina was the leader of the processors' cartel was taken into account in the contested decision as an aggravating circumstance only when calculating the fine.

⁶⁹ Next, the Commission considers that, in any event, the part of the plea in question must be rejected as unfounded. First, it points out that, according to case-law, its previous practice does not itself serve as a legal framework for fines imposed in competition matters. Second, it refers to recital 435 in the preamble to the contested decision, which, in its view, sets out in a sufficiently precise and clear manner the grounds on which Deltafina was regarded as the leader of the processors' cartel.

— Findings of the Court

⁷⁰ It should be noted that the third part of the first plea is relied on by Deltafina in support of its claim that the contested decision should be annulled and that, like the first two parts of the plea, it is intended to demonstrate that the Commission could not hold it liable for the processors' cartel.

71 As the Commission correctly submitted, the role of leader of the processors' cartel attributed to Deltafina was taken into account in the contested decision as an aggravating circumstance only in the calculation of the amount of the fine (see recitals 435 and 436). Contrary to what Deltafina claims, it is not the finding that it acted as leader of the processors' cartel which led the Commission to find that it was liable for the infringement but the finding, based in particular on the various factors summarised at recitals 359 to 369 in the preamble to the contested decision, that it participated directly and actively in the cartel. In other words, the role of leader of the processors' cartel attributed to Deltafina has no bearing on the attribution of its liability for the commission of the infringement.

72 Undoubtedly, Deltafina's actions on which the Commission based its assessment that it was the leader of the processors' cartel are essentially the same as those which led it to conclude that it had participated in the cartel. The fact none the less remains, as the Commission correctly pointed out in its pleadings, that the question whether an undertaking participated in a cartel and the question, as the case may be, of the extent and intensity of that participation relate to two separate considerations — the first concerning the establishment of the existence of an infringement of Article 81(1) EC and the second the determination of the level of the penalty.

73 It follows from the above considerations that, even if it were well founded, the third part of the first plea could not lead to the annulment of the contested decision. It must therefore be rejected as ineffective in the context of that plea. However, account will be taken of this part of the plea in the examination of the sixth plea, which is based in part on the same arguments.

The fourth part of the first plea, alleging that the Commission failed to define the relevant market in the contested decision

— Arguments of the parties

⁷⁴ Deltafina complains that the Commission failed to define the relevant product and geographic markets in the contested decision.

⁷⁵ In that connection, first, Deltafina refers to paragraphs 27 et seq of the judgment in Case T-61/99 *Adriatica di Navigazione v Commission* [2003] ECR II-5349. It states that, according to paragraph 30 of that judgment, objections to the Commission's definition of the relevant market may impinge upon factors which have a bearing upon the application of Article 81(1) EC other than the existence of 'agreements' between undertakings, of an effect upon 'trade between Member States', or the 'prevention, restriction or distortion of competition', such as, inter alia, the scope of the cartel in question, the question whether it is a specific or general cartel, or the extent of the individual participation of each of the undertakings concerned. Those factors are closely connected with the principle of personal responsibility for collective infringements and with the general principles of law, such as legal certainty and proportionality. Deltafina also points out that, according to paragraph 32 of that judgment, '[t]herefore, it is desirable that, where it adopts a decision in which it finds that an undertaking has participated in a complex, collective and continuous infringement (which cartels often are), the Commission should, in addition to ensuring that the specific conditions for applying Article [81(1) EC] are satisfied, take into consideration the fact that, whilst the decision will entail the personal liability of each of its addressees, that liability is limited to their particular involvement in the collective conduct sanctioned, as properly defined'. It adds that, according to that paragraph, '[s]ince a decision of this kind is capable of creating significant consequences not only for relations between the undertakings concerned and the administrative authorities but

also for their relations with third parties, the Commission ought to examine the relevant market or markets and identify them in the statement of reasons which it gives for any decision sanctioning an infringement of Article [81(1) EC], and it should do so with sufficient precision so as to be able to identify the operating conditions in the market in which competition has been distorted and to satisfy the essential requirements of legal certainty’.

⁷⁶ Next, Deltafina claims that, since it was not active on the market on which the anti-competitive conduct occurred, the Commission cannot, without infringing the principle of individual liability, hold it liable for that conduct and impose a penalty on it.

⁷⁷ Lastly, relying on the same reason, Deltafina also submits that, in the contested decision, the Commission fails to establish ‘the link between [such] conduct and the impact on the market, which, even in the case where an infringement has been found by virtue of the object of the cartel, must result in adverse effects on competition’. It considers that the reference made by the Commission at recital 368 in the preamble to the contested decision to paragraph 136 of the judgment in Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others v Commission* [1998] ECR II-3141 is irrelevant.

⁷⁸ In response to Deltafina’s arguments, the Commission submits, first, that, in the contested decision, it defines with sufficient clarity and detail the legal and economic context of the market on which the restrictive practices at issue were implemented.

- 79 Next, the Commission rejects Deltafina's claim that it infringed the principle of individual liability by holding it liable for the anti-competitive conduct in question, even though that company was not active on the market on which that conduct occurred.
- 80 Lastly, the Commission dismisses as 'totally illogical' Deltafina's argument that, since it was not present on the relevant market, there is no link between the unlawful conduct in question and its impact on the market. It submits that the fact that Deltafina did not operate directly on the market on which it has been established that there were the anti-competitive practices does not exonerate it of its share of liability for implementing those practices and cannot lead to the conclusion that those practices did not have an impact on that market. In that connection, referring in particular to paragraph 136 of the judgment in *European Night Services and Others v Commission*, paragraph 77 above, it states that, according to settled case-law, it is not necessary to assess the actual effects on the market of agreements which, as in the present case, clearly restrict competition.

— Findings of the Court

- 81 It is clear that, contrary to what Deltafina claims, the Commission did not fail to identify the relevant product and geographic markets in the contested decision.
- 82 The contested decision demonstrates sufficiently clearly and precisely that the relevant market is the Spanish market for the purchase and first processing of raw tobacco. In particular, at recitals 19 to 65 in the preamble to the contested decision, the Commission describes in detail the undertakings engaged in the first processing of

raw tobacco in Spain — providing, inter alia, specific information on their activities involving the purchasing and first processing of raw tobacco and the trading relationships they have with each other — the producers of raw tobacco, the producers' representatives, various aspects of the raw tobacco sector in Spain, including its tobacco-producing regions, the production yields and values, the value of sales, the various varieties of raw tobacco and the average (maximum) delivery prices for each of those varieties and the Community and Spanish legislative framework applicable to raw tobacco.

⁸³ Moreover, it is perfectly possible, as a result of the Commission's analysis in the contested decision, to identify the operating conditions of the market in which competition has been distorted, contrary to what Deltafina claims by referring to the last sentence of paragraph 32 in *Adriatica di Navigazione v Commission*, paragraph 75 above.

⁸⁴ There is even less basis for Deltafina's claim that the Commission failed to identify the relevant market in the contested decision, since it is apparent from numerous passages in its pleadings that it understood perfectly well that it was the Spanish market for the purchase and first processing of raw tobacco. Thus, to cite but one example, all its arguments in support of the first part of the first plea are in fact based on that definition.

⁸⁵ The fourth part of the first plea is therefore wholly unfounded in fact.

⁸⁶ Deltafina's argument that the Commission failed to have regard to the principle of individual liability by holding it liable for a cartel implemented on a market on which it was not active cannot be accepted. As already stated at paragraphs 48 and 49 above, an undertaking may infringe the prohibition laid down in Article 81(1) EC where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict

competition on a specific relevant market within the common market, and that does not mean that the undertaking has to be active on that relevant market itself. What in fact matters in order for the attribution of the infringement as a whole to an undertaking which has participated in a cartel to be consistent with the requirements of the principle of individual liability is that the undertaking should meet the two conditions, one of an objective and the other of a subjective nature, referred to at paragraphs 57 to 63 above, which is the case with Deltafina, as will become apparent at paragraphs 122 to 133 below.

⁸⁷ Lastly, contrary to what Deltafina appears to claim (see paragraph 77 above), it cannot be inferred from the simple fact that it was not active on the relevant market that the producers' cartel was not capable of having an adverse effect on competition on that market.

⁸⁸ In the light of the foregoing considerations, the fourth part of the first plea must be rejected as unfounded.

⁸⁹ It is apparent from all the above considerations that none of the parts of the first plea can be accepted.

The second plea, alleging infringement of Article 27(1) and (2) of Regulation No 1/2003, the rights of the defence and the right to a fair hearing, essential procedural requirements and the principles of legality, legal certainty and proportionality, as well as failure to state reasons

⁹⁰ The second plea relied on by Deltafina can be divided into four parts. In the first part, it criticises the fact that, in the contested decision, the Commission attributed to it a

different role from that for which it was criticised in the statement of objections. In the second part, it submits that the conduct of which it is accused should in fact be attributed to its chairman. In the third part, it claims that the Commission refused to grant it access to certain inculpatory documents. Finally, in the fourth part, it claims that the Commission failed to define with sufficient clarity the relevant product and geographic markets in the statement of objections.

- ⁹¹ As regards the complaint alleging failure to state reasons put forward by Deltafina in the second plea, without expressly relating it to any one of the four parts of that plea, it is clear that it does not provide any argument to clarify the complaint. It must therefore be rejected as inadmissible under Article 44(1)(c) of the Rules of Procedure (see paragraph 35 above).

The first part of the second plea, alleging that, in the contested decision, the Commission attributed to Deltafina a different role from that for which it was criticised in the statement of objections

— Arguments of the parties

- ⁹² Deltafina submits that, by holding it liable as ‘perpetrator’ or ‘co-perpetrator’ of the infringement in the contested decision and characterising it as the ‘leader’ of the processors’ cartel in that decision, the Commission attributed to it a role that was different from — and more serious than — the role imputed to it in the statement of objections.

- ⁹³ In support of its claims, Deltafina identifies a number of differences between the wording of the statement of objections and that of the contested decision. It submits, *inter alia*, that, whereas at no point in the former is it claimed that it was a party to the agreements or practices at issue — such a claim being made in that statement only with regard to the Spanish processors — in the latter, it is presented as having participated directly and actively in those agreements and practices. Similarly, no mention is made in the statement of objections of the fact that Deltafina could be regarded as the leader of the processors' cartel. Moreover, Deltafina criticises a number of considerations set out in the contested decision.
- ⁹⁴ Deltafina states that, by acting in that way, the Commission not only put forward an argument that was not substantiated by any evidence on the file but also infringed its rights of defence. As regards the latter point, it complains in particular that the Commission refused to allow it to express its views on the claims made against it in the contested decision that it was to be regarded as the perpetrator or co-perpetrator of the infringement and leader of the processors' cartel.
- ⁹⁵ The Commission claims that it never regarded Deltafina as the 'perpetrator' or 'co-perpetrator' of the restrictive practices at issue, while at the same time pointing out that any such characterisation has no 'legal significance' in competition law. Referring to the facts set out at recitals 362 to 366 in the preamble to the contested decision, it states that the conclusion it reached in that decision was that Deltafina 'participated' fully in those practices and it must therefore be regarded as 'fully' sharing liability for the infringement.
- ⁹⁶ The Commission states that, in the statement of objections, it relied on the same facts to reach the finding that Deltafina participated in the processors' cartel and, consequently, that it was jointly liable for the infringement of Article 81 EC. It points out that, in its reply to the statement of objections, Deltafina also put up a robust defence as regards the role thus attributed to it in the processors' cartel. It considers that no

‘differences in wording’ between the statement of objections and the contested decision identified by Deltafina is therefore capable of showing that the applicant’s rights of defence were infringed.

97 Moreover, the Commission rejects the criticisms made by Deltafina concerning certain considerations set out in the contested decision.

98 Lastly, referring to the conduct described at recitals 363 to 365 in the preamble to the contested decision, the Commission is of the view that it is not at all ‘unreasonable’ to state, as it did at recital 361, that Deltafina played a ‘particularly active’ role in the processors’ cartel.

99 According to the Commission, it is apparent from the factors set out above that it neither made errors of assessment nor infringed Deltafina’s rights of defence by regarding it as a party to the restrictive practices referred to in Article 1 of the contested decision and finding it shared liability for those practices.

100 As regards Deltafina’s criticisms concerning the fact that it was regarded in the contested decision as the leader of the processors’ cartel, the Commission submits, first, that even if they were justified, they could at most lead to a reduction in the amount of the fine.

101 Next, the Commission points out that, according to settled case-law, provided that it indicates expressly in the statement of objections that it will consider whether it is

appropriate to impose fines on the undertakings concerned and that it sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed ‘intentionally or negligently’, it fulfils its obligation to respect the undertakings’ right to be heard (Case T-23/99 *LR AF 1998 v Commission* [2002] ECR II-1705, paragraph 199). The elements thus required by case-law are present in the statement of objections.

- ¹⁰² Lastly, the Commission submits that, in any event, the fact that it did not state expressly in the statement of objections its intention to consider as an aggravating circumstance the particular role played by Deltafina in the processors’ cartel had no effect on that undertaking’s defence. Indeed, at pages 31 to 37 of its reply to the statement of objections, Deltafina expressly put forward arguments designed to minimise its role.

— Findings of the Court

- ¹⁰³ The part of the plea in question has two main elements. First, Deltafina claims that there are differences between the statement of objections and the contested decision as regards the assessment of its role in the processors’ cartel. Second, it does not accept that that assessment, as made in the contested decision, is correct.
- ¹⁰⁴ In the context of both those elements, Deltafina criticises in particular the fact that the role of leader of the processors’ cartel was attributed to it. Thus, in connection with the first element, it complains that the Commission failed to mention in the

statement of objections the fact that it could be regarded as the leader of the processors' cartel, thus infringing its right of defence. In connection with the second element, it submits that the Commission's conclusion in the contested decision that it played such a role in the processors' cartel is not adequately substantiated.

¹⁰⁵ As already stated at paragraph 71 above and correctly pointed out by the Commission, the role of leader of the processors' cartel attributed to Deltafina was taken into account in the contested decision as an aggravating circumstance only in the calculation of the amount of the fine. Accordingly, even if were established that the rights of the defence were infringed, as alleged in connection with that role, or it appeared that it was not established to the requisite legal standard that the applicant played such a role, that could not lead to the annulment of the contested decision, as sought by Deltafina in reliance on the part of the plea in question, but, at most, to a reduction in the amount of the fine imposed on it. Therefore, the criticisms set out above must be rejected as ineffective in the context of the part of the plea in question. They will be considered below in connection with the sixth plea, relied on by Deltafina in support of its claim that the amount of the fine should be reduced, which is essentially based on the same considerations.

¹⁰⁶ The other criticisms made by Deltafina in connection with the part of the plea in question raise three separate questions, namely: (i) on what basis did the Commission conclude in the contested decision that that company had infringed Article 81(1) EC; (ii) whether there are, in that regard, any differences between that decision and the statement of objections; and (iii) whether there is sufficient legal justification for the Commission's conclusion.

¹⁰⁷ As regards the first question, it should be recalled that, as already stated at paragraphs 15 to 21 above, the contested decision relates to two horizontal cartels

concluded and implemented on the Spanish raw tobacco market, the first involving the Spanish producers and Deltafina, and the second the producers' representatives. According to the contested decision, each of those cartels was characterised by a set of agreements and/or concerted practices and constitutes a single and continuous infringement of Article 81(1) EC (see, in particular, recitals 275 to 277 and 296 to 298).

¹⁰⁸ The Spanish producers and Deltafina are held liable for all of the first infringement and the producers' representatives for all of the second (see in particular Article 1 of and recitals 358, 359 and 366 in the preamble to the contested decision).

¹⁰⁹ In particular, it is apparent from a number of recitals in the preamble to the contested decision that Deltafina is regarded, in the same way as the Spanish processors, as having concluded agreements and/or participated in concerted practices, the object of which was to fix each year, over the period 1996/2001, 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 buy from the producers (see, in particular, recitals 85, 88, 112, 144, 274, 276, 278, 279, 281 to 283, 285 to 287, 301, 303, 305 and 357). Moreover, Deltafina is regarded, in the same way as the Spanish producers, during the period 1999/2001, as having concluded agreements and/or participated in concerted practices, the object of which was to fix the price brackets per quality grade for each raw tobacco variety given in the schedules annexed to the cultivation contracts as well as additional conditions (see, in particular, recitals 85, 274, 276, 290 and 357).

¹¹⁰ In other words, it is alleged in the contested decision that Deltafina participated directly and actively in the processors' cartel (see, in particular, recitals 357, 361, 366 and 369). In that connection, it should be noted that the Commission states in

particular, at recital 369, that ‘Deltafina must be regarded in the present case as having played a direct and leading role which [was not] confined to the role of external coordinator and/or facilitator.’

- 111 At recitals 359 to 366 in the preamble to the contested decision, the Commission sets out, by reference to other recitals in that decision, the reasoning and the particular facts on which it based the conclusions set out at paragraphs 109 and 110 above.

- 112 That reasoning and those facts are as follows:

- Deltafina, through its chairman and — occasionally — other representatives, participated at certain meetings held by the processors’ cartel (recitals 67, 112 and 363), namely the meetings held on 13 March 1996 in Madrid (Spain) (recitals 88 and 92), on 17 December 1996 (recital 117), on 30 January 1997 in Rome (Italy) (recital 118) and in March 1999 (recital 186);
- when it did not attend some of the meetings held by the processors’ cartel, Deltafina was informed on a regular basis by the processors of the situation on the Spanish raw tobacco market and of the practices which they had implemented (recitals 112, 133 to 136, 140 to 143, 145, 149 and 364);

- in 1997, the chairman of Deltafina was even the addressee of a note prepared and signed by the Spanish processors at one of their meetings which set out the details of various agreements which they had reached (recitals 122 and 364);

- Deltafina was involved in the organisation of the processors' cartel; in particular, it sent letters to the processors in order to ensure that the unlawful agreements were properly implemented, thus acting as mediator in disputes between them (recitals 140 and 365);

- Deltafina played a central role in negotiations between the Spanish processors and the producers' representatives concerning the price bracket for surplus tobacco in the 1999 harvest (recitals 207, 221 and 365).

¹¹³ As regards the second question, it should be noted, first, that it is settled case-law that in all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law which must be complied with even if the proceedings in question are administrative proceedings (Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, paragraph 9, and Case C-176/99 P *ARBED v Commission* [2003] ECR I-10687, paragraph 19).

¹¹⁴ That principle requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which

the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it (see *ARBED v Commission*, paragraph 113 above, paragraph 20 and the case-law cited).

- ¹¹⁵ In addition, an infringement of the rights of the defence during the administrative procedure must be examined in the light of the objections established by the Commission in the statement of objections and in the decision concluding the procedure (Case T-30/91 *Solvay v Commission* [1995] ECR II-1775, paragraph 60, and Case T-36/91 *ICI v Commission* [1995] ECR II-1847, paragraph 70). In those circumstances, the finding of an infringement of the rights of the defence presupposes that the objection — which the undertaking maintains was not raised against it in the statement of objections — has been included by the Commission in its final decision.
- ¹¹⁶ In the present case, in the statement of objections, as in the contested decision, the Commission makes a distinction between two horizontal cartels, characterised by a series of agreements and/or concerted practices on the Spanish raw tobacco market, the first involving the first processing sector and the second the production sector, and classifies each of those cartels as a single and continuous infringement of Article 81(1) EC (see, in particular, paragraphs 1, 316 to 318 and 338 to 340 of the statement of objections). As in the contested decision, the Spanish processors and Deltafina are held liable in the statement of objections for all of the first infringement and the processors' representatives for all of the second (see, in particular, paragraphs 411, 412 and 420 of the statement of objections).
- ¹¹⁷ As regards Deltafina in particular, it is clear from the statement of objections that, as in the contested decision, liability for the infringement is imputed to that company because of its direct and active participation in the activities of the processors' cartel. Thus, in the first sentence of paragraph 415 of the statement of objections, which is virtually the same as the first sentence of recital 361 in the preamble to the contested decision, the Commission states that: 'Deltafina played a particularly active role in the

Spanish raw tobacco processors' cartel'. Similarly, at paragraph 420 of the statement of objections, which is written in similar terms to those of recital 366 in the preamble to the contested decision, the Commission concludes, *inter alia*, that 'Deltafina must be regarded as having actively participated in setting up and implementing the agreement on average prices and quantities concluded between the processors from 1996 and in negotiating the price schedules for surplus tobacco in 2000'.

¹¹⁸ Moreover, the reasoning and facts relied on by the Commission to establish the objection that Deltafina was directly and actively involved in the infringement are essentially the same as those used in the contested decision, which are set out at paragraph 112 above (see, in particular, paragraphs 412 to 420 of the statement of objections and the various paragraphs of the statement to which they refer).

¹¹⁹ It is clear that, contrary to what Deltafina maintains, the contested decision does not differ from the statement of objections as regards the reasons for which liability for the infringement was imputed to it. Upon reading the statement of objections, Deltafina should accordingly have understood that, as in the contested decision, the Commission intended to rely on its direct and active involvement in the activities of the processors' cartel. Since the statement of objections enabled Deltafina to be aware not only of the objection that it was directly and actively involved in the infringement but also of the facts relied on by the Commission in the contested decision in support of that objection, the applicant was fully in a position to defend itself during the administrative procedure.

¹²⁰ It is true that, in a number of passages in the contested decision, Deltafina is expressly referred to, along with the Spanish processors, as having taken part in the agreements and/or concerted practices at issue (see paragraph 109 above), whereas no

such reference is made in the corresponding passages of the statement of objections. However, that is merely a difference in presentation of the facts, the intention being simply to give a more precise account of the facts in the contested decision, and cannot constitute a substantive alteration of the objections set out in the statement of objections. It should be recalled in that connection that it is settled case-law that the Commission's final decision is not necessarily required to be a replica of the statement of objections (Case 41/96 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 91; Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 14; Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge de transports and Others v Commission* [1996] ECR II-1201, paragraph 113).

- ¹²¹ Similarly, at paragraph 413 of the statement of objection, the Commission, referring to its Decision 80/1334/EEC of 17 December 1980 relating to a proceeding under Article [81 EC] (IV/29.869 — Italian cast glass) (OJ 1980 L 383, p. 19; ‘the cast glass decision’), states that, in accordance with its decision-making practice, ‘where an undertaking enables and “consciously” assists the implementation of the restrictions of competition which were the very purpose of the agreements, it can be held “jointly responsible” for the resulting restrictive effects’. That observation, for which there is no equivalent in the contested decision and which appears in the section of the statement of objections dedicated to the addresses of the decision — to Deltafina in particular — could, *prima facie*, be interpreted as meaning that the Commission is alleging, not that Deltafina directly and actively participated in the processors’ cartel, but simply that it facilitated the commission of the infringement. However, such an interpretation cannot be accepted, since it fails to take account of the paragraphs of the statement of objections following that observation, in particular paragraphs 415 and 420, in which it is clearly alleged that Deltafina actively participated in the processors’ cartel (see paragraph 117 above). In fact, by making that observation at paragraph 413 of the statement of objections, the Commission — even though it may be a matter for regret that it did not express itself more precisely in that regard — intended to say that an undertaking may infringe the prohibition laid down in Article 81(1) EC where the purpose of its conduct, as coordinated with that of other undertakings,

is to restrict competition on a specific relevant market within the common market, and that does not mean that the undertaking has to be active on that relevant market itself. That is apparent when that observation is read in the context in which the passage appears in the cast glass decision.

¹²² As regards the third question, Deltafina does not dispute that the facts relied on by the Commission, at recitals 359 to 366 in the preamble to the contested decision, in order to hold it liable for an infringement of Article 81 EC, as set out at paragraph 112 above, are substantiated by evidence in the case-file. In actual fact, in the part of the plea in question, Deltafina challenges the Commission's conclusion that those facts justify the first infringement being attributed to it in its entirety.

¹²³ In order that all of the infringement may be imputed to an undertaking which has participated in a cartel, two conditions, one of an objective and the other of a subjective nature, must be met (see paragraphs 57 to 63 above). As regards the first condition, the undertaking must have contributed to the implementation of the cartel, even in a subsidiary, accessory or passive role. The second condition is that the undertaking must have manifested its own intention, showing that it is in agreement, albeit only tacitly, with the objectives of the cartel.

¹²⁴ In the present case, first, it is established that Deltafina actively and directly contributed to the implementation of the processors' cartel during the period of the infringement.

125 Thus, the evidence on the file shows that two of Deltafina's representatives, namely Mr M, its chairman, and Mr C, the director responsible for buying, attended the first meeting of the processors' cartel, namely that held on 13 March 1996 in Madrid, at which prices and amounts of raw tobacco to be purchased for the 1997 marketing year were discussed and an agreement on prices concluded. It is apparent from a fax sent by WWTE to Deltafina on 10 April 1996, which is referred to at recital 95 in the preamble to the contested decision, that the latter actively contributed to the conclusion of that agreement and drafted the minutes recording the agreement. It is also clear from that fax that and from a fax sent by Agroexpansión to Deltafina on 22 April 1996 that WWTE and Agroexpansión complained to Deltafina about Cetarsa's failure to comply with the agreement.

126 Another meeting of the processors' cartel was held on 17 December 1996 which was attended by Mr M. Mr M and Mr C also attended the meeting of the processors' cartel held in Rome on 30 January 1997, at which agreements on prices and amounts of raw tobacco to be purchased for the 1997/1998 marketing year were concluded. It is apparent from the file that Mr M kept a note drafted and signed by the Spanish processors at that meeting, setting out the details of the various agreements and that he subsequently destroyed it at the request of those processors.

127 Subsequently, on a number of occasions, WWTE and Agroexpansión informed Deltafina of the situation on the Spanish raw tobacco market and complained to Deltafina about the non-compliance with the agreements referred to at paragraph 126 above and other agreements concluded during the first months of 1997. Accordingly, on 29 April 1997, WWTE sent a fax to Mr M informing him that the minimum (average) price which Cetarsa had agreed to pay to the producers constituted a breach of an agreement concluded between the processors in the presence of Mr M and that it would therefore be impossible to comply with the undertaking to pay an average price of 50/60 Spanish pesetas (ESP) per kilo. On the same day, in reply to that fax, on Deltafina-headed paper, Mr M asked WWTE to 'keep calm' and stated that 'paying

more and more does not help anyone'. On 30 April 1997, Agroexpansión sent a fax to Mr M in which it stated, inter alia, that 'the agreements and meetings with the other processors [were], yet again, pointless and ridiculous' and that it '[had] complied with the agreement and [would] buy 5 million kilos but pay ESP 30 more than last year'. By fax of 9 July 1997, WWTE once again complained to Deltafina about Cetarsa's conduct, stressing in particular the need to 'make peace in the sector' and to have 'an agreement without agreement'. In its fax, WWTE also stated: '[a]s you have said on many occasions, an agreement on prices is not possible without an agreement on quantities. The agreement on prices cannot be for one year only ... It will be necessary to have an agreement [lasting] possibly five years [or] at least three years.'

¹²⁸ On 1 October 1997, Agroexpansión sent a fax to Deltafina informing it that WWTE had agreed to pay prices above those which had been agreed. In response to that fax, Mr M wrote to WWTE on the same day on Deltafina-headed paper to inform it that, if that information proved to be correct, a serious problem would arise and that its conduct could be interpreted as a 'violent attack' on Agroexpansión. WWTE gave Deltafina its opinion on that issue by fax of 2 October 1997.

¹²⁹ On 6 November 1997, WWTE sent a fax to Deltafina stating, inter alia, that it was attempting 'by all means possible' to reach an agreement on quantities and that, at the meeting to be held with the other processors on 20 November 1997, it would propose 'guaranteeing the agreements by depositing a significant sum of money which would ensure some security in the implementation of the agreements'. A table containing information on some of the prices paid by each of the Spanish processors was attached to that fax.

- 130 Deltafina was informed by Taes of the framework agreement on the purchasing conditions for the 1998/1999 marketing year concluded by the processors at the meeting held in Madrid on 20 January 1998 the day after that meeting.
- 131 It is apparent from an activity report of Agroexpansión's of 6 April 1999 that Mr M participated at a meeting with the Spanish processors and the Anetab in March 1999, during which raw tobacco prices and the manner in which the amounts of raw tobacco purchased were to be shared out for the 1999/2000 marketing year were discussed.
- 132 Lastly, in 2000, Deltafina was involved in negotiations between the processors and the producers' representatives concerning the price brackets for surplus tobacco in 1999. In particular, prior to a meeting which the Anetab was to hold at the end of February 2000, Mr M sent a fax on Deltafina-headed paper to Cetarsa, Agroexpansión and WWTE on 15 February 2000 in order to share with them his thoughts, advice and proposals in that regard.
- 133 Next, in the light of all the objective circumstances characterising Deltafina's participation, it must be found that it acted in full knowledge of the facts and intentionally in contributing to the processors' cartel. Deltafina clearly could not have been unaware, or indeed was well aware, of the anti competitive and unlawful objective of the cartel, that objective having become apparent, *inter alia*, from the meetings which were held with an anti-competitive aim, from the exchange of sensitive information in which it actively participated throughout the period of the infringement and from a note setting out the details of certain agreements relating to prices and amounts of raw tobacco purchased which was in its safekeeping. It should be added in that context that, in the light of the important position it held on the market for the purchase of Spanish processed tobacco and the responsibility it had for the coordination and supervision of the commercial activities of the Universal Group in Europe (see paragraphs 142 and 268 to 272 below), Deltafina had an interest in ensuring that the restrictive practices at issue were implemented.

¹³⁴ In the light of all the foregoing, it must be held that the Commission was correct in considering in the contested decision that the applicant had incurred liability for the infringement constituted by the processors' cartel and did not thereby infringe Deltafina's rights of defence.

¹³⁵ It follows that the first part of the second plea must be rejected as unfounded.

The second part of the second plea, alleging that the criticism levelled at Deltafina for its conduct should, in fact, be levelled at its chairman

— Arguments of the parties

¹³⁶ Deltafina submits that the conduct for which it is criticised could be attributed only to its chairman, Mr M, since he always acted in connection with the processors' cartel in a personal capacity and not as a representative or organ of the company.

¹³⁷ Deltafina states that the Spanish processors chose Mr M as 'guardian of their agreements' because he guaranteed neutrality and held a position of authority in the tobacco industry in both Spain and Italy as well as in the rest of the world.

¹³⁸ The Commission contends that Deltafina's arguments should be rejected.

— Findings of the Court

- 139 It is clear from a number of facts in the case-file that Mr M participated in the processors' cartel not in a personal capacity but as a representative of Deltafina.
- 140 In that regard, first, it should be noted that Mr M is the chairman of that company.
- 141 Next, it should be borne in mind that, at some of the meetings of the cartel, Mr M was accompanied by another representative of Deltafina, who held an important position within that company (see paragraphs 125 and 126 above). Moreover, the meeting held in Rome on 30 January 1997 (see paragraph 126 above) took place at Deltafina's offices and the various letters sent by Mr M to the Spanish processors in connection with the processors' cartel were written on Deltafina--headed paper. Furthermore, in his fax of 29 April 1997 to WWTE, Mr M includes the name of the company along with his own (see paragraph 127 above).
- 142 Lastly, it is clear that the purpose of Mr M's involvement in the activities of the processors' cartel was to defend the commercial interests of Deltafina on the Spanish market. Accordingly, it should be noted, first, that Deltafina was responsible for the coordination and supervision of the commercial activities of the Universal Group in Europe and that it therefore had a direct interest in the purchase of raw tobacco by its sister company in Spain, Taes. Second, in addition to the fact that it acquired virtually all the processed tobacco produced by Taes (recital 27 in the preamble to the contested decision), Deltafina concluded important contracts for the purchase of processed tobacco with Cetarsa (recitals 20 and 29) and Agroexpansión (recitals 21 and 29). However, as is apparent from certain documents in the file and is not disputed between the parties, the price paid by the Spanish processors for the purchase

of raw tobacco had a direct influence on the price paid by Deltafina for the purchase of processed tobacco (see also recital 32).

¹⁴³ It should also be noted that, in its statement of 18 February 2002 (see paragraph 9 above), Taes stated that Deltafina had an interest in the conclusion of the agreement on the purchase price of surplus raw tobacco for 1999 since it wished to acquire additional quantities of processed tobacco. It should be added that, in a number of letters exchanged between Deltafina and the Spanish processors in connection with the processors' cartel, express reference is made to the applicant's situation.

¹⁴⁴ In the light of the foregoing considerations, the second part of the second plea must be rejected as unfounded.

The third part of the second plea, alleging that the Commission refused to grant Deltafina access to certain inculpatory documents

— Arguments of the parties

¹⁴⁵ Deltafina claims that, by refusing it access to documents establishing that it acted as the leader of the processors' cartel, the Commission infringed its rights of defence and its right to a fair hearing.

¹⁴⁶ It states in that regard that the Commission did not act on its request for access to the statements submitted by the other undertakings to which the statement of objections was addressed in response to that statement, which it made by fax on 23 March 2004 and repeated by fax on 24 November 2004. The main evidence to which the Commission referred in the contested decision in order to attribute to Deltafina the role of leader was certain passages in the replies of Agroexpansión and WWTE to the statement of objections.

¹⁴⁷ The Commission does not accept that it relied on evidence in the replies of Agroexpansión and WWTE to the statement of objections to establish that Deltafina acted as leader of the processors' cartel. As is apparent from recital 436 in the preamble to the contested decision, in their replies, Agroexpansión and WWTE simply confirmed that role or, to be more precise, 'the facts which make that role apparent'. They did not put forward any facts which had not already been established with regard to Deltafina in the statement of objections and in respect of which the latter would not have therefore been able to defend itself.

— Findings of the Court

¹⁴⁸ On the same grounds as those set out at paragraphs 70 to 73 and 105 above, the claims made by Deltafina in support of the part of the plea in question must be rejected as ineffective. They will be examined in due course in the context of the sixth plea, relied on by Deltafina in support of its claims that the amount of its fine should be reduced.

The fourth part of the second plea, alleging that the Commission failed to define with sufficient clarity the relevant product and geographic markets in the statement of objections

— Arguments of the parties

¹⁴⁹ Deltafina submits that the Commission failed to define with sufficient clarity the relevant product and geographic markets in the statement of objections and thereby seriously infringed its rights of defence.

¹⁵⁰ According to Deltafina, if that market had been defined ‘with the requisite clarity’ in the statement of objections, it would have been able to present to the Commission legal and factual arguments which could have made it reach other conclusions than those set out in the contested decision. In particular, that would have enabled it to put forward arguments concerning whether or not it was present on the relevant market and its role on that market.

¹⁵¹ The Commission rejects Deltafina’s claims.

— Findings of the Court

¹⁵² First, the statement of objections demonstrates sufficiently clearly and precisely that the relevant market is the Spanish market for the purchase and first processing of raw tobacco. In the statement of objections, as in the contested decision (see

paragraphs 82 and 83 above), the Commission describes in detail the undertakings engaged in the first processing of raw tobacco in Spain — providing, *inter alia*, information on their raw tobacco purchasing and first processing activities and the trading relationships between them — the producers of raw tobacco and their representatives, various aspects of the raw tobacco sector in Spain, including its tobacco-producing regions, the production yields and values, the value of sales, the various varieties of raw tobacco and the average (maximum) delivery prices for each of those varieties and the Community and Spanish legislative framework applicable to raw tobacco (see paragraphs 15 to 81 of the statement of objections). It is possible as a result of the analysis thus carried out by the Commission in the statement of objections to be fully apprised of the operating conditions on the market on which competition was distorted.

153 Next, it is apparent from Deltafina's reply to the statement of objections that it had not only perfectly understood the Commission's perception of the relevant market in the present case but also expressed its opinion on its role on that market.

154 In those circumstances, the fourth part of the second plea must be rejected as unfounded.

155 In the light of all the foregoing considerations, the second plea cannot be accepted.

The third plea, alleging infringement of Article 81(1) EC, Article 2 of Regulation No 1/2003 and paragraph 43 of the Guidelines on the effect on trade concept contained in Articles 81 [EC] and 82 [EC], as well as failure to state reasons

Arguments of the parties

¹⁵⁶ Deltafina claims that the Commission did not adequately prove that the restrictive practices at issue affected trade between Member States.

¹⁵⁷ In support of that claim, first, it argues that the Commission contradicts itself by stating, on the one hand, at recital 316 in the preamble to the contested decision, that ‘the cartel between the producers and Deltafina ... may have an influence, direct or indirect, actual or potential, on the pattern of trade between Spain and the other Member States insofar as its purpose was to ensure that Spanish processed tobacco was exported’ and, on the other, at recital 412, that it ‘does not possess conclusive evidence of the actual effects of the producers’ and processors’ infringements on the market’.

¹⁵⁸ Next, Deltafina criticises the fact that the Commission assumed that trade between Member States was affected in the present case ‘simply on the objective ground that a product other than that of the relevant market may sometimes be exported to other markets’. Thus, the Commission took account of a market downstream of the relevant market, namely the processed tobacco market. Moreover, the Commission did not describe the ‘forces present’ on that downstream market or explain how that market could be affected ‘in an anti-competitive and appreciable manner by activities which

took place on the relevant market”. Deltafina also complains that the Commission disregarded the fact that the raw tobacco market is ‘exclusively national’, since non-Spanish undertakings are not recognised as processors in Spain and cannot purchase raw tobacco from Spanish producers. It adds that there are no imports of raw tobacco from Spain and no exports of raw tobacco to that country.

¹⁵⁹ Deltafina also complains that the Commission disregarded paragraph 43 of the Guidelines on the effect on trade concept contained in Articles 81 [EC] and 82 [EC], which provide, *inter alia*, that ‘[t]he likelihood of a particular agreement to produce indirect or potential effects must be explained by the authority ... claiming that trade between Member States is capable of being appreciably affected’ and that ‘[h]ypothetical or speculative effects are not sufficient for establishing Community law jurisdiction’.

¹⁶⁰ Lastly, Deltafina submits that the cartel at issue is similar to a ‘[cartel] covering a single Member State’ within the meaning of paragraphs 78 to 82 of the Guidelines on the effect on trade concept in Articles 81 [EC] and 82 [EC]. It adds that, according to the Guidelines, ‘the capacity of those cartels to distort trade lies mainly in their ability to exclude competitors from other Member States.’ There is nothing in the contested decision which makes it possible to establish the existence of such exclusionary effects in the present case. In fact, according to Deltafina, the legal barriers which preclude the establishment in Spain of foreign processing undertakings and the intrinsic characteristics of raw tobacco which dictate that the product must be processed immediately after harvesting and near to the place at which it was harvested ‘make it unlikely that there should be even any indirect effects, which, if they occurred, could make a purely hypothetical effect on trade into a potential effect’.

161 The Commission considers that the third plea should be rejected as unfounded.

162 First, it states that the condition relating to the effect on trade between Member States is met where it is possible to foresee with a sufficient degree of probability and on the basis of objective factors of law or fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. Therefore, for the purposes of the application of Article 81 EC, it is not necessary to show that trade is actually affected.

163 Next, the Commission points out that, at recitals 316 and 317 in the preamble to the contested decision, it sets out the reasons for which the concerted practices at issue were 'potentially capable' of affecting trade between Member States. It considers there to be no contradiction between recitals 316 and 412.

164 Moreover, the Commission points out that Deltafina does not dispute that a cartel concerning the purchase prices of raw tobacco is capable of having an impact on the price of processed tobacco or that Spanish processed tobacco is mainly intended for export. It considers that, in those circumstances, it was not required to describe the processed tobacco market before being able to conclude that the cartel could have an effect on the export of that product.

165 Lastly, the Commission rejects Deltafina's claim that, since the cartel at issue is similar to a cartel covering a single Member State, it was necessary for it to show that it had the effect of excluding competitors in other Member States. In that regard, it refers in particular to recital 317 in the preamble to the contested decision.

Findings of the Court

¹⁶⁶ It follows from well-established case-law that the interpretation and application of the condition relating to effects on trade between Member States contained in Articles 81 EC and 82 EC must be based on the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus, Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the common market (Case 22/78 *Hugin Kassaregister and Hugin Cash Registers v Commission* [1979] ECR 1869, paragraph 17, and Case C 475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 47).

¹⁶⁷ For an agreement, decision or practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that it might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant (Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 16, and *Ambulanz Glöckner*, paragraph 116 above, paragraph 48).

¹⁶⁸ Thus, an effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive (Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-315, paragraph 47, and Case C-359/01 P *British Sugar v Commission* [2004] ECR I-4933, paragraph 27).

- 169 Case-law has also established that Article 81(1) EC does not require that the arrangements referred to in that provision have actually appreciably affected trade between Member States, but requires that it be established that those arrangements are capable of having that effect (see Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 43 and the case-law there cited).
- 170 In the present case, it must be held that the Commission has established to the requisite legal standard in the contested decision that the processors' cartel was capable of affecting trade between Member States.
- 171 In particular, the Commission was correct in concluding, at recital 316 in the preamble to the contested decision, that the condition for the application of Article 81 EC was met, in the light of the fact that the processors' cartel was capable of having an effect on exports of processed tobacco from Spain to other Member States.
- 172 As is apparent from various passages in the contested decision (see, in particular, recitals 20, 23, 27, 32 and 84), first, the purchase price of raw tobacco has a direct effect on the price of processed tobacco and, second, Spanish processed tobacco is mainly intended for export. Those factors, which are not in any event disputed by Deltafina, are sufficient to demonstrate that the processors' cartel was capable of having an effect on the export of Spanish processed tobacco and, accordingly, Deltafina cannot criticise the Commission for failing to define the 'forces present' on the market for that product.
- 173 It is true that, in assessing whether the condition relating to effects on trade between Member States is met, the Commission took account of a product — processed tobacco — on a market situated downstream of the relevant market. However, as

Deltafina expressly acknowledges in the application, that approach is consistent not only with case-law, which considers that the effect on the pattern of trade between Member States may be indirect (see paragraph 167 above), but also the Guidelines on the effect on trade concept in Articles 81 [EC] and 82 [EC]. Thus, paragraph 38 of the Guidelines states, *inter alia*, that '[i]ndirect effects often occur in relation to products that are related to those covered by an agreement or practice', that '[i]ndirect effects may ... occur where an agreement or practice has an impact on cross-border economic activities of undertakings that use or otherwise rely on the products covered by the agreement or practice' and that '[s]uch effects can, for instance, arise where the agreement or practice relates to an intermediate product, which is not traded, but which is used in the supply of a final product, which is traded.'

- ¹⁷⁴ Moreover, the Commission's conclusion that the processors' cartel is capable of having an effect on the export of Spanish processed tobacco and, therefore, on intra-Community trade is not in any way contradicted by the statement, at recital 412 in the preamble to the contested decision, that '[it] does not possess conclusive evidence of the actual effects of the producers' and processors' infringements on the market; in fact, it would be impossible to determine *ex post* the price levels which would have been applied on the raw tobacco market in Spain but for the practices in question'. By that statement, made in the context of the examination of the gravity of the infringement, the Commission simply states that it cannot quantify precisely the actual impact of the processors' cartel on the market. It does not, however, rule out the possibility that the cartel may have had such an impact. On the contrary, as will be explained in greater detail at paragraphs 245 to 259 below, when assessing the gravity of the infringement in the contested decision, the Commission took account of the fact that, from 1998, the processors' cartel had an actual impact on the market.

175 Since the Commission's reasoning at recital 316 in the preamble to the contested decision is sufficient in itself for the purpose of establishing, on the grounds set out above, that the processors' cartel was capable of affecting trade between Member States, it is not necessary to examine Deltafina's criticism of the argument, set out in the alternative by the Commission at recital 317, that 'a cartel extending over the whole territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the [EC] Treaty is designed to bring about'.

176 Lastly, as regards whether the processors' cartel had a appreciable effect on trade, at recital 317 in the preamble to the contested decision, the Commission stated that the cartel brought together all the recognised processors in Spain, that those processors purchased virtually all the raw tobacco produced in Spain each year, that the cartel related to all the raw tobacco thus purchased and that, once processed, it was mainly sold for export. Those various factors establish to the requisite legal standard that the processors' cartel was capable of having an appreciable effect on intra-Community trade.

177 It follows from all the foregoing considerations that the third plea must be rejected as unfounded.

178 The claims seeking annulment of the contested decision cannot therefore be accepted.

3. *The claims seeking a reduction in the amount of the fine*

The fourth plea, alleging infringement of Articles 2 and 23(2) of Regulation No 1/2003, paragraphs 1A and 5(d) of the Guidelines, the principle of proportionality and the principle of 'equal treatment and penalties', as well as failure to state reasons

Summary of the contested decision

- 179 At recitals 404 to 458 in the preamble to the contested decision, the Commission considers the fines to be imposed on the addressees of the decision.
- 180 At recital 405, the Commission points out that, in fixing the amount of the fine, it must have regard to the gravity and the duration of the infringement.
- 181 In order to determine the starting amount to reflect gravity, the Commission considers, first, at recitals 407 to 414 in the preamble to the contested decision, the 'intrinsic' gravity of the infringements at issue.
- 182 Thus, first, it states, at recital 407, that in carrying out such an assessment, it must take account of the nature of the infringement, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

- 183 Next, at recital 408, the Commission states that ‘the production of raw tobacco in Spain accounts for 12 % of Community production,’ that ‘the area under cultivation in that country is 14 571 hectares and is concentrated in the Autonomous Communities of Extremadura (84 %), Andalucía (11.5 %) and Castilla-Léon (3 %)’ and that ‘the size of the market is relatively small and for the most part concentrated in a single region of Spain’.
- 184 Moreover, at recital 409, the Commission states that the nature of the infringements is considered to be very serious, since it concerns the fixing of the prices of varieties of raw tobacco in Spain and the sharing out of quantities.
- 185 With regard in particular to the producers’ representatives, the Commission states, at recital 410, that they participated in agreements and/or concerted practices the essential purpose of which was to fix the price brackets per quality grade for each raw tobacco variety — within which they then negotiated the final delivery price of raw tobacco — and the minimum average price per producer and producer group. It adds that, while the margins within those price brackets were very wide and could vary by between 100 % and 380 % as regards the minimum and maximum for each quality grade for the same raw tobacco variety, by agreeing on the minimum level of the average price — per producer and producer group — the producers’ representatives nevertheless sought to raise the final sale price of their raw tobacco above the level that would have resulted from the free play of competition.
- 186 As regards the Spanish producers and Deltafina, the Commission states, at recital 411 in the preamble to the contested decision, that, in addition to agreeing the price brackets per quality grade and the additional conditions, they also ‘made a secret agreement on various other price-related matters and quantities to be sold, in particular the average (maximum) delivery price for each variety of raw tobacco (all

grades) and the amounts of raw tobacco to be purchased by each processor'. It adds that, from 1998, they also set up complex arrangements for offsetting and transfers in order to ensure that their secret agreement on prices and quantities was complied with.

¹⁸⁷ Lastly, at recital 412 in the preamble to the contested decision, the Commission indicates that it 'does not possess conclusive evidence of the actual effects of the producers' and processors infringements on the market, since it would be impossible to determine ex post the price levels which would have been applied on the raw tobacco market in Spain but for the practices in question'. In the following recital, it states: '[n]one the less, since at least 1998, as a result of their secret coordination on prices and quantities both before and after the conclusion of the cultivation contracts and up to the conclusion of the final transactions, the processors' cartel can be regarded as having been fully implemented and complied with ... and must have had a real impact on the market.'

¹⁸⁸ At recital 414 in the preamble to the contested decision, the Commission states that it must be concluded from the preceding considerations that both infringements must be regarded as 'very serious'. However, it points out that it 'will take account of the relatively small size of the product market'.

¹⁸⁹ Next, the Commission treats the undertakings concerned differently, taking the view that it is necessary to 'take account of the specific weight of each undertaking and therefore of the actual impact of its unlawful conduct on competition, in order to

ensure that the deterrent effect of the fine imposed on each undertaking is proportionate to its contribution to the unlawful conduct that must be penalised' (recital 415).

¹⁹⁰ Thus, first, it makes a distinction between the processors' cartel (recitals 416 to 424) and that of the producers' representatives (recitals 425 to 431).

¹⁹¹ Next, as regards the processors' cartel, the Commission considers that 'the fines must be graded to reflect each party's contribution to the unlawful conduct and the position it occupies on the market' (recital 416).

¹⁹² In that regard, the Commission states that 'Deltafina should receive the highest starting amount on account of its prominent market position as the main purchaser of Spanish processed tobacco (its commercial relations with Cetarsa, Agroexpansión and Taes are described at recitals 20, 21 and 27)'. According to the Commission, 'it is to be inferred from that purchasing power that Deltafina had a greater capacity than any other person to influence the conduct of the Spanish processors' (recital 417).

¹⁹³ As regards the Spanish processors, the Commission considers that their 'contribution' to the unlawful practices 'may be regarded, on the whole, as similar' (recital 418). However, it is of the view that it is none the less necessary to take account of the size and market share of each of the processors concerned.

194 On that basis, the Commission divides the Spanish processors into three categories:

- in the first category, it places Cetarsa, on the basis of the fact that, with a share of approximately 67 % of the market for the purchase of Spanish raw tobacco, it is by far the leading processor in Spain and the highest starting point must therefore be applied to it (recital 419);
- in the second category, it places Agroexpansión and WWTE, pointing out that each has a market share of approximately 15 % and the same starting point must therefore be applied to them (recital 420);
- lastly, in the third category, it places Taes, on the ground that it has a market share of only 1.6 % and the lowest starting point must therefore be applied to it (recital 421).

195 Moreover, in order to ensure that the fine has sufficient deterrent effect, the Commission considers it necessary to apply a multiplying factor to the starting amount decided on for WWTE and that decided on for Agroexpansión. It states in that connection that, although they have a relatively small market share in Spain, those two companies belong to multinationals with ‘considerable economic and financial power’ and that ‘[i]n addition, [they] acted under the decisive influence of their respective parent companies’ (recital 422). The Commission therefore considers it to be necessary to increase the starting amount of the fine for those companies by applying a coefficient which takes account of, first, the size of the groups to which they belong and, second, their size compared with that of the other Spanish processors (recital 423). It therefore applies a multiplying factor of 1.5 — namely an increase of 50 % — to the starting

amount decided on for WWTE and a multiplying factor of 2 — namely an increase of 100 % — to the starting amount decided on for Agroexpansión.

¹⁹⁶ In the light of those various factors, at recital 424 in the preamble to the contested decision, the Commission sets the starting amounts of the fines as follows:

— Deltafina: EUR 8 000 000

— Cetarsa: EUR 8 000 000

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

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

— Taes EUR 200 000

¹⁹⁷ Lastly, as regards the producers' representatives, the Commission considers that it is appropriate to impose on each of them only a symbolic fine of EUR 1 000 (recitals 425 and 430). It justifies its position by reference, *inter alia*, 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 conduct of the producers' representatives and the processors in the very specific context of the collective negotiation of standard contracts' (recital 428). It also states that it must

be borne in mind that ‘the existence and the results of the negotiations on standard contracts were generally in the public domain and ... no authority ever questioned their compatibility with either Community or Spanish law before these proceedings started’ (recital 429).

Arguments of the parties

¹⁹⁸ In its fourth plea, put forward in the alternative, Deltafina claims in essence that in its assessment of the gravity of the infringement and in setting the starting amount of the fine imposed on it, the Commission failed to have regard to the Guidelines and infringed the principle of proportionality and the principle of ‘equal treatment and penalties’. It also submits that sufficient reasons are not given in the contested decision.

¹⁹⁹ In that fourth plea, Deltafina puts forward a series of complaints and arguments which can be divided into seven parts.

²⁰⁰ First, it criticises the fact that the Commission classified the infringement as ‘very serious’, even though it recognised that the relevant market was ‘relatively small’.

²⁰¹ Second, it complains that the Commission classified the infringement as ‘very serious’, even though it had no proof that the infringement had any actual effect on the market and, thereby, infringed section 1A of the Guidelines. Referring to a report of 13 January 2005 prepared by its economist, it states that that shows that the behaviour objected to is unlikely to have had any effect on the Spanish raw tobacco market. In particular, that report showed that, far from being stable or falling, the prices of

the main variety of Spanish tobacco during the period of the infringement increased by 21 % and that, during the same period, the prices of Spanish tobacco ‘converged significantly with European and ... world prices.’

202 Third, Deltafina claims that the contested decision is contradictory in so far as the Commission states on the one hand, at recital 413 in the preamble to the decision, that ‘the processors’ cartel can be regarded as having been fully implemented and complied with’ and, on the other hand, states the contrary, at recitals 85, 88, 111, 113, 122, 126, 130, 133, 144, 175, 186, 206, 229, 231, 232, 233, 235, 239, 244, 255, 256, 257, 284, 294, 295, 296, 307 and 319.

203 Fourth, Deltafina submits that the Commission distorted the facts by stating, at recital 417 in the preamble to the contested decision, that it was the main purchaser of Spanish processed tobacco and that the purchasing power it wielded enabled it to influence the conduct of Spanish processors. In support of its assertions, it refers once again to the report of its economist of 13 January 2005, in particular to Table 5 in that report, which shows that, as regards the purchase of Spanish processed tobacco, during the period of the infringement its average market share was 27.5 %, that of Dimon (which included Agroexpansión) was 25.2 %, that of Cetarsa was 31.6 % and that of Standard Commercial Tobacco Co., Inc. (which included WWTE) was approximately 15 %.

204 Deltafina also maintains that, contrary to what is stated in the summary of the contested decision published in the Official Journal in accordance with Article 30 of Regulation No 1/2003, it was not ‘the most important customer of three of the Spanish processors’. Referring to Table 7 of its economist’s report, it states that, during the period of the infringement, it purchased all of the production of its sister company, Taes, an average of 32.3 % of the production of Cetarsa, an average of 19.8 % of the production of Agroexpansión and a small amount of the production of WWTE. In actual fact, according to Deltafina, Cetarsa’s main customer was an ‘old customer’,

with which Cetarsa was connected, namely Altadis, SA (formerly Tabacalera), Agro-expansión's main customer was the Dimon Group and WWTE's was the Standard Group.

205 Lastly, Deltafina criticises the Commission's position that, for the purpose of determining market shares for the purchase of Spanish processed tobacco, the transfers between Cetarsa and Tabacalera/Altadis should be omitted.

206 Fifth, Deltafina states that, in the contested decision, the Commission accepts that 'the legal framework surrounding the collective negotiation of standard agreements could engender a considerable degree of uncertainty as to the legality of the conduct of the producers' representatives and the processors' (recital 428) and that 'the existence and the results of the negotiations on standard contracts were generally in the public domain and ... no authority ever questioned their compatibility with either Community or Spanish law before these proceedings started' (recital 429). It submits that it is as a result of those circumstances that the Commission imposed a symbolic fine of EUR 1 000 only on the producers and takes issue with the fact that the Commission failed to explain in the contested decision why the same solution was not adopted in its case. It also claims that the Commission infringed Section 5(d) of the Guidelines, which provides that, where a symbolic fine of EUR 1 000 is imposed, '[t]he justification for imposing such a fine should be given in the text of the decision'.

207 Sixth, relying on the principle of 'equal penalties', Deltafina complains that, when it assessed the gravity of the infringement, the Commission failed to take account of the fact that, unlike the Spanish processors, it was not accused of 'conduct entailing unlawful agreements and vertical negotiations with the producers, their associations and cooperatives'.

- 208 Seventh and finally, Deltafina considers that the Commission infringed the principle of equal treatment since it deviated considerably from its earlier practice as regards the calculation of the amount of fines in the case of cartels involving undertakings active only on the product market on which the facts alleged to constitute the infringement occurred. Referring to a second report of its economist of 13 January 2005, it claims that, during the period 1991/2004, the overall amount of the fines imposed in connection with that type of cartel was on average 0.91 % of the value of the relevant market. It also criticises the Commission for failing to set out in the contested decision the reasons for which it considered it necessary to thus deviate from its earlier practice.
- 209 In the light of the foregoing considerations, Deltafina claims that the Court should reduce the amount of its fine.
- 210 The Commission submits that none of the parts of the fourth plea is well founded.
- 211 In first place, the Commission claims that, for the purpose of setting the starting amount of the fine, it took account of the small size of the relevant market, in spite of the fact that the infringement at issue was, by its nature, ‘very serious’.
- 212 In second place, the Commission rejects Deltafina’s argument that it had no proof that the infringement at issue had an actual impact on the market.
- 213 In that regard, it states, first, that restrictive practices relating to price fixing and sharing sources of supply constitute of themselves very serious infringements, even where there is no proof as to the actual impact of those practices on the market (Case T-348/94 *Enso Española v Commission* [1998] ECR II-1875, paragraph 232, and

European Night Services and Others v Commission, paragraph 77 above, paragraph 136).

- ²¹⁴ Second, referring to recital 413 in the preamble to the contested decision, the Commission reiterates that the processors' cartel was fully implemented and complied with, at least from 1998, and states that the view may therefore be reasonably taken that it could have had an effect on the market, even if that effect cannot be measured. It adds that, if it had not been possible for the cartel to have any effect on raw tobacco price trends, there would have been no reason for the processors and Deltafina to take part in it for over five years.
- ²¹⁵ Third, the Commission states that the report of Deltafina's economist of 13 January 2005 does not demonstrate that the processors' cartel had no effect on the market.
- ²¹⁶ In third place, the Commission submits that what is stated at recital 413 in the preamble to the contested decision is not contradicted by any of the other recitals in the decision referred to by Deltafina.
- ²¹⁷ In fourth place, the Commission does not consider that it erred in stating that Deltafina held a prominent position on the Spanish market for the purchase of raw tobacco.
- ²¹⁸ The Commission states that whereas, in his report of 13 January 2005, the economist appointed by Deltafina includes Cetarsa among the purchasers of processed tobacco, that company does not in fact purchase processed tobacco from third parties. It argues that if the economist intends to include Cetarsa's sales to Tabacalera/Altadis in the total sales of the Spanish processed tobacco market, the data in his report is unrealistic, since those sales 'cannot be compared to sales to third party exporters (such

as Universal/Deltafina, Standard and Dimon), which were the generating force behind the processors' cartel. The Commission states that, until the mid 1990s, Cetarsa sold virtually all the tobacco it processed to Tabacalera and that those two undertakings were, at least until 1998, state-controlled. It therefore takes the view that, during the early years of the processors' cartel, namely from 1996 to 1998, the commercial transactions between Tabacalera and Cetarsa could be regarded as sales within the same group and cannot be taken into account in calculating the amounts of tobacco purchased by third parties ('export tobacco'). According to the Commission, if Cetarsa's sales to Tabacalera/Altadis are thus excluded, Deltafina's average share of the market for the purchase of processed tobacco in Spain from 1996 to 2001 was considerably greater than 27.5 % and was, in any event, the largest share.

²¹⁹ The Commission adds that there is no doubt that Deltafina was also the main customer of Cetarsa, Agroexpansión and Taes.

²²⁰ Lastly, referring to certain passages in the contested decision, the Commission states that Deltafina also had 'trading relationships' with the processors, 'contracts having been signed with Cetarsa for the processing and threshing of part of Taes' and Agroexpansión's tobacco,'

²²¹ According to the Commission, as a result of the purchase of tobacco from Taes, Agroexpansión and Cetarsa and the conclusion of contracts with Cetarsa for the processing of Taes' tobacco, Deltafina enjoyed a 'rather special' position on the Spanish market.

- 222 In fifth place, the Commission claims that sufficient reasons were given in the contested decision for its assessment of the effects which the uncertainty caused by the Spanish legal framework had on the conduct of the various undertakings and associations in question.
- 223 In sixth place, the Commission rejects as unfounded the criticism relating to its alleged failure to take account of the fact that Deltafina was not accused of participating ‘[in] unlawful discussions and vertical negotiations’ with the producers, their associations and cooperatives.
- 224 In seventh place, the Commission submits that it has never undertaken, either on a formal or an informal basis, to comply with the practice advocated by Deltafina for calculating the amount of fines. Moreover, it points out that, under Regulation No 1/2003, it has a wide margin of discretion when fixing the amount of fines and that it assesses the gravity of infringements by reference to numerous factors which do not fall within a binding or exhaustive list of the criteria to be taken into account and that its earlier decision-making practice does not itself serve as a legal framework for fines imposed in competition matters, since that is defined only in Regulation No 1/2003.

Findings of the Court

- 225 Before examining the various arguments formulated by Deltafina, it is necessary to set out a number of general considerations concerning the fixing of the amount of fines and, in particular, the assessment of the gravity of the infringement.

— General considerations

- ²²⁶ Article 23(3) of Regulation No 1/2003 provides that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.' The same provision was to be found in the second subparagraph of Article 15(2) of Regulation No 17, which was applicable at the time of the infringement in the present case.
- ²²⁷ According to settled case-law, the Commission has a margin of discretion when fixing the amount of fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (Case T-150/89 *Martinelli v Commission* [1995] ECR II-1165, paragraph 59; Case T-49/95 *Van Megen Sports v Commission* [1996] ECR II-1799, paragraph 53; and Case T-229/94 *Deutsche Bahn v Commission* [1997] ECR II-1689, paragraph 127).
- ²²⁸ It has also consistently been held that the gravity of infringements of Community competition law must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (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 241; and *Dalmine v Commission*, paragraph 34 above, paragraph 129).
- ²²⁹ In the present case, it is apparent from the contested decision that the Commission determined the amount of the fine imposed on the various addressees on the basis of the general method laid down in the Guidelines, even though it does not expressly refer to the Guidelines in the decision.

- 230 Although the Guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* [2006] ECR I-4429, paragraph 91). The fact that, in the Guidelines, the Commission set out its approach to assessment of the gravity of an infringement does not prevent it from assessing that criterion as a whole by reference to all the relevant circumstances of the case, including factors that are not expressly mentioned in the Guidelines (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 237).
- 231 According to the method set out in the Guidelines, the Commission takes as its starting point for calculating the amount of the fines to be imposed on the undertakings concerned an amount determined according to the ‘intrinsic’ gravity of the infringement. The assessment of that gravity must take account of the nature of the infringement, its actual impact on the market, where that can be measured, and the size of the relevant geographic market (Section 1.A, first paragraph).
- 232 Within that framework, infringements are classified in three categories, namely ‘minor infringements’, for which the likely amount of the fines is between EUR 1 000 and EUR 1 million, ‘serious infringements’, for which the likely amount of the fines is between EUR 1 million and EUR 20 million, and ‘very serious infringements’, for which the likely amount of the fines is above EUR 20 million (Section 1.A, second paragraph, first to third indents). As regards very serious infringements, the Commission states that these will generally be horizontal restrictions, such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly (Section 1.A, second paragraph, third indent).

233 Moreover, the three factors to be taken into account in assessing the gravity of the infringement referred to at paragraph 231 above do not have the same weight in the context of the overall assessment. The nature of the infringement plays a primary role, in particular in classifying infringements as ‘very serious’. In that regard, it follows from the description of very serious infringements in the Guidelines that agreements or concerted practices involving in particular price fixing or market sharing may be classified as ‘very serious’ on the basis of their nature alone, without it being necessary for such conduct to have a particular impact or cover a particular geographic area. That conclusion is corroborated by the fact that, while the indicative description of serious infringements expressly mentions the market impact and the effects on extensive areas of the common market, that of very serious infringements does not mention any requirement as to the actual market impact or the effects produced in a particular geographic area (see, to that effect, Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others v Commission* [2005] ECR II-3033, paragraph 178, and Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraph 150).

234 Finally, there is an interdependence between the three factors in the assessment of gravity in that a high degree of gravity in respect of one of the factors may offset the lesser gravity of the infringement in respect of other factors (*Raiffeisen Zentralbank Österreich and Others v Commission*, paragraph 230 above, paragraph 241).

— The first part of the plea, alleging failure to take account of the relatively small size of the product market

235 It is apparent from recital 408 in the preamble to the contested decision that, in its assessment of the gravity of the infringement, the Commission took account of the small size of both the relevant geographic and the relevant product market.

236 It follows from a reading of that recital in conjunction with recital 409 in the preamble to the contested decision (see paragraph 184 above), in particular the use of the adverb ‘however’ in recital 409, that the Commission considered that, notwithstanding the small size of both those markets, the infringement had to be classified as ‘very serious’, since it ‘concern[ed] the fixing of the prices of the varieties of raw tobacco in Spain and the sharing out of quantities’.

237 First, it is clear that that assessment is justified.

238 The extent of the geographic market is only one of the three criteria which, according to the Guidelines, are relevant for the purpose of the overall assessment of the gravity of the infringement. Among those interdependent criteria, the nature of the infringement plays a major role (see paragraphs 233 and 234 above).

239 It is clear that the infringement of which the processors and Deltafina are accused, which consists in fixing the prices of various varieties of raw tobacco in Spain and sharing out quantities of raw tobacco to be purchased from producers, constitutes by its nature a very serious infringement. It should be borne in mind that Article 81(1)(a), (b) and (c) EC expressly states that agreements and concerted practices which, respectively, directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production, markets, technical development or investment and share markets or sources of supply are incompatible with the common market. Infringements of that kind, in particular those involving horizontal cartels, are classified by case-law as ‘particularly serious’, since they involve direct interference with the essential parameters of competition on the market in question (Case T-141/94 *Thyssen Stahl v Commission* [1999] ECR II-347, paragraph 675) or clear infringements of the Community competition rules (Case T-311/94 *BPB de Eendracht v*

Commission [1998] ECR II-1129, paragraph 303). It is also important to bear in mind that very serious infringements, within the meaning of the third indent of the second paragraph of Section 1.A of the Guidelines, are ‘generally horizontal restrictions such as price cartels and market-sharing quotas’. To that can be added the fact, referred to at recital 411 in the preamble to the contested decision, that there was a secret aspect to the processors’ cartel, which is a factor that can accentuate the gravity of the infringement.

²⁴⁰ Moreover, the size of the geographic market is not an autonomous criterion in the sense that only infringements affecting most of the Member States would be classifiable as ‘very serious’. Neither the EC Treaty, nor Regulation No 17, nor the Guidelines, nor the case-law support the conclusion that only geographically very extensive restrictions may be classified as such (see, to that effect, Case T-241/01 *Scandinavian Airlines System v Commission* [2005] ECR II-2917, paragraph 87).

²⁴¹ Accordingly, the small size of the relevant geographic market does not preclude the infringement established in the present case being classified as ‘very serious’.

²⁴² That applies all the more where the relevant product market is small, since the size of the product market is not, in principle, a factor that must necessarily be taken into account but simply one relevant factor among others in assessing the gravity of the infringement and fixing the amount of the fine (see, to that effect, *Dalmine v Commission*, paragraph 34 above, paragraph 132).

²⁴³ Next, while the Commission took the view that the small size of the relevant geographic market and the relevant product market did not preclude the infringement being classified as very serious, it nevertheless took full account of that size in fixing

the starting amount of the fines, which was determined by reference to the gravity of the infringement (see in particular recital 414). Accordingly, the Commission decided on a starting point of only EUR 8 000 000 for Deltafina, whereas, under the Guidelines, as the infringement was very serious, it could have contemplated using a starting point of at least EUR 20 000 000.

²⁴⁴ In the light of the foregoing, the first part of the fourth plea must be rejected as unfounded.

— The second part of the fourth plea, relating to the actual impact of the infringement on the market

²⁴⁵ First, it should be recalled that, according to the first paragraph of Section I A of the Guidelines, '[i]n assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market'.

²⁴⁶ It should also be noted that the nature of the infringement plays a primary role in classifying infringements as 'very serious' and that agreements or concerted practices involving price fixing or market sharing may be classified as 'very serious' on the basis of their nature alone, without it being necessary for such conduct to have a particular impact or cover a particular geographic area (see paragraph 233 above).

- ²⁴⁷ In the contested decision, in assessing the gravity of the infringement, the Commission took account of the fact that, from 1998, the processors' cartel had had an actual impact on the market, even though, first, it had already classified that infringement as 'very serious' on the basis of its very nature (recitals 409 to 411) and, second, it considered that that impact could not be precisely quantified (recital 412).
- ²⁴⁸ If the Commission thus chooses to take account of the actual impact of the infringement on the market, it must provide specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in that market (see, to that effect, Case T-322/01 *Roquette Frères v Commission* [2006] ECR II-3137, paragraphs 73 to 75).
- ²⁴⁹ In the present case, in the part of the contested decision dealing with the assessment of the gravity of the infringement (see recital 413), the Commission failed to provide any evidence to substantiate its conclusion that the processors' cartel had an actual impact on the market from 1998, but simply referred to the fact that the cartel was fully implemented and complied with from that date, which can constitute only an initial indicator that the cartel had such an impact (see paragraph 252 below).
- ²⁵⁰ However, the fact that the Commission failed in that part of the contested decision to prove to the requisite legal standard that the processors' cartel had an actual impact on the market is irrelevant to the classification of the infringement as 'very serious'. That classification remains wholly appropriate in the light of the very nature of the infringement (see paragraphs 233, 238, 239 and 246 above).

- 251 Moreover, the Court considers, in the context of its unlimited jurisdiction, that the lack of adequate proof as to any actual impact on the market cannot call into question the starting amount of the fine determined by the Commission by reference to the gravity of the infringement.
- 252 First, in the light of the fact that the processors' cartel brought together all the recognised processors in Spain, that those processors purchased virtually all the raw tobacco produced in that country each year and that the cartel covered all the raw tobacco purchased by the processors, the actual implementation of the cartel constitutes an initial indication that it had an impact on the market.
- 253 Second, parts of the contested decision other than that in which the gravity of the infringement is assessed contain indications that the cartel had an actual impact on the market.
- 254 Thus, at recital 173 in the preamble to the contested decision, the Commission states that, in 1998, 'the price escalation of the previous years ceased and prices even fell'. It adds that, in a statement of 15 February 2002, Agroexpansión told it that '[d]uring the 1998/1999 marketing year, the Spanish processors complied in general with the agreements described' and that '[t]hus, they succeeded for the first time in giving the market a certain stability, which slowed down the escalating purchase prices of the previous years and counterbalanced the combined negotiating power of the production sector'.
- 255 Similarly, at recital 301 in the preamble to the contested decision, the Commission explains that the maximum average delivery price agreed on by the processors and Deltafina 'had a very direct effect on the final price paid for each particular variety of raw tobacco' and that '[t]he impact of the infringement on competition was

significant in so far as, by consulting together on the [maximum] average delivery price to be paid to the producers, the processors managed to align the final prices they would pay to the producers as closely as possible and to reduce them, to their benefit, to a level below that which would have resulted from free competition.’

²⁵⁶ Lastly, at recital 314 in the preamble to the contested decision, the Commission states that it is apparent from the table set out at recital 38 that, from 1998, ‘prices stabilised and even fell (in 1998 the price of all varieties fell by 4.8 %).’ Referring to recital 173, it repeats that Agroexpansión also confirmed that the processors’ cartel and the fall in prices were connected.

²⁵⁷ The foregoing considerations are not affected by what is stated in the report of Deltafina’s economist of 13 January 2005. First, that economist expressly acknowledges that the prices of all varieties of raw tobacco fell in 1998. Second, as regards the period 1999/2001, it is apparent from the report that, while the price of the ‘Virginia’ variety rose, the prices of other varieties remained stable or even fell. Lastly, it cannot be ruled out that, but for the cartel, the prices of the ‘Virginia’ variety would have risen to an even greater extent or that the prices of other varieties of tobacco would have risen, instead of stabilising or falling. The comparison made by the economist between the price trends of the ‘Virginia’ variety on the Spanish market on the one hand, and on the market of the three other raw tobacco producing Member States on the other, is not conclusive, because the conditions of competition and the legislation applicable on each of those national markets are not necessarily the same.

258 Third, while it is true that the Commission assessed the gravity the infringement in the contested decision by taking account of the actual impact of the processors' cartel on the market, the fact that that impact related to only part of the period of the infringement, namely from 1998, is a factor which, together with that relating to the small size of the relevant geographic market and the relevant product market, led the Commission to use a starting amount of only EUR 8 000 000 for Deltafina, whereas, under the Guidelines, as the infringement was very serious, it could have contemplated adopting a starting amount of at least EUR 20 000 000.

259 It follows from all the above considerations that the second part of the fourth plea must be rejected.

— The third part of the fourth plea, alleging a contradiction between recital 413 in the preamble to the contested decision and other recitals in the decision

260 It is clear that, contrary to what Deltafina claims, there is no contradiction between the statement at recital 413 in the preamble to the contested decision that 'the processors' cartel was fully implemented and complied with' and the other recitals referred to by Deltafina.

261 First, Deltafina's assertion is based on a selective reading of the passage in question in recital 413. In that passage, the Commission claims that the processors' cartel was fully implemented and complied with only with effect from 1998. Recitals 85, 88, 111, 122, 133, 144, 284 and 307 relate to how that cartel operated between 1996 and 1997.

- ²⁶² Next, the matters set out in recitals 113, 126 and 130 in the preamble to the contested decision are irrelevant, since they concern the cartel of the producers' representatives, not the processors' cartel.
- ²⁶³ Similarly, recitals 175, 206, 229, 231 to 233, 235, 239, 255 to 257, 294, 295 and 319 refer to problems in the bilateral negotiations between the processors and the producers' representatives. As stated in recital 295, 'the failure [of those] bilateral negotiations ... does not alter the nature of the processors' anti-competitive conduct'. In other words, those problems are irrelevant as regards the fact that, from 1998, the processors' cartel was implemented and complied with.
- ²⁶⁴ While it is true that recital 186 in the preamble to the contested decision states that the discussion which took place between the processors at the beginning of 1999 did not result in an agreement being concluded, it also states that the processors decided to extend the framework agreement of the previous year. That emerges even more clearly from the following recital.
- ²⁶⁵ At recital 244 in the preamble to the contested decision, which concerns the year 2001, the Commission simply states that it 'does not have examples of exchanges of information during the harvest period'. None the less, it does not claim that the agreements concluded between Deltafina and the Spanish processors were not fully implemented that year. To the contrary, at recital 236, it states that the 1998 framework agreement was extended in 2001. It should be added that it is apparent from recital 240 that all the Spanish processors expressly accepted during the administrative procedure that that framework agreement was extended until 3 October 2001.

266 Lastly, the Commission simply states in recital 296 in the preamble to the contested decision that the agreements and concerted practices in which the processors and Deltafina participated were ‘single and continuous.’

267 The third part of the fourth plea must therefore be rejected as unfounded.

— The fourth part of the fourth plea, alleging that Deltafina was incorrectly identified as the main purchaser of processed tobacco in Spain

268 It is clear that, contrary to what Deltafina claims, the Commission did not err in considering that that undertaking held a prominent position on the market for the purchase of Spanish processed tobacco.

269 In first place, the Commission’s assessment is not in any way contradicted by what is stated in the report of Deltafina’s economist. First, it should be noted that, in Table 5 of that report, Cetarsa is included as one of the undertakings purchasing Spanish processed tobacco, even though it is a first processor of tobacco and does not purchase processed tobacco from third parties. In fact, as Deltafina explained in its reply to one of the written questions put to it by the Court, the data in that table relate to sales to cigarette manufacturers of Spanish processed tobacco. Next, even if account is taken of the data provided by Deltafina’s economist, it is Deltafina and not Cetarsa which emerges as the main seller of Spanish processed tobacco in 2000 and 2001. Accordingly, during those years, Deltafina held 31.6 % and 28.7 %, respectively, of the

market for the sale of Spanish processed tobacco, whereas Cetarsa's share was 26.7 % and 27.6 %, respectively.

270 In second place, it cannot be disputed that Deltafina was the main customer of three of the four Spanish processors. Accordingly, first, the parties agree that Taes sold most of its production to Deltafina. Next, as is apparent from recital 21 in the preamble to the contested decision and Table 7 of the report of Deltafina's economist, the latter was by far the biggest client of Agroexpansión during the period from 1996 to 1998. Moreover, in a reply of 15 March 2002 to a request for information from the Commission, Cetarsa stated that its main customers were, in order of importance, Deltafina, Altadis and Dimon. Lastly, it is also apparent from that table that, in 1999 and 2000, Deltafina was a customer of the four Spanish processors.

271 In third place, it should also be noted that, in addition to the trading relationships referred to above, Deltafina had other trading relationships with certain processors. Thus, as is apparent from recital 29 in the preamble to the contested decision, the validity of which is not called into question by Deltafina, Deltafina concluded with Cetarsa, which had surplus processing capacity, contracts for processing and threshing part of Taes' and d'Agroexpansión's tobacco.

272 The various factors referred to above prove to the requisite legal standard that Deltafina was in a better position than any other person to influence the conduct of the Spanish processors, as stated by the Commission at recital 417 in the preamble to the contested decision.

273 The fourth part of the fourth plea must therefore be rejected as unfounded.

— The fifth part of the fourth plea, alleging failure to state reasons as regards the conclusions to be drawn, in fixing the amount of the fines, from the uncertainty engendered by the Spanish legal framework and the approach of the Spanish authorities

²⁷⁴ Contrary to what Deltafina claims, the Commission sets out very precisely in the contested decision the grounds for which the uncertainty engendered by the Spanish legal framework and the approach of the Spanish authorities to the negotiation of standard contracts justifies the imposition of a symbolic fine only in the case of the producers' representatives.

²⁷⁵ It should be recalled, first, that, as summarised in recitals 275 to 277 in the preamble to the contested decision and already stated at paragraphs 15 to 21 and 107 above, the contested decision concerns two horizontal cartels, the first involving the Spanish processors and Deltafina, and the second the producers' representatives. Those recitals also make clear that each of those cartels is characterised by a series of agreements and/or concerted practices and constitutes a single and continuous infringement of Article 81(1) EC.

²⁷⁶ It is also very clear from the contested decision that there were two aspects to the producers' cartel, namely:

— first, during the period 1996/2001, the processors and Deltafina secretly concluded agreements and/or participated in concerted practices, the object of which was, in essence, to fix each year 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, the summary at recitals 276 and 278 and, as regards the classification of this aspect of the cartel as ‘secret’, recitals 411, 413, 438 and 454);

- second, during the period 1999/2001, the processors and Deltafina also concluded agreements and/or participated in concerted practices, the object of which was to fix the price brackets per quality grade for each raw tobacco variety and the additional conditions which they proposed to the producers’ representatives in collective negotiations between the two sectors (see, in particular, the summary in recitals 276 and 280).

²⁷⁷ The contested decision clearly states that the cartel of the producers’ representatives is characterised by a series of agreements and/or concerted practices during the period 1996/2001, the object of which was, essentially, to fix each year the price brackets per quality grade for each raw tobacco variety and the additional conditions which they subsequently proposed to the processors in collective negotiations between the two sectors (see, in particular, the summary in recitals 277 and 318).

²⁷⁸ In other words, it is clear from the contested decision that the processors’ cartel went much further than the cartel of the producers’ representatives, since there was a secret aspect to it outside the context of the collective negotiations between the two sectors.

²⁷⁹ Second, the Commission examined in the contested decision, in the context of setting the amount of the fines, the consequences which the Spanish legal framework and the approach of the Spanish authorities had on the conduct of the various addressees of the decision and sets out precisely its reasoning in that regard.

280 Accordingly, first, the Commission examines the cartel of the producers' representatives (recitals 425 to 430).

281 First of all, the Commission points out, referring to recitals 350 et seq in the preamble to the contested decision, that the national rules applicable did not require the producers' representatives and the Spanish processors to reach an agreement on the price brackets and the additional conditions. It states that, while, between 1982 and 2000, those rules provided that, in order to be approved by the Ministry of Agriculture, the standard contracts had to contain clauses on the 'guaranteed minimum price' and the 'price which the producer was to receive for the raw material', they did not oblige the parties negotiating those standard contracts to come to an agreement on 'the figures in the strict sense to be included in the price clauses'. With regard to the latter point, it states that, between 1995 and 1998, the Ministry of Agriculture approved standard contracts in which the price clauses were blank (recital 426).

282 However, at recital 427 in the preamble to the contested decision, the Commission refers to certain factors which led it to concede in the following recital that 'the legal framework surrounding the collective negotiation of standard agreements could engender a considerable degree of uncertainty as to the legality of the conduct of the producers' representatives and the processors in the very specific context of the collective negotiation of standard contracts.' Those factors are as follows:

- the standard contracts negotiated between 1995 and 1998 which were approved by the Ministry of Agriculture provided that all the producers' representatives were to negotiate jointly with each individual processor the price schedules and the additional conditions;

- in 1999, the Ministry of Agriculture even approved the price schedules which had already been jointly negotiated by all the producers' representatives and the four processors;

- those schedules were annexed to the standard contract published that year in the *Boletín Oficial del Estado*;

- in 2000 and 2001, the Ministry of Agriculture invited the representatives of both sectors to a number of meetings, some of which were held at the Ministry itself, in order to agree price schedules, thus encouraging the parties to pursue their collective negotiations relating to those schedules.

²⁸³ At recital 429 in the preamble to the contested decision, the Commission adds that the existence and the results of the negotiations on standard contracts were generally in the public domain and no authority ever questioned their compatibility with either Community or Spanish law before the administrative proceedings started.

²⁸⁴ Lastly, it is apparent from recital 430 in the preamble to the contested decision that it is the factors set out at paragraphs 282 and 283 above which led the Commission to impose only a symbolic fine of EUR 1 000 on the producers' representatives.

²⁸⁵ Second, as regards the processors' cartel, the Commission gives its view on the influence of the Spanish legislative framework and the approach adopted by the Spanish authorities at recitals 437 and 438 in the preamble to the contested decision.

- ²⁸⁶ The Commission distinguishes between the aspect of that cartel relating to the ‘public’ negotiation and conclusion of standard contracts with the producers’ representatives — in particular the negotiations on price brackets and additional conditions — and the ‘secret’ aspect of the cartel.
- ²⁸⁷ Accordingly, at recital 437 in the preamble to the contested decision, the Commission states that the findings which it made at recitals 427 to 429 relating to the conduct of the producers’ representatives (see paragraphs 282 and 283 above) are equally valid as regards the former of those two aspects of the processors’ cartel.
- ²⁸⁸ Moreover, as regards the ‘secret’ aspect of that cartel, the Commission states, at recital 438 in the preamble to the contested decision, that the processors’ conduct went considerably beyond the scope of the applicable legal framework, the public negotiations and the agreements with the producers’ representatives. However, in the same recital, it acknowledges that ‘the public negotiations between the producers’ representatives and the processors determined, at least to a certain degree, the material framework (in particular as regards the opportunities for colluding with each other and adopting a common position) within which the processors were able to develop — in addition to the common position which they would adopt in public negotiations — their secret strategy on average (maximum) delivery prices and quantities’.
- ²⁸⁹ It is thus apparent from the last sentence of recital 438 in the preamble to the contested decision that the Commission decided, in the light of the factors referred to at paragraphs 287 and 288 above, to reduce by 40 % for attenuating circumstances the basic amount of the fines fixed for the processors and Deltafina.

²⁹⁰ In the light of all the foregoing considerations, the fifth part of the fourth plea must be rejected as unfounded.

— The sixth part of the fourth plea, alleging failure to take account of the fact that Deltafina did not take part in the discussions and negotiations between the Spanish processors and the producers' representatives

²⁹¹ There is no factual basis for the sixth part of the fourth plea because, in the contested decision, the Commission did not take the view that the 'vertical' negotiations which took place between the Spanish processors and the producer representatives were contrary to Article 81 EC. Therefore, the fact that Deltafina did not take part in those discussions or negotiations cannot have any effect on the assessment of the gravity the infringement of which it is accused or, consequently, on the starting amount of the fine imposed in its case.

— The seventh part of the fourth plea, alleging infringement of the principle of equal treatment in that the Commission deviated from its earlier practice

²⁹² Since the Commission's previous practice does not itself serve as a legal framework for fines imposed in competition matters (*LR AF 1998 v Commission*, paragraph 101 above, paragraph 234), the seventh part of the fourth plea cannot succeed.

— Conclusion as to the fourth plea

²⁹³ It follows from all the foregoing considerations that the fourth plea must be rejected in its entirety.

The fifth plea, alleging infringement of Article 23(3) of Regulation No 1/2003, Section 1 B of the Guidelines and the principle of equal treatment

Summary of the contested decision

²⁹⁴ At recitals 432 and 433 in the preamble to the contested decision, the Commission examines the question of the duration of the infringement of which the processors and Deltafina are accused.

²⁹⁵ First, referring to recital 92 in the preamble to the contested decision, the Commission states that the processors' cartel had commenced 'at least' by 13 March 1996 (recital 432).

²⁹⁶ Next, it states that, according to what was said by the processors, that cartel ended on 3 October 2001. However, pointing out that the 'latest evidence' available to it relates to a meeting held on 10 August 2001, referred to in recital 260, it takes that date to be the date on which the infringement ended (recital 432).

²⁹⁷ In the light of those factors, the Commission decided that the duration of the infringement was five years and four months, which amounts to an infringement of long duration. Therefore, at recital 433 in the preamble to the contested decision, it increased the starting amount of the fine imposed on each of the Spanish processors and Deltafina by 50 %.

Arguments of the parties

²⁹⁸ In its fifth plea, raised in the alternative, Deltafina argues that, at recitals 432 and 433 in the preamble to the contested decision, the Commission ‘simply brackets together all conduct’, namely the ‘actual’ conduct imputed to the processors and the ‘virtual’ conduct imputed to Deltafina, decides that the duration of the infringement is ‘more than five years and four months’, takes the view that that infringement constitutes, for all those parties, an infringement of long duration and increases the starting amount of the fine for each of those parties by 50 %. The applicant considers that, since it attributed to it joint liability in terms of intent, which is not based on fact or specific conduct, the Commission should at the very least have determined precisely the ‘starting date’ of the infringement, that is, ‘state from which point Deltafina’s intent began to provide external support for the intent of the four Spanish processors by influencing or determining their conduct’.

²⁹⁹ Deltafina therefore requests the Court to reduce the amount of the fine by taking account of the fact that the infringement can be of only medium duration.

³⁰⁰ The Commission replies that 13 March 1996, the date of its first meeting, must be taken as the starting point of the processors’ cartel.

Findings of the Court

- 301 It is clear that, at recital 432 in the preamble to the contested decision, the Commission expressly took 13 March 1996 as the starting point of the processors' cartel.
- 302 As is apparent from recital 92 in the preamble to the contested decision, to which recital 432 refers, that date corresponds to the date on which — according to what was stated by Taes, WWTE and Agroexpansión — Deltafina and the Spanish processors met for the first time in order to discuss prices and amounts of raw tobacco to be purchased for the 1996/1997 marketing year.
- 303 The Commission was all the more justified in regarding that date as the starting point of the infringement in the case of Deltafina because, as already stated at paragraph 125 above, the latter was represented at the meeting in question by both its chairman, Mr M, and Mr C, the director responsible for buying.
- 304 Furthermore, Deltafina's argument is based on the erroneous assumption that, acting outside the processors' cartel, it merely facilitated the commission of the infringement (see paragraphs 122 to 133 above).
- 305 Since Deltafina does not challenge the Commission's assessment that the infringement ended on 10 August 2001, it must be concluded that the Commission was entitled to find that the duration of the infringement was in excess of five years and four months — namely, an infringement of long duration within the meaning of the Guidelines — and, therefore, to increase the starting amount of the fine for Deltafina by 50 %.

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

The sixth plea, alleging infringement of Article 23(3) of Regulation No 1/2003 and Section 2 of the Guidelines, as well as failure to state reasons

Summary of the contested decision

307 It is apparent from recital 436 in the preamble to the contested decision that 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.

308 In that connection, at recital 435 in the preamble to the contested decision, the Commission states as follows:

'It is apparent from the facts set out at recitals 361 et seq [of the contested decision] that Deltafina played a decisive role in conceiving and implementing the agreements on (maximum) average delivery prices and quantities concluded between the processors after 1996. Deltafina (represented by its chairman) persuaded the Spanish processors to coordinate their purchasing strategies and acted as the repository and arbiter of the processors' anticompetitive agreements, especially when their anticompetitive practices began.'

309 At recital 436 in the preamble to the contested decision, the Commission adds that ‘it was also confirmed by Agroexpansión and WWTE, in their replies to the statement of objections and at the hearing ... which followed, that Deltafina acted as the leader of the processors’ cartel’.

Arguments of the parties

310 In its sixth plea, put forward in the alternative, Deltafina submits that, in so far as the Commission regards its role as leader of the cartel as an aggravating circumstance, the contested decision is flawed in two respects.

311 First, it claims that the contested decision is vitiated by a failure to state reasons in that, at recital 435, the Commission simply refers vaguely to the ‘facts set out at recital 361 et seq.’

312 In that context, it states that those facts boil down to attendance at meetings, making proposals, the receipt of information, the preservation of a document, the sending of letters and mediating at and participating in discussions, namely ‘passive, external conduct limited to attendance or, at most, indirect support for the activities of the Spanish processors, who were the real protagonists of the cartel’. Those facts do not in any way demonstrate that it was the leader of the cartel.

- 313 Second, Deltafina states that, in order to attribute such a role to it, the Commission relied on certain parts of Agroexpansión's and WWTE's replies to the statement of objections. It once again criticises the Commission for refusing to grant it access to those replies, thus seriously infringing its right of defence.
- 314 In the light of those various factors, Deltafina requests the Court to reduce the amount of the fine by excluding from the calculation the 50 % increase applied by the Commission for aggravating circumstances.
- 315 The Commission contends that the sixth plea should be rejected.
- 316 First, the Commission states that, in the contested decision, it sets out in a sufficiently precise and clear manner the reasons for which it considered that Deltafina was the leader of the cartel. In particular, it refers to recital 435 in the preamble to the contested decision, which refers to the facts set out at recitals 361 to 369.
- 317 In that context, it submits that those facts clearly demonstrate that, as alleged, Deltafina was the leader of the cartel.
- 318 Second, referring to the recitals described at paragraph 147 above, the Commission disputes that it infringed Deltafina's rights of defence by failing to grant it access to Agroexpansión's and WWTE's replies to the statement of objections.

Findings of the Court

319 First, concerning the claim that the statement of reasons was insufficient, it is settled case law that the statement of reasons for an individual decision must disclose, clearly and unequivocally, the reasoning of the institution which adopted the measure, in such a way as to allow those concerned to know the grounds of the measure adopted and the competent court to exercise its power of review. The requirement to state reasons must be assessed by reference to the circumstances of the case. The reasoning is not required to go into all the relevant facts and points of law, since the question whether it meets the requirements of Article 253 EC must be assessed by reference not only to the wording of the measure in question but also to the context in which it was adopted and to all the legal rules governing the matter in question (see Case C 367/95 P *Commission v Sytravel and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited).

320 In the present case, the Commission set out in a sufficiently precise manner, at recital 435 in the preamble to the contested decision, the factors on which it relied in coming to the view that Deltafina was the leader of the processors' cartel. Thus, in that recital, in addition to identifying the conduct of Deltafina which, in its opinion, justified that view, it expressly referred to the facts set out at recital 361 et seq, which in turn referred to other recitals.

321 Moreover, at recital 436 in the preamble to the contested decision, the Commission stated that Agroexpansión and WWTE confirmed in their reply to the statement of objections and at the hearing that Deltafina had acted as the leader of the processors' cartel.

- ³²² The claim that the statement of reasons was insufficient must therefore be rejected as unfounded.
- ³²³ Second, it is necessary to examine the claim made by Deltafina in the first part of the second plea (see paragraphs 104 and 105 above) that the Commission failed to mention in the statement of objections the fact that it could be regarded as the leader of the processors' cartel, thus infringing its rights of defence.
- ³²⁴ According to settled case-law, provided that the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and that it sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently', it fulfils its obligation to respect the right of the undertakings concerned to be heard. In doing so, it provides them with the necessary elements to defend themselves not only against a finding of infringement but also against the fact of being fined (see, to that effect, *Dansk Rørindustri and Others v Commission*, paragraph 228 above, paragraph 428, and Joined Cases C-101/07 P and C-110/07 P *Coop de France bétail et viande and Others v Commission* [2008] ECR I-10193, paragraph 49).
- ³²⁵ Moreover, it is apparent from the case-law that to oblige the Commission to give to undertakings under investigation specific indications of the level of the contemplated fines at the stage of the statement of objections would in effect require it inappropriately to anticipate its final decision (see, to that effect, *Musique Diffusion française and Others v Commission*, paragraph 120 above, paragraph 21).

326 In the present case, it should be noted that, in accordance with the case-law cited above, the Commission set out in the statement of objections the principal elements of fact and of law that could justify the fine which it envisaged imposing on Deltafina. Thus, at paragraph 459 of that statement, it stated, *inter alia*, that, in assessing the gravity of the infringement, it intended to take account of the fact that agreements aimed at fixing prices and quantities were among the most serious infringements of the rules governing competition. At paragraph 460 of the statement of objections, it stated that the infringement attributed to the processors had commenced on 13 March 1996 and ended, according to what the latter stated, on 3 October 2001. It added that the last item of evidence available to it related, however, to a meeting of 10 August 2001. Lastly, at paragraph 461 of the statement of objections, the Commission stated that it would take account of all the circumstances of the case, as set out in the statement, in particular the part played by each individual addressee, the effect which the Spanish legislation on agricultural products may have had on the conduct of the addressees and the cooperation given by the processors and their association pursuant to the Leniency Notice.

327 It is true that the Commission did not indicate in the statement of objections that Deltafina could be characterised as the leader of the cartel. It should be noted that such a characterisation has important consequences as to the amount of the fine to be imposed on the undertaking concerned. Thus, in accordance with Section 2 of the Guidelines, it is an aggravating circumstance which results in a significant increase in the amount of the fine. Similarly, in accordance with Section B(e) of the Leniency Notice, such characterisation automatically rules out the benefit of a very significant reduction of the fine, even if the undertaking classified as leader meets all the conditions laid down for obtaining such a reduction. It is therefore for the Commission to set out in the statement of objections the evidence which it considers relevant for the purpose of enabling the undertaking which may be characterised as the leader of the cartel to reply to such a claim. However, in the light of the fact that that statement is but a step in the adoption of the final decision and does not therefore constitute the Commission's definitive position, the Commission cannot be required, already at that

stage, to carry out a legal classification of the evidence on which it relies in its final decision in characterising an undertaking as the leader of the cartel.

328 In the present case, the facts relied on by the Commission in the contested decision in order to attribute to Deltafina the role of leader of the processors' cartel are, according to its own statements, those summarised at recital 435 in the preamble to the decision. As regards the particulars set out in the first sentence of recital 435 (see paragraph 321 above), the Court takes formal note of the Commission's statement that, in their replies to the statement of objections and at the hearing, WWTE and Agroexpansión simply confirmed the evidence referred to above and did not refer to any fact which had not already been brought to Deltafina's attention in the statement of objections (see paragraphs 147 and 316 to 318 above). In those circumstances and without prejudice to the question whether the evidence on which the Commission states that it thus relied is sufficient to establish that Deltafina acted as the leader of the processors' cartel, it must be found that the Commission did not infringe Deltafina's rights of defence by refusing to grant it access, before adopting the contested decision, to those replies to the statement of objections.

329 Moreover, it is clear that the facts thus relied on by the Commission in the contested decision in attributing to Deltafina the role of leader of the processors' cartel were already mentioned in the statement of objections, so that the latter was in a position to assert effectively its point of view on those facts before the decision was adopted. Indeed, the facts referred to at recital 435 in the preamble to the contested decision were already included among the facts set out at paragraphs 416 to 420 of the statement of objections.

330 Consequently, the Commission did not infringe Deltafina's rights of defence by failing to state, in the statement of objections, that the latter could be regarded as the leader of the processors' cartel.

331 Third, it is necessary to examine whether it was in fact possible, on the basis of the facts relied on by the Commission in the contested decision in characterising Deltafina as the leader of the processors' cartel, to arrive at such a characterisation. In the plea under consideration (see paragraph 312 above), the third part of the first plea (see paragraph 73 above) and the first part of the second plea (see paragraph 105 above), Deltafina effectively complains that the Commission has failed to prove that it played such a role in the processors' cartel.

332 It should be noted in that connection that, in order to be characterised as a leader, the undertaking in question must have represented a significant driving force in the cartel (Case T-15/02 *BASF v Commission* [2006] ECR II-497, paragraph 374, and Case T-410/03 *Hoechst v Commission* [2008] ECR II-881, paragraph 423) and bore individual and specific liability for the operation of the cartel (see, to that effect, *BASF v Commission*, paragraphs 300 and 375).

333 While the evidence relied on by the Commission at recital 435 in the preamble to the contested decision demonstrates that Deltafina played an active and direct role in the processors' cartel, it does not suffice to establish that that company represented a significant driving force in the cartel or even that its role was more important than that of any of the Spanish processors. It should be noted in particular that, even though the Commission was entitled, on the grounds set out at paragraphs 122 to 133 above, to attribute the whole of the infringement in question to Deltafina, the fact nevertheless remains that, during a period of infringement lasting over five years, Deltafina was present at only a very limited number of meetings of the processors' cartel at which the unlawful agreements were concluded — at most, four meetings out of a total of almost 30 — and that its participation in exchanges of correspondence and information between the members of the cartel was relatively limited.

334 Moreover, there is nothing in the file to show that Deltafina took any initiatives to create the cartel or that it was instrumental in securing the participation of any of the Spanish processors. In particular, the Commission's claim at recital 435 in the preamble to the contested decision that Deltafina 'persuaded the Spanish processors to coordinate their purchasing strategies' is not adequately proven. The simple fact that, in its fax of 9 July 1997 (see paragraph 127 above), WWTE mentions that, on a number of occasions, the Chairman of Deltafina had indicated that 'an agreement on prices [was] not possible without an agreement on quantities' is not sufficient to substantiate that claim. That applies a fortiori since it is to be understood from that fax that, on the contrary, it was WWTE itself which sought the conclusion of an agreement on quantities and even insisted that it should last five years or, at least, three years. In that connection, it should be noted that, in a fax of 6 November 1997 to the Chairman of Deltafina, referred to in recital 143 in the preamble to the contested decision, WWTE stated that it was attempting 'by all means possible to reach an agreement on quantities', and specified that, at the next meeting of the processors' cartel, it would propose 'guaranteeing the agreements by depositing a significant sum of money which would ensure some security in the implementation of the agreements'.

335 Nor is there any other evidence in the file to prove that Deltafina assumed responsibility for activities usually associated with acting the part of leader of a cartel, such as chairing meetings or centralising and distributing certain data. While it is true that Deltafina preserved for a short period a note setting out the details of certain unlawful agreements, that was but an isolated case. Similarly, while the evidence on the file shows that Deltafina acted as mediator in disputes between the processors, its interventions in that capacity appear to have been few and limited to the first two years of the processors' cartel. Moreover, they were not accompanied by any real threat or disciplinary measure.

336 The sixth plea must therefore be upheld in part and it is therefore necessary to vary the contested decision in that it found that the aggravating circumstance of having been the leader of the cartel existed as against Deltafina. The practical consequences of that variation will be set out at paragraphs 437 to 439 below.

The seventh plea, alleging infringement of Article 23(3) of Regulation No 1/2003 and Section 3 of the Guidelines

Arguments of the parties

³³⁷ Deltafina criticises the Commission for failing to take account in the present case of the attenuating circumstances set out in the second and third indents of Section 3 of the Guidelines, namely the ‘non-implementation in practice of the offending agreements or practices’ and the ‘termination of the infringement as soon as the Commission intervenes’, respectively.

³³⁸ Thus, first, Deltafina submits that, in the contested decision, the Commission ‘repeatedly’ asserts that the offending agreements or practices were not implemented, ‘at least in part’, during 1996 (recitals 85, 88 and 111), 1997 (recitals 113, 122, 126, 130 and 133), 1998 (recitals 144 and 175), 1999 (recital 186), 2000 (recitals 206, 209, 231 to 233 and 235) and 2001 (recitals 239, 244 and 255 to 257). It also refers to certain passages in recitals 295, 307 and 319.

³³⁹ In that context, Deltafina states that, in Case T-220/00 *Cheil Jedang v Commission* [2003] ECR II-2473, the Court stated that the Guidelines ‘make express provision for non-implementation in practice of an infringing agreement to be taken into account as a mitigating circumstance’ (paragraph 191), that the second indent of Section 3 of the Guidelines did not refer only to ‘cases where a cartel as a whole is not implemented and not to the individual conduct of each undertaking’ (paragraph 188) and that the Commission must ‘in accordance with the principle of the individual application

of penalties and sanctions, examine the relative gravity of the undertaking's individual involvement in the infringement' (paragraph 189).

340 Second, Deltafina complains that the Commission failed to take account of the fact that the infringement of which it is accused ended on 10 August 2001, that is, before the date of the initial investigations.

341 In the light of the foregoing considerations, Deltafina requests the Court to reduce the amount of its fine.

342 The Commission contends that the seventh plea should be rejected.

343 First, it submits that it was not required in the present case to take account of the attenuating circumstance referred to in the second indent of Section 3 of the Guidelines.

344 In that regard, first of all, it states that account was taken of the fact that the cartel was not fully implemented before 1998 in assessing the gravity of the infringement, the starting amount of the fine for Deltafina having been fixed at EUR 8 000 000 instead of EUR 20 000 000, in spite of the serious nature of the infringement.

345 Next, it claims that its position is supported by paragraphs 189 and 192 of the judgment in *Cheil Jedang v Commission*, paragraph 339 above, and by paragraphs 276 and 277 of the judgment in Case T-44/00 *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223. The Commission points out that not only did Deltafina never clearly and substantially oppose the implementation of the processors' cartel but it

fully adhered to the cartel and played a particularly active role as coordinator and mediator.

- ³⁴⁶ Second, nor was the Commission required, in its view, to regard as an attenuating circumstance the fact that the infringement ended before its initial intervention.

Findings of the Court

- ³⁴⁷ As a preliminary observation, it should be noted that the Commission must, in principle, comply with the terms of its own Guidelines when determining the amount of fines (see paragraph 230 above). However, the Guidelines do not state that the Commission must always take account separately of each of the mitigating 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 mitigating circumstances must be examined comprehensively on the basis of all the relevant circumstances.

- ³⁴⁸ 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 mitigating 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 mitigating circumstances (see *Raiffeisen Zentralbank*

Österreich v Commission, paragraph 230 above, paragraph 473 and the case-law cited).

³⁴⁹ As regards Deltafina's first complaint, it should be noted that the second indent of Section 3 of the Guidelines provides that the 'non-implementation in practice of the offending agreements or practices' may constitute attenuating circumstances.

³⁵⁰ It is clear from the case-law that the Commission is not required to recognise the existence of an attenuating circumstance consisting of non-implementation of a restrictive agreement unless the undertaking relying on that circumstance is able to show that it clearly and substantially opposed the implementation of the agreement, to the point of disrupting the very functioning of it, and that it did not give the appearance of adhering to the agreement and thereby incite other undertakings to implement the agreement in question. It would be too easy for undertakings to reduce the risk of being required to pay a heavy fine if they were able to take advantage of an unlawful agreement and then benefit from a reduction in the fine on the ground that they had played only a limited role in implementing the infringement, when their attitude encouraged other undertakings to act in a way that was more harmful to competition (*Mannesmannröhren-Werke v Commission*, paragraph 345 above, paragraphs 277 and 278).

³⁵¹ In connection with the plea in question, Deltafina does not put forward any circumstance from which it can be concluded that it clearly and substantially distanced itself from the processors' cartel to the point of disrupting the very functioning of it. It simply refers to certain recitals in the preamble to the contested decision which, as already stated at paragraphs 260 to 267 above, are either irrelevant for the purpose of the complaint in question, especially as they do not concern the processors' cartel, or merely establish that, until 1998, the cartel was not fully implemented and complied

with by its members, that point being made in general terms and not by reference to Deltafina individually.

352 As regards the latter point, it should be recalled that the fact that the processors' cartel was not fully implemented until 1998 is one of the factors taken into account by the Commission when it assessed the gravity of the infringement and thus fixed the starting amount of the fine to be used to reflect that gravity. The Commission used a starting amount of only EUR 8 000 000 for Deltafina, whereas, under the Guidelines, as the infringement was very serious, it could have contemplated adopting a starting amount of EUR 20 000 000.

353 The first objection put forward by Deltafina cannot therefore succeed.

354 As regards the second complaint, it should be noted that the third indent of Section 3 of the Guidelines provides that the 'termination of the infringement as soon as the Commission intervenes' is an attenuating circumstance.

355 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 (*Dalmine v Commission*, paragraph 34 above, paragraph 158).

356 In the present case, the infringement ceased — as Deltafina claims — on 10 August 2001, namely before the Commission's initial investigations on 3 October 2001. 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.

357 It should also be borne in mind that a reduction of the fine on account of the cessation of an infringement as soon as the Commission first intervenes cannot be automatic, but depends on an assessment 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 (*Mannesmannröhren-Werke v Commission*, paragraph 345 above, paragraph 281).

358 In the present case, it cannot be held that Deltafina could have had any reasonable doubt as to the anti-competitive nature of its conduct, as regards its participation in a horizontal cartel aimed at fixing prices and sharing out quantities and having a secret aspect to it, thus constituting a manifest infringement of Article 81 EC.

359 The second complaint put forward by Deltafina cannot therefore be accepted.

360 In the light of the foregoing considerations, the seventh plea must be rejected as unfounded.

The eighth plea, alleging infringement of Article 23(2) of Regulation No 1/2003 and Section 5(a) of the Guidelines

Arguments of the parties

- ³⁶¹ In its eighth plea, put forward in the alternative, Deltafina complains that the Commission took into account, for the purpose of calculating the 10 % ceiling laid down in Article 23(2) of Regulation No 1/2003, its turnover for the 2002/2003 business year. According to Deltafina, the Commission should have taken account of the turnover for the business year ending on 31 March 2004, since its business year ends on 31 March each year and the contested decision was adopted on 20 October 2004.
- ³⁶² Deltafina states that its turnover for the year ending 31 March 2004 was EUR 127 360 989, that is, less than the amount of EUR 133 228 000 given in recital 443 in the preamble to the contested decision. It is of the view that the amount of its fine, before application of the Leniency Notice, could not therefore exceed EUR 12 736 000.
- ³⁶³ The Commission recognises that the turnover to be taken into account in Deltafina's case in order to determine whether the 10 % ceiling has been exceeded is its turnover for the business year ending 31 March 2004. However, even if account were taken of that turnover figure, the 10 % ceiling would not be exceeded.
- ³⁶⁴ For the sake of completeness, the Commission submits that the Court held in 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, paragraphs 352 to 354, that the maximum limit of 10 % should be applied 'at the stage of the calculation of the final

amount' of the fine and not an earlier stage, that is, before the application of the Leniency Notice. In the present case, it is not disputed that the amount of the fine imposed on Deltafina, namely EUR 11 880 000, does not exceed 10 % of its turnover for the business year ending 31 March 2004.

Findings of the Court

³⁶⁵ At recital 439 in the preamble to the contested decision, the Commission sets the amount of the fine to be imposed on Deltafina, before applying the Leniency Notice, at EUR 13 200 000. At recital 443, it states that 'as Deltafina's turnover in 2003 was EUR 133 228 000', there is no need to adjust that figure in accordance with Article 23(2) of Regulation No 1/2003.

³⁶⁶ Under Article 23(2) of Regulation No 1/2003, the turnover to be taken into account for the purpose of calculating the 10% ceiling referred to in that provision is the turnover for the preceding business year. As the parties agree, in order to determine whether that ceiling was exceeded, the Commission should have taken account of Deltafina's turnover for the business year ending 31 March 2004.

³⁶⁷ The Commission was therefore incorrect in using, at recital 443 in the preamble to the contested decision, Deltafina's turnover for the business year ending 31 March 2003.

368 However, the plea alleging that error on the part of the Commission is ineffective, since, even if account is taken of Deltafina's turnover in the business year ending 31 March 2004, the 10 % ceiling is not exceeded. It is apparent from the table in Deltafina's annual accounts for the year ending 31 March 2004, annexed to the application, that, at that date, its turnover was EUR 139 904 230.95, that is, more than ten times the amount of EUR 13 200 000 referred to above. In that connection, it should be pointed out that the relevant amount is that at the side of the accounting item headed 'Sales and service revenue' in that table, not that used by Deltafina, namely the amount set out at the side of the heading 'Total', which includes accounting items which cannot be taken into account, in this case those referred to as 'Variation in stocks, finished goods' and 'Other goods and income'.

369 It follows from all the above considerations that the eighth plea must be rejected as ineffective.

The ninth plea, alleging infringement of Article 23(3) of Regulation No 1/2003, the preamble to and Section 4 of the Guidelines, Section B(e) and Section D of the Leniency Notice and the principle of equal treatment, as well as failure to state reasons

Summary of the contested decision

370 At recitals 448 to 456 in the preamble to the contested decision, the Commission sets out its view on the application of the Leniency Notice in the case of the processors and Deltafina.

- 371 First, it states, *inter alia*, that Deltafina and the processors claimed the benefits of the application of that notice before the statement of objections was notified to them (recital 449).
- 372 Second, it states that Section D of the Leniency Notice is applicable to the Spanish processors. It points out that, even though it was already in possession of most of the essential evidence proving the existence of the infringement, the information provided by the processors assisted it in clarifying and establishing the infringement (recitals 450 and 451).
- 373 Third, the Commission considers that, in consideration of its ‘particularly useful’ co-operation during the procedure, especially insofar as Deltafina’s participation in the infringement is concerned, and of the fact that it never contested the facts as set out in the statement of objections, Taes should be granted a 40 % reduction in the fine, in accordance with the first and second indents of Section D(2) of the Leniency Notice (recital 452).
- 374 Fourth, the Commission states that, while the information provided by Cetarsa and WWTE was significant, it did not prove to be as useful to its investigations as that provided by Taes (recital 453). It explains that, in their reply to the statement of objections, Cetarsa and WWTE made an assertion which was not borne out by the facts. It therefore decided to grant to both of those processors a 25 % reduction of the fine, in accordance with the first indent of Section D(2) of the Leniency Notice.

375 Fifth, the Commission states that Agroexpansión also provided useful information but that, in its reply to the statement of objections, it disputed the facts ‘in the same terms as Cetarsa and WWTE’ (recital 454). It adds that Agroexpansión denied that the producers’ agreements on average (maximum) delivery prices were secret. In the light of those factors, it granted to that company a 20 % reduction in the fine.

376 Lastly, the Commission reduces the fine imposed on Deltafina by 10 % (recital 456). It considers that, even though neither Universal nor Deltafina gave precise information concerning Deltafina’s contribution to Taes’ cooperation with the Commission, the fact cannot be overlooked that part of the documents annexed to Taes’ statement of 18 February 2002 clearly came from Deltafina and had been provided to Taes for the purpose of that cooperation. It reiterates that the information provided by Taes was particularly useful to its investigation and essential, in particular, in establishing Deltafina’s liability. However, Deltafina failed to explain to it directly in what manner and to what extent it intended to cooperate and, in its reply to the statement of objections, contested the correctness of the claims made in that statement regarding its liability. It also stated that Deltafina ‘does not meet the criteria laid down in Section B[e] of the [Leniency] Notice’.

Arguments of the parties

377 In its ninth plea, put forward in the alternative, Deltafina submits that the Commission made a series of errors in its assessment of its cooperation in the administrative procedure. Those complaints can be divided into four parts.

378 In the first part, Deltafina argues that the Commission wrongly concluded that it had contested the correctness of the accusations in the statement of objections concerning its liability. Thus, in asserting that Mr M acted in a personal capacity, it simply contested the Commission's interpretation and legal assessment of certain facts. It adds that, in its statement of 18 February 2002, Taes had also made such an assertion and is surprised that Taes was nevertheless granted a greater reduction in its fine than it was.

379 In the second part, Deltafina submits that the Commission infringed the Leniency Notice by alleging, at recital 456 in the preamble to the contested decision, that it did not meet the criteria laid down in Section B(e) of that notice. It claims that that criterion is not applicable in the present case because, in the contested decision, the Commission applied Section D of the notice, which refers specifically to the situation in which 'an [undertaking] cooperates without having met all the conditions set out in Sections B or C'. It adds that the Commission did not accuse it in the statement of objections of conduct such as that referred to in Section B(e) of the Leniency Notice and failed to demonstrate in any event in the contested decision that it was responsible for such conduct.

380 In the third part of the plea, Deltafina argues that the contested decision is 'vitiated by a serious contradiction in the grounds', in that the percentage by which the Commission reduced its fine was lower than the percentage reduction granted to Taes. In support of that claim, Deltafina submits that, since the Commission states, at recital 360 in the preamble to the contested decision, that it coordinated and supervised the European activities of the Universal Group, including those of its sister company, Taes, 'it is reasonable that it should have not only the responsibilities but also the advantages which that role entails'. It adds that the particularly useful 'contributions' provided by Taes, especially with regard to its participation in the processors' cartel, could have come only from Deltafina itself. It emphasises that it cooperated with the Commission as soon as Taes was implicated in the present case. The information sent

to the Commission in the course of the administrative procedure by Taes' advisers was on behalf of both Taes and Deltafina itself, was prepared jointly by the representatives and management of both companies under the supervision of Universal and, to a large extent, was provided by Deltafina itself.

381 Lastly, in the fourth part of the plea, Deltafina claims that the Commission applied the Leniency Notice in a discriminatory manner. First, it criticises the fact that Cetaresa, WWTE and Agroexpansión benefited from a greater reduction in the fines imposed than it did, even though they contested the facts, 'albeit to a different degree'. Next, it states that it was only in their reply to the statement of objections that WWTE and Agroexpansión claimed, for the first time, that it had acted as leader of the processors' cartel. It considers, therefore, that there is reason to doubt 'the fullness and sincerity of their cooperation during the two previous years'. Lastly, it criticises the Commission for applying the criterion laid down in Section B(e) of the Leniency Notice only in its case.

382 In the light of the foregoing considerations, Deltafina requests the Court to reduce the amount of its fine by applying the same percentage reduction as that applied to the fine imposed on Taes, namely 40%.

383 The Commission considers that none of the parts of the plea in question is well founded.

384 In first place, it points out that, in its reply to the statement of objections, Deltafina claimed that all the conduct for which it was criticised was, in fact, attributable to Mr M, who had acted solely in a personal capacity. That claims constitutes a 'clear attempt to alter the facts'.

385 In second place, the Commission disputes that it incorrectly applied Section B(e) of the Leniency Notice. First, it submits that the fact that it applied Section D of the notice does not in any way preclude it from being able to take into account, for the purpose of determining the percentage reduction to apply to the fine of an undertaking which cooperates, the fact that that undertaking does not satisfy some of the conditions set out in Sections B and C of the notice. Second, it states that it is incorrect to claim that it did not accuse Deltafina of conduct of the kind referred to at Section B(e) of the Leniency Notice.

386 In third place, the Commission considers that it was not required to apply the same percentage reduction to Deltafina's fine as that which it applied to Taes' fine.

387 In that regard, first, it points out that Deltafina was considered to be responsible for the infringement of Article 81 EC not on account of the part it played in coordinating and supervising the activities of Taes but because it had itself taken a 'series of significant, often decisive, actions in the context of the [processors'] cartel'. Second, it states that Deltafina's cooperation was confined to the joint drafting, in conjunction with Taes, of Taes' statement of 18 February 2002.

388 In fourth place, the Commission considers that it did not in any way infringe the principle of equal treatment by applying to Deltafina a lower percentage reduction than that applied to other undertakings which were addressees of the contested decision.

Findings of the Court

³⁸⁹ The Commission has a wide discretion as regards the method of calculating fines and it may, in that regard, take account of numerous factors, including the cooperation provided by the undertakings concerned during the investigation conducted by its departments. The Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings (Case C-328/05 P *SGL Carbon v Commission* [2007] ECR I-3921, paragraphs 81 and 88).

³⁹⁰ In order to justify the reduction of a fine for cooperation, the conduct of an undertaking must facilitate the Commission's task of finding and bringing to an end infringements of Community competition rules (see 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 499 and the case-law cited) and reveal a true spirit of cooperation (*Dansk Rørindustri and Others v Commission*, paragraph 228 above, paragraphs 395 and 396).

³⁹¹ In the Leniency Notice, the Commission set out the conditions under which undertakings cooperating with it during its investigation into a cartel may be exempted from fines, or may be granted a reduction in the fines which would otherwise have been imposed upon them (see Section A, paragraph 3, of the Leniency Notice).

³⁹² Under Section B of the Leniency Notice, an undertaking can benefit from a very substantial reduction in the amount of the fine, namely at least 75 %, or even from exemption from the fine if it meets all the conditions laid down in Section B(a) to (e).

According to Section B(e), an undertaking which has ‘acted as an instigator or played a determining role in the illegal activity’ cannot benefit from such a reduction or be exempted from the fine.

³⁹³ Section C of the Leniency Notice provides that ‘[undertakings] which both satisfy the conditions set out in Section B, points (b) to (e), and disclose the secret cartel after the Commission has undertaken an investigation ordered by decision on the premises of the parties to the cartel which has failed to provide sufficient grounds for initiating the [administrative] procedure leading to a decision, will benefit from a reduction of 50 % to 75 % of the fine.’

³⁹⁴ Section D of the Leniency Notice, headed ‘Significant reduction in a fine’, provides as follows:

‘1. Where an [undertaking] cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10 % to 50 % of the fine that would have been imposed if it had not cooperated.

Such cases may include the following:

- before a statement of objections is sent, an [undertaking] provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

- after receiving a statement of objections, an [undertaking] informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.’

³⁹⁵ It is in the light of those considerations that the Court must assess the merits of the plea in question. The second part of the plea will be examined last.

³⁹⁶ As regards the first part of the plea, it is clear that the Commission was entitled to state, at recital 456 in the preamble to the contested decision, that, in its reply to the statement of objections, Deltafina ‘substantially contest[ed] the allegations ... concerning its liability’. In that reply, Deltafina strongly denied any liability on its part for the infringement by claiming, repeatedly, that such liability was to be attributed to Mr M, who acted solely in a personal capacity in connection with the processors’ cartel and not as a representative of the company. In so doing, Deltafina contested the facts relied on in the statement of objections and did not confine itself to interpreting those facts differently or contradicting the Commission’s legal assessment.

³⁹⁷ As regards Deltafina’s argument that Taes was not criticised for having contested the facts even though it had also claimed during the administrative procedure that Mr M acted solely in a personal capacity, it is sufficient to point out that, unlike Deltafina, it did not intend by that claim to deny a fact which concerned it directly and put in issue its own liability for the infringement.

³⁹⁸ As regards the third part of the plea, first, it is clear that it is based on an erroneous premiss. As is clear from recitals 359 to 366 in the preamble to the contested decision

and paragraphs 107 to 112 above, if Deltafina was found liable for the infringement, it is not on account of its supervision and control of the activities of Taes but its direct and active participation in the activities of the processors' cartel.

399 Next, according to settled case-law, when assessing the cooperation provided by the members of a cartel, the Commission cannot ignore the principle of equal treatment, which is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (see *Tokai Carbon and Others v Commission*, cited at paragraph 364 above, paragraph 394 and the case-law cited).

400 The Commission has clearly not overstepped the bounds of its discretion by considering that the cooperation provided by Taes was more useful than that provided by Deltafina.

401 Accordingly, as already stated at paragraphs 396 and 397 above, unlike Taes, Deltafina contested certain facts for the purpose of the second indent of Section D, paragraph 2, of the Leniency Notice.

402 Moreover, unlike Taes, Deltafina never cooperated directly with the Commission. In particular, the Commission was entitled to take the view that Deltafina's cooperation was confined to participation in drafting Taes' statement of 18 February 2002 (see paragraphs 8 and 9 above). It is only in connection with the preparation of that statement that Universal Leaf referred, in its letter of 15 February 2002 to the Commission, to Deltafina's cooperation. Subsequently, neither Universal Leaf nor Taes nor Deltafina indicated to the Commission that Deltafina was continuing to cooperate in

the investigation through Taes or even that the information which Taes forwarded to it had been prepared in conjunction with Deltafina.

403 The Commission was therefore justified in applying to Deltafina a lower percentage reduction in the fine than that granted to Taes.

404 As regards the fourth part of the plea, Deltafina cannot claim that it was discriminated against by comparison with Cetarsa, WWTE and Agroexpansión, since the cooperation it provided was much more limited than that provided by those companies.

405 In that connection, first, as Deltafina itself recognises in its application, while Cetarsa, WWTE and Agroexpansión also contested certain facts, they nevertheless did so 'to a different degree' than Deltafina. Thus, by repeatedly claiming in its reply to the statement of objections that its chairman was acting solely in a personal capacity, Deltafina alone denied any participation in the activities of the processors' cartel throughout the administrative procedure.

406 Second, whereas Cetarsa, WWTE and Agroexpansión provided very useful information to the Commission during the administrative procedure (see recitals 453 and 454), Deltafina's cooperation was confined, as already pointed out at paragraph 402 above, to participating in the drafting of Taes' statement of 18 February 2002.

407 The fourth part of the plea must therefore be rejected as unfounded.

408 Lastly, as regards the second part of the plea, first, it should be noted that there is nothing to preclude the Commission, in the context of the considerable discretion available to it in this field, from taking account of the fact that the undertaking concerned does not meet one of the conditions laid down in Section B, points (a) to (e) of the Leniency Notice where, in applying Section D of the notice, it is required to determine, within the range of 10 to 50 % provided for in paragraph 1 of that section, the percentage reduction to be granted to the undertaking.

409 It is apparent from the Commission's pleadings and the explanations which it gave at the hearing that, by stating at recital 456 in the preamble to the contested decision that Deltafina did not meet the condition laid down in Section B(e) of the Leniency Notice, it was referring to the fact that Deltafina was the leader of the processors' cartel. It should be noted in that connection that it follows from Section B(e) of the Leniency Notice that it is not the Commission's intention to grant a very substantial reduction of the fine or even total exemption from it if the party concerned has played a particularly decisive role within the cartel, such as that of leader, inciter or instigator.

410 However, as held at paragraphs 331 to 335 above, the evidence on the Commission's file is not sufficient to prove that Deltafina acted as leader. The Commission therefore erred in taking account of that role, along with other considerations, in fixing the percentage reduction to be applied to Deltafina for cooperation at only 10 %.

411 In the light of all the foregoing, the ninth plea must be upheld in part and it is therefore necessary to vary the contested decision by fixing an appropriate rate of reduction in the case of Deltafina. Pursuant to its unlimited jurisdiction, the Court considers it appropriate to reduce the fine imposed on Deltafina by 15 % to take account of its cooperation. The practical consequences of that variation will be set out at paragraphs 437 to 439 below.

The tenth plea, alleging infringement of Article 23(3) of Regulation No 1/2003, Section 5(b) of the Guidelines and the principle of proportionality

Arguments of the parties

- ⁴¹² In its tenth plea, put forward in the alternative, Deltafina complains that the Commission failed to take account, on the basis of Section 5(b) of the Guidelines, of ‘the social and economic context of raw tobacco in Spain’ and thereby reduce the final amount of its fine.
- ⁴¹³ In support of this plea, Deltafina states that tobacco growing in the European Union will undergo a structural decline following the cessation of the premium system introduced by the common organisation of the market in raw tobacco. It points out that, in 2010, after a provisional period of four years, a new system will be introduced under which income aid will not be dependant on tobacco production but linked to objectives aimed at conversion and support for other crops. It also states that, according to the Commission’s forecasts, ‘the net effect of the new model will be a sizeable reduction in the production of tobacco in the Community, as a result of which it will be impossible to maintain most of the non-family based agricultural employment in this sector and in the first processing industry’. It adds that the varieties of tobacco grown in the European Union are not regarded as strategic by the manufacturing industries and can easily be replaced by tobacco grown in third countries at lower cost. Lastly, it states that, currently, premiums account for more than 80 % of growers’ income.
- ⁴¹⁴ Deltafina adds that, in its Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 [EC] (Case COMP/C.38.279/F3 — French beef) (OJ 2003

L 209, p. 12), the Commission expressly took into account, as an attenuating circumstance, the 'specific economic context' referred to in Section 5(b) of the Guidelines. In that case, the Commission accordingly reduced by 60 % the fine imposed on each of the parties.

- 415 The Commission considers that, in determining the amount of the fine, it was not required to take account of the decline referred to by Deltafina and that the tenth plea must therefore be rejected as unfounded.

Findings of the Court

- 416 Section 5(b) of the Guidelines provides as follows:

'Depending on the circumstances, account should be taken, once the above calculations have been made, of certain objective factors such as a specific economic context, any economic or financial benefit derived by the offenders ..., the specific characteristics of the undertakings in question and their real ability to pay in a specific social context, and the fines should be adapted accordingly.'

- 417 Contrary to what Deltafina claims, the Commission was not in any way required to take account of an alleged structural decline in tobacco growing in the European Union and thus reduce the final amount of its fine, on the basis of Section 5(b) of the Guidelines, since, at the time the contested decision was adopted, such a decline was a future and uncertain event.

418 Moreover, Deltafina cannot rely on Decision 2003/600 because the circumstances of that case cannot be compared to those of the present case. In particular, none of the exceptional circumstances taken into account by the Commission pursuant to Section 5(b) of the Guidelines in that decision were present in this case. Furthermore and in any event, according to settled case-law, the Commission enjoys a wide discretion in the area of setting fines and is not bound by assessments which it has made in the past (Case C-510/06 P *Archer Daniels Midland v Commission* [2009] ECR I-1843, paragraph 82).

419 In the light of the foregoing, the tenth plea must be rejected as unfounded.

The eleventh plea, alleging infringement of the principles of equal treatment, non-retroactivity of penalties and the protection of legitimate expectations

Arguments of the parties

420 In its eleventh plea, put forward in the further alternative, first, Deltafina claims that the Commission infringed the principle of the protection of legitimate expectations by not confining itself, in accordance with its previous practice, to imposing a symbolic fine on it. In support of that claim, it submits that, in the organic peroxides decision, the Commission imposed a fine of only EUR 1 000 on AC-Treuhand on the basis that it was adopting a new approach in this area, namely to impose penalties not

only on undertakings which are members of a cartel but also on those which, albeit not present on the relevant market, organise and facilitate the cartel. It submits that it is apparent from that decision, the press release relating to that decision and paragraph 33 of the 2003 Report on competition policy (XXXIIIrd Report on Competition Policy — 2003) that only in future cases would the Commission depart from its practice of imposing just a purely symbolic fine in such a situation. All the conduct for which Deltafina is criticised occurred before 11 August 2001, that is, two years and four months before the organic peroxides decision was adopted.

421 Next, Deltafina claims infringement of the principle of equal treatment, pointing out that the Court held that '[i]n so far as concerns combating infringements of the competition rules, the principle of equal treatment undoubtedly requires that undertakings guilty of infringements of a similar nature, committed at a similar time, should be liable to the same legal penalties irrespective of the date - which will necessarily vary - on which a decision is adopted against each of them' and that '[t]o that extent, the principle is closely connected with the principle of the non-retroactivity of penalties, in accordance with which penalties imposed on undertakings for infringement of the competition rules must correspond to the penalties contemplated at the time when the infringement was committed' (Case T-224/00 *Archer Daniels Midland et Archer Daniels Midland Ingredients v Commission* [2003] ECR II-2597, paragraph 70).

422 In the light of the foregoing considerations, Deltafina requests the Court to reduce the fine to the symbolic amount of EUR 1 000.

423 The Commission considers that the eleventh pleas must be rejected as unfounded.

424 First, the Commission points out that, according to case-law, its previous practice does not itself serve as a legal framework for fines imposed in competition matters. Next, it reiterates that the case which gave rise to the organic peroxides decision is not comparable with the present case. Moreover, it states that neither that decision nor the press release relating to that decision nor the 2003 report on competition policy (XXXIIIrd Report on Competition Policy — 2003) contain precise, unconditional and consistent assurances that ‘particularly light’ fines will be imposed for conduct such as that ascribed to Deltafina.

Findings of the Court

425 First, as regards the alleged infringement of the principle of the protection of legitimate expectations, none of the factors relied on by Deltafina was capable of giving rise to a legitimate expectation on its part that the penalty imposed on it would be purely symbolic.

426 First, it should be recalled, in that connection, that the Commission’s practice in earlier decisions does not itself serve as a legal framework for fines imposed in competition matters (see paragraph 292 above). The fact that in the past the Commission has applied fines of a particular level for certain types of infringements does not mean that it is stopped from raising that level within the limits indicated by Regulation No 1/2003 if that is necessary to ensure implementation of Community competition policy (see, by analogy, *Musique Diffusion française and Others v Commission*, paragraph 120 above, paragraph 109). Moreover, economic operators cannot have a legitimate expectation that an existing situation which is capable of being altered by the Commission in the exercise of its discretionary power will be maintained (see Case

C-350/88 *Delacre and Others v Commission* [1990] ECR I-395, paragraph 33 and the case-law cited). Consequently, undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously imposed (Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others v Commission* [2001] ECR II-2035, paragraph 146, and *LR AF 1998 v Commission*, paragraph 101 above, paragraph 243)

427 Next, it should be observed that the principle of the protection of legitimate expectations extends to any individual in a situation where the Community authorities have caused him to entertain justified expectations (Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products v Commission* [1987] ECR 1155, paragraph 44), it being understood that no one may plead infringement of that principle unless he has been given precise, unconditional and consistent assurances, from authorised, reliable sources, by the administration (see *Tokai Carbon and Others v Commission*, paragraph 364 above, paragraph 152, and the case-law cited).

428 In the present case, the fact that, in a number of decisions preceding the organic peroxides decision, the Commission did not hold liable for infringement of Article 81(1) EC undertakings which contributed to the implementation of a cartel but were not active on the market affected by the infringement could not give rise to a legitimate expectation on the part of Deltafina that it would refrain in future from pursuing and penalising such undertakings. As the Court has already held at paragraphs 163 to 165 in its judgment in *AC-Treuhand v Commission*, paragraph 48 above, the reorientation of the Commission's decision-making practice in the organic peroxides decision is based on a correct interpretation of the full implications of the prohibition laid down in Article 81(1) EC.

429 The reorientation of the Commission's decision-making practice was even more foreseeable on the part of Deltafina, given the existence of a precedent, namely the cast glass decision of 1980. Moreover, the Commission's post-1980 practice could not

reasonably be construed as a definitive abandonment of the initial approach followed in the cast glass decision. That practice is merely not to censure or penalise the consultancy firms involved, but it does not disavow, as a matter of law, the approach initially followed in the cast glass decision (*AC-Treuhand v Commission*, paragraph 48 above, paragraph 164).

- ⁴³⁰ As regards Deltafina's claim that it is apparent from the organic peroxides decision, the press release relating to that decision and paragraph 33 of the 2003 Report on competition policy (XXXIIIrd Report on Competition Policy — 2003) that it was only with respect to the future that the Commission stated that it would no longer just impose a purely symbolic fine, there is no need to establish whether those texts contained precise, unconditional and consistent assurances to that effect, it being sufficient to point out that those texts were published more than six years after the conduct attributed to Deltafina commenced and more than two years after it ceased. Deltafina could not therefore in any way have believed, at the time at which it committed the infringement at issue, that the Commission would impose on it only a symbolic fine.

- ⁴³¹ Lastly, as already pointed out at paragraph 51 above, the situation of Deltafina in the present case is not comparable to that of AC-Treuhand in the case which gave rise to the organic peroxides decision. Whereas AC-Treuhand was a consultancy firm and not in any way active on the product market in question in that case either as a competitor or on the side of supply or demand, Deltafina, on the other hand, as the main customer of the Spanish processors, was active on a market immediately downstream from that on which the anti-competitive practices were implemented. Moreover, Deltafina was present on the first processing market in Italy and had close commercial links with certain Spanish processors.

- 432 Second, as regards Deltafina's claim that the principle of equal treatment was infringed, it should be recalled that the Commission's earlier practice does not itself serve as a legal framework for fines imposed in competition matters (see paragraph 292 above).
- 433 It should nevertheless also be recalled that, when it imposes such fines, the Commission must observe general principles of law, which include the principle of equal treatment.
- 434 Accordingly, the comparison which Deltafina makes with other Commission decisions imposing fines can be relevant from the point of view of observance of the principle of equal treatment only where it is demonstrated that the circumstances of the cases giving rise to those decisions are comparable to those of the present case (see, to that effect, Case T-67/01 *JCB Service v Commission* [2004] ECR II-49, paragraph 187). As already established at paragraphs 51 and 431 above, the situation of Deltafina in the present case is not comparable to that of AC-Treuhand in the case which gave rise to the organic peroxides decision.
- 435 Third, as regards the alleged infringement of the principle of the non-retroactivity of penalties, it should be noted that, as is apparent from paragraphs 137 to 150 of the judgment in *AC-Treuhand v Commission*, paragraph 48 above, any undertaking which has contributed to the implementation of a cartel, including undertakings that are not active on the relevant market affected by the restriction of competition, could reasonably have foreseen, at the time when the infringement in question was committed, that the prohibition laid down in Article 81(1) EC was, in principle, applicable to it. Moreover, in the light of the considerations set out at paragraph 426 above, any undertaking involved in an administrative procedure in which fines may be imposed must take account of the possibility that the Commission may decide at any time to raise the level of the fines by comparison to that applied in the past. Therefore, by

deciding not to impose a purely symbolic fine on Deltafina, the Commission did not infringe the principle of the non-retroactivity of penalties.

436 In the light of all the foregoing considerations, the eleventh plea must be rejected as unfounded.

The determination of the final amount of the fine imposed on Deltafina

437 It follows from paragraphs 331 to 336 and 410 and 411 above that it is necessary to vary the contested decision in so far as the Commission has not sufficiently proved in that decision that Deltafina acted as the leader of the processors' cartel. The Commission was therefore not justified in increasing the basic amount of the fine imposed on Deltafina by 50 % for aggravating circumstances or in taking account of that alleged role in reducing the amount of the fine by only 10 % for cooperation.

438 As to the remainder, the Commission's considerations set out in the contested decision and the method of calculating fines applied in the present case remain unchanged.

439 The final amount of the fine is therefore to be calculated as follows: the basic amount of the fine imposed on Deltafina (EUR 12 000 000) is to be reduced by 40 % for attenuating circumstances, which gives an amount of EUR 7 200 000 before application of the Leniency Notice. That amount is to be reduced by 15 % under that notice. Consequently, the final amount of the fine to be imposed on Deltafina is EUR 6 120 000.

Costs

⁴⁴⁰ 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 those rules, the Court may, where each party succeeds on some and fails on other heads, order costs to be shared.

⁴⁴¹ In the present case, as the action has been successful in part, the Court will make an equitable assessment of the case in holding that Deltafina is to bear three quarters of its own costs and pay three quarters of the costs incurred by the Commission, and that the Commission is to bear one quarter of its own costs and pay one quarter of those incurred by the Deltafina.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Sets the amount of the fine imposed on Deltafina SpA by 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) at EUR 6 120 000;**
2. **Dismisses the action as to the remainder;**

- 3. Orders Deltafina to bear three quarters of its own costs and pay three quarters of the costs incurred by the Commission and the Commission to bear one quarter of its own costs and pay one quarter of those incurred by Deltafina.**

Czúcz

Labucka

O'Higgins

Delivered in open court in Luxembourg on 8 September 2010.

[Signatures]

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