JUDGMENT OF THE GENERAL COURT (Third Chamber)

5 October 2011 *

In Case T-11/06,

Romana Tabacchi Srl, formerly Romana Tabacchi SpA, established in Rome (Italy), represented by M. Siragusa and G.C. Rizza, lawyers,

applicant,

v

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

defendant,

APPLICATION, first, for annulment in part of Commission Decision C (2005) 4012 final of 20 October 2005 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.281/B.2 — Raw tobacco — Italy) and, second, for a reduction of the amount of the fine imposed on the applicant,

* Language of the case: Italian.

THE GENERAL COURT (Third Chamber),

composed of J. Azizi, President, E. Cremona (Rapporteur) and S. Frimodt Nielsen, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 December 2010,

gives the following

Judgment

Background to the dispute

1 The applicant, Romana Tabacchi Srl, is an Italian company, now in liquidation, whose main activity is the first processing of raw tobacco. At the material time the applicant's sole shareholders were Mr and Mrs B., who jointly owned — and still own — all the shares.

1. *Administrative procedure*

2 On 15 January 2002 the Commission of the European Communities sent requests for information, pursuant to Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ English Special Edition 1959-1962, p. 87), concerning the Italian raw tobacco market, to the trade associations of Italian raw tobacco processors and producers, namely the Associazione professionale trasformatori tabacchi italiani (APTI, the Professional Association of Italian Raw Tobacco Processors) and the Unione italiana tabacco (Unitab, the Italian Tobacco Union) respectively.

3 On 19 February 2002 the Commission received an application for immunity from fines pursuant to the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the Leniency Notice') from Deltafina SpA, an Italian processor and a member of APTI. On 6 March 2002 the Commission granted Deltafina conditional immunity under point 15 of the Leniency Notice.

4 On 4 April 2002 the Commission received an application from Dimon Italia Srl (a subsidiary of Dimon Inc. and now called Mindo Srl) for immunity from fines under point 8 of the Leniency Notice and, in the alternative, an application for a reduction of any fine, under points 20 to 27 of the Leniency Notice, and also an application on the same basis from Transcatab SpA (a subsidiary of Standard Commercial Corp., 'SCC'), for a reduction of any fine.

5 On 18 and 19 April 2002 the Commission carried out investigations pursuant to Article 14 of Regulation No 17 at the premises of Dimon Italia and Transcatab and also at the premises of Trestina Azienda Tabacchi SpA and the applicant.

6 On 8 October 2002 the Commission informed Dimon Italia and Transcatab that, as they had been the first and second undertakings, respectively, to provide evidence of the infringement for the purposes of the Leniency Notice, it proposed to grant them, at the end of the administrative procedure, a reduction of the amount of the fines that would otherwise have been imposed on them with respect to any infringements found.

7 On 25 February 2004 the Commission adopted a statement of objections, which it addressed to 10 undertakings or associations of undertakings, including Deltafina, Dimon Italia, Transcatab and the applicant (together 'the processors') and the parent companies of certain of them, inter alia Universal Corp., Dimon and SCC. The addressees of the statement of objections had access to the administrative file, a CD-ROM copy of which was sent to them by the Commission, and submitted written observations in response to the Commission's objections. A hearing was then held on 22 June 2004.

8 Following the adoption, on 21 December 2004, of an addendum to the statement of objections of 25 February 2004, a second hearing was held on 1 March 2005.

9 After consulting the Advisory Committee on Restrictive Practices and Monopolies, and in the light of the final report of the Hearing Officer, the Commission adopted on 20 October 2005 Decision C (2005) 4012 final relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.281/B.2 — Raw tobacco — Italy) ('the contested decision'), a summary of which was published in the *Official Journal of the European Union* of 13 February 2006 (OJ 2006 L 353, p. 45).

2. *The contested decision*

10 The contested decision relates, first, to a horizontal cartel implemented by the processors on the Italian raw tobacco market (recital 1 to the contested decision).

11 The Commission found, in the contested decision, that, in the context of that cartel, during the period 1995 to the beginning of 2002, the processors had fixed the trading conditions for the purchase of raw tobacco in Italy in respect of both direct purchases from producers and purchases from 'third packers', in particular by price fixing and market sharing (recital 1 to the contested decision).

12 The contested decision concerns, second, two other infringements separate from the cartel implemented by the processors, which took place between the beginning of 1999 and the end of 2001 and consisted, for APTI, in fixing the contract prices which it would negotiate, on behalf of its members, for the conclusion of interprofessional agreements with Unitab and, for the latter, in fixing the prices which it would negotiate with APTI, on behalf of its members, for the conclusion of the same agreements.

13 In the contested decision, the Commission found that the practices of the processors constituted a single and continuous infringement of Article 81(1) EC (see, in particular, recitals 264 to 269 to the contested decision).

14 In Article 1(1) of the contested decision, the Commission attributed liability for the cartel to the processors and also to Universal, Deltafina's parent company, and to Alliance One International, Inc. ('Alliance One'), as the company resulting from the merger between Dimon and SCC. The Commission also found, in Article 1(2) of the

contested decision, that APTI and Unitab had infringed Article 81(1) EC by adopting decisions fixing prices which they would negotiate, on behalf of their members, for the conclusion of interprofessional agreements.

15 In Article 2 of the contested decision, the Commission imposed fines on the undertakings referred to at paragraph 14 above and also on APTI and Unitab (see paragraph 42 below).

16 At recitals 356 to 404 to the contested decision the Commission determined the fines to be imposed on the addressees of that decision.

17 The amounts of the fines were determined by the Commission by reference to the gravity and duration of the infringements in question, that is to say, the two criteria expressly mentioned in Article 23(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the competition rules laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) and in Article 15(2) of Regulation No 17 (recitals 356 and 357 to the contested decision).

Determination of the starting amount of the fines

Gravity

18 As regards the gravity of the infringement in question, the Commission observed that, in assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market (recital 365 to the contested decision).

19 Next, the Commission stated that the production of raw tobacco in Italy accounted for some 38 % of the European Union ('EU') in-quota production, which represented EUR 67.338 million in 2001, the last full year of the infringement (recital 366 to the contested decision).

20 As for the nature of the infringement, the Commission stated that it was a very serious infringement, as it consisted in fixing the purchase prices of the varieties of raw tobacco in Italy and sharing the purchased quantities. The Commission added, referring to the part of the contested decision relating to the analysis of the restriction of competition (recital 272 et seq.), that a buying cartel could distort producers' willingness to generate output as well as limit competition among processors in downstream markets. The Commission also asserted that that was particularly so where, as in the present case, the product affected by the cartel, in this case raw tobacco, constituted a substantial 'input' of the activities carried out by participants downstream, in this case the first processing of tobacco and sale of processed tobacco (recitals 367 and 368 to the contested decision).

21 At recital 369 to the contested decision the Commission concluded from the foregoing considerations that the processors' infringement must be qualified as very serious.

Differentiated treatment

22 At recitals 370 to 376 to the contested decision, the Commission examined the question of 'specific weight' and 'deterrence'. In that regard, the Commission stated that the 'specific weight of each undertaking and the likely effect of its unlawful behaviour' should be considered in determining the amount of the fine (recital 370 to the contested decision).

23 Thus, the Commission considered that the fines should be set according to the market position enjoyed by each party involved (recital 371 to the contested decision).

24 In that regard, the Commission considered that Deltafina should receive the highest starting amount of the fine because it appeared to be the biggest purchaser, with a market share of around 25 % in 2001 (recital 372 to the contested decision).

25 Since Transcatab, Dimon Italia and Romana Tabacchi held smaller shares in the market in question, around 9 to 11 % in 2001, the Commission considered that they 'should be grouped together' and that the starting amount of their fines should be lower (recital 373 to the contested decision).

26 The Commission considered however that a starting amount merely reflecting the market position would not be a sufficient deterrent in respect of Deltafina, Dimon Italia (Mindo) and Transcatab because, in spite of their relatively small turnovers, these three companies belonged — or, in the case of Mindo, had belonged — to multinational groups of considerable economic and financial strength, representing the biggest tobacco merchants in the world and operating at different levels of business in the tobacco industry and in different geographic markets (recital 374 to the contested decision).

27 Therefore, in order to ensure that the fine was deterrent, the Commission considered that it was necessary to apply a multiplier of 1.5 — an increase of 50 % — to the starting amount of the fine set for Deltafina, and of 1.25 — an increase of 25 % — to the starting amount of the fine set for Dimon Italia (Mindo) and Transcatab (recital 375 to the contested decision).

28 Thus, at recital 376 of the contested decision, the Commission set the starting amounts of the fines as follows:

— Deltafina: EUR 37.5 million;

— Transcatab: EUR 12.5 million;

— Dimon Italia (Mindo): EUR 12.5 million;

— Romana Tabacchi: EUR 10 million.

Setting of the basic amount of the fines

29 At recitals 377 and 378 to the contested decision, the Commission examined the question of the duration of the infringement.

30 The Commission considered that the restrictive practice involving the processors had begun on 29 September 1995 and had ceased to exist, according to their statements, on 19 February 2002. With particular respect to the applicant, the Commission stated that it had joined the cartel in October 1997 and had suspended its participation from 5 November 1999 to 29 May 2001 and rejoined from 29 May 2001 until 19 February 2002. As the applicant's participation in the infringement had lasted for only two years and eight months, the Commission considered that the starting amount of its fine should be increased by 25 %, whereas increases of 60 % were applied to the starting amount of the fines imposed on the other processors.

31 The basic amounts of the fines imposed on the addressees of the contested decision were therefore set as follows:

— Deltafina: EUR 60 million;

— Transcatab: EUR 20 million;

— Dimon Italia (Mindo): EUR 20 million;

— Romana Tabacchi: EUR 12.5 million.

Attenuating circumstances

32 At recitals 380 to 398 to the contested decision, the Commission considered whether any attenuating circumstances should be taken into account.

33 As regards the applicant, the Commission stated, at recital 380 to the contested decision, that it '[had not taken] part in certain aspects of the cartel (mainly those relating to direct purchases from producers[,] from whom it only started buying small quantities in 2000)'. The Commission considered, moreover, that in 1997, when the applicant had joined the cartel, its market position was weak. Last, the Commission stated that '[the applicant's] behaviour [had] often disrupted the purpose of the cartel to the point that the other participants [had] jointly discussed how to react to Romana Tabacchi's conduct'.

34 In the light of those factors, the Commission decided to reduce the basic amount of the fine imposed on the applicant by 30 %.

35 As regards the situation of Dimon Italia and Transcatab, the Commission rejected all the arguments whereby they sought to benefit from attenuating circumstances (recitals 381 to 384 to the contested decision).

36 Last, the Commission took Deltafina's particular situation into account and concluded that its fine should be reduced by 50 % on account of its cooperation (recitals 385 to 398 to the contested decision).

37 The Commission set the amounts of the fines, following the application of the attenuating circumstances, as follows (recital 399 to the contested decision):

— Deltafina: EUR 30 million;

— Dimon Italia (Mindo): EUR 20 million;

— Transcatab: EUR 20 million;

— Romana Tabacchi: EUR 8.75 million.

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

38 At recitals 400 to 404 to the contested decision, the Commission considered whether the basic amounts as thus calculated should be adjusted for the different addressees in order to ensure that they did not exceed the limit of 10 % of turnover laid down in Article 23(2) of Regulation No 1/2003.

39 On that basis, the Commission stated that the fine to be imposed on the applicant was not to exceed EUR 2.05 million and that there was no need to reduce the other fines by reference to that provision (recitals 402 and 403 to the contested decision).

Application of the Leniency Notice

40 At recitals 405 to 500 to the contested decision, the Commission dealt with the application of the Leniency Notice.

41 After having established that Dimon Italia and Transcatab had satisfied the conditions imposed on them under their applications for a reduction of the fine, the Commission inferred from its assessment of the evidence adduced and from their cooperation during the procedure that they should benefit from the highest rates of reduction available within the brackets indicated to them following their applications for a reduction, that is to say, 50 % and 30 % respectively (recitals 492 to 499 to the contested decision). By contrast, no immunity or reduction of the fine was granted to Deltafina.

Final amount of the fines

42 In accordance with Article 23(2) of Regulation No 1/2003, the Commission set, in Article 2 of the contested decision, the amounts of the fines to be imposed on the undertakings and associations of undertakings to which the contested decision was addressed as follows:

— Deltafina and Universal, jointly and severally: EUR 30 million;

— Dimon Italia (Mindo) and Alliance One: EUR 10 million, Alliance One being liable for the entire fine and Mindo being jointly and severally liable for only EUR 3.99 million;

— Transcatab and Alliance One, jointly and severally: EUR 14 million;

— Romana Tabacchi: EUR 2.05 million;

— APTI: EUR 1 000;

— Unitab: EUR 1 000.

Procedure and forms of order sought by the parties

43 By application lodged at the Court Registry on 19 January 2006, the applicant brought the present action.

44 By separate document, lodged at the Court Registry on the same date (Case T-11/06 R), the applicant brought an action under Article 242 EC and Article 104 of the Rules of Procedure of the General Court for, first, suspension of the operation of the contested decision and, second, an exemption from the obligation to provide a bank guarantee as a condition for that fine not being recovered immediately.

45 By order of the President of the Court of 13 July 2006 in Case T-11/06 R *Romana Tabacchi* v *Commission* [2006] ECR II-2491, the obligation on the applicant to provide a bank guarantee in order to avoid immediate recovery of the fine imposed on it by Article 2 of the contested decision was suspended, on certain terms, and costs were reserved.

46 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, in the context of the measures of organisation of procedure laid down in Article 64 of its Rules of Procedure, requested the parties to produce documents. The parties complied with that request within the prescribed period.

47 The parties presented oral argument and their replies to the questions put by the Court at the hearing on 1 December 2010.

48 By letter of 7 and 10 December 2010, the applicant and the Commission, respectively, responded to a measure of organisation of procedure adopted by the Court at the hearing and produced certain documents.

49 On 19 January 2011 the Commission, at the Court's request, filed other documents.

50 On 8 February 2011 the applicant submitted its observations on those documents.

51 The applicant claims that the Court should:

— annul the contested decision in part, namely the part relating to the calculation of the fine imposed on the applicant;

— substantially reduce the fine imposed on the applicant;

— order any other measure, including measures of inquiry, which the Court considers appropriate;

— order the Commission to pay the costs.

52 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

53 In support of its action, the applicant puts forward five pleas in law. The first plea alleges failure to conduct a proper investigation, failure to state reasons or illogical reasoning and also breach of the principles of equal treatment and proportionality with respect to the Commission's failure to take into account, for the purposes of calculating the starting amount of the fine, the fact that the cartel had no actual impact on the market. The second plea alleges illogical reasoning and breach of the principle of equal treatment in the gradation of the starting amount of the fine in order to adjust it to the applicant's specific weight. The third plea alleges failure to state reasons and to carry out an investigation and also failure to observe the burden of proof with respect to the finding of the duration of the applicant's participation in the infringement. The fourth plea alleges insufficient reduction of the amount of the fine in order to take account of the 'disruptive' role played by the applicant and failure to take other attenuating circumstances into account. The fifth plea alleges that the fine is iniquitous and disproportionate by reference to the applicant's financial structure and its real ability to pay in a specific social context.

54 The Court will examine the first plea first, then the third plea and, last, the second, fourth and fifth pleas.

1. *The request for witness evidence to be taken*

55 As regards the appraisal of the statements which the applicant has annexed to the application, as evidence, it should be observed, first of all, that the Rules of Procedure do not preclude the production of such statements by the parties; however, their appraisal is a matter for the Court, which, if the facts described therein are crucial to the outcome of the case, may order, by way of a measure of inquiry, that the author of such a document be heard as a witness (see, to that effect, Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraph 97). In this instance, however, in the light of the parties' written pleadings, the evidence placed on the file and the results of the hearing, the Court considers that it has sufficient information to rule on the present case (see, to that effect, Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 80).

56 The applicant's request for a measure of inquiry is therefore rejected.

2. First plea, alleging failure to carry out an investigation, failure to state reasons or illogical reasoning and also breach of the principles of equal treatment and proportionality with respect to the Commission's failure to take into account the fact that the cartel had no actual impact on the market

Arguments of the parties

57 By its first plea, the applicant maintains, first of all, that, for the purpose of calculating the starting amount of the fine imposed on the applicant, the Commission ought to have taken into account the fact that the cartel had no actual impact on the market. In particular, the Commission did not draw the inferences, first, from the findings made

in the contested decision (recitals 97 and 98 to the contested decision) that the prices paid to producers for raw tobacco increased in Italy at a rate much higher than the Community average and, second, from the fact that as the participants in the cartel represented no more than 55 % of the market they inevitably remained exposed to intense competitive pressure from processors which had not adhered to the agreement.

58 In the applicant's submission, in setting the fine the Commission was required, in accordance with its practice in taking decisions, which had been approved by the case-law, to distinguish cartels having a significant actual impact on the market from those having no or only limited effects. The Commission is thus under a 'positive obligation' to measure the effective impact of the cartel on the market when it establishes gravity for the purpose of setting the starting amount of the fines. The obligation to take into account the 'actual impact [of the infringement] on the market, where this can be measured', is expressly laid down in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines'), from which the Commission cannot depart.

59 More particularly, in order to assess the actual impact of an infringement on the market, the Commission must refer to the competition which would normally have existed without the infringement. Thus, first, in the case of price agreements there must be a finding by the Commission that the agreements have in fact enabled the undertakings concerned to achieve a higher level of price than that which would have prevailed had there been no cartel. Second, the Commission must take account in its appraisal of all the objective conditions of the relevant market, in the light of the economic context. It is not impossible to evaluate the impact on prices of an agreement, moreover, and the Commission is capable of carrying out such an analysis, as is proved by its practice in taking decisions relating to the control of concentrations.

60 In the applicant's submission, a schematic and mechanical approach in setting fines which ignores the actual effects of the infringement on the market is also contrary to the principles of equal treatment and proportionality. Observance of the first principle requires that the Commission differentiate fines according to the actual impact of the agreements on the market, which must be penalised on a case-by-case basis. Observance of the second principle requires that the Commission, when setting the fine, ensure that there is an appreciable and reasonable relationship with the actual impact of the unlawful conduct and, in particular, with the harm caused to customers and end-users, which did not exist in the present case. In effect, the level of such harm constitutes the first criterion for distinguishing between the agreements. The fine imposed for an agreement whose actual impact on the market is not significant and does not harm the customers of the participating undertakings or consumers should correspond to the lowest point on the scale of fines, including for 'very serious' infringements.

61 The applicant also disputes the Commission's argument that the amount of EUR 20 million cited at Section 1.A of the Guidelines represents the minimum amount of the basic penalty applicable in principle to the undertaking which has the most important position on the market affected by the infringement and not to all the undertakings participating in the infringement. Furthermore, in the case leading to the adoption of Decision C (2004) 4030 final of 20 October 2004 relating to a proceeding pursuant to Article 81(1) [EC] (Case COMP/C.38.238/B.2 — Raw tobacco — Spain), which is clearly analogous to the case giving rise to the present action, the Commission derogated from the minimum amount of EUR 20 million.

62 Nor does the formal characterisation based on the 'serious/very serious' distinction assume the relevance which the Commission attributes to it, since the object of the applicant's complaints is the final result of the Commission's calculation by reference to its Guidelines. It follows from the case-law, moreover, that where the effects on the market are small a price cartel may also be qualified as a 'serious', rather than as a 'very serious', infringement. Last, in order to take proper account of the limited impact of the infringement on the market, the Commission can also reduce the amount set for

gravity by reference to the minimum amount normally applied in the case of a 'very serious' infringement.

63 All in all, in the absence of evidence of the actual impact of the cartel on the market, the starting amount of the fine imposed on the applicant ought to have been set at a level corresponding to the lowest point on the scale of fines appropriate to cartels.

64 The Commission contends that the plea should be rejected.

Findings of the Court

65 In the context of the first plea, the applicant raises a number of complaints, all taking issue with the Commission's failure to take into account, when determining the starting amount of the fine, the fact that the agreement had no actual impact on the market.

66 In that regard, the Court considers it appropriate, before addressing the applicant's complaints, to recall the general principles governing the determination of the amount of fines imposed in respect of practices contrary to Article 81 EC and, more particularly, the assessment of the gravity of the infringement.

General considerations

67 Article 81(1)(a) and (b) EC expressly declare that agreements and concerted practices which consist in directly or indirectly fixing purchase or selling prices or other transaction conditions or in limiting or controlling production or outlets are incompatible with the common market. Infringements of that kind, particularly in the case of horizontal cartels, are classified by the 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-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 109, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 303).

68 Article 23(3) of Regulation No 1/2003 provides that, in fixing the amount of the fine for infringements of Article 81(1) EC, regard is to be had both to the gravity and to the duration of the infringement.

69 It has consistently been held that the gravity of infringements of 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; Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 54; and Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 91).

70 In order to ensure the transparency and impartiality of its decisions setting fines for infringements of the competition rules, the Commission adopted the Guidelines (first introductory paragraph of the Guidelines).

71 The Guidelines are an instrument designed to clarify, in compliance with superior rules of law, the criteria which the Commission intends to apply when exercising the discretion conferred on it by Article 23(2) of Regulation No 1/2003 for the purpose of setting fines. The Guidelines do not constitute the legal basis of a decision imposing fines, which is based on Regulation No 1/2003, but they determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by that decision and, consequently, ensure legal certainty on the part of the undertakings (*Dansk Rørindustri and Others* v *Commission*, paragraph 69 above, paragraphs 209 to 213, and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraphs 219 and 223).

72 Thus, 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 (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 69 above, paragraphs 209 and 210, and Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91).

73 The fact that the Commission has limited its own discretion by adopting the Guidelines is not incompatible with its maintaining a significant discretion (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraphs 246, 274 and 275). 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

infringements as a whole by reference to all the relevant circumstances of the case, including factors that are not expressly mentioned in the Guidelines (*Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 71 above, paragraph 237).

74 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, of the Guidelines).

75 Within that context, infringements are put into one of three categories, namely 'minor infringements', for which the likely fines will be between EUR 1 000 and EUR 1 million, 'serious infringements', for which the likely fines will be between EUR 1 million and EUR 20 million, and 'very serious infringements', for which the likely fines will be above EUR 20 million (Section 1.A, second paragraph, first to third indents of the Guidelines). 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 of the Guidelines).

76 Moreover, the three aspects of assessment of the gravity of the infringement referred to at paragraph 74 above do not carry the same weight in the overall examination of an infringement. The nature of the infringement plays a major role, in particular, for the qualification of 'very serious' infringements (*Erste Group Bank and Others* v *Commission*, paragraph 69 above, paragraph 101, and Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky* v *Commission* [2010] ECR II-1443, paragraph 137).

77 On the other hand, neither the actual impact on the market nor the extent of the geographic market is a factor necessary for the infringement to be classified as very serious in the case of horizontal agreements concerning, as here, price fixing. While those two criteria are factors to be taken into consideration for the purpose of assessing the gravity of the infringement, they are two among other factors for the purposes of the overall assessment of gravity (see, to that effect, *Prym and Prym Consumer* v *Commission*, paragraph 69 above, paragraphs 74 and 81; *Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 71 above, paragraphs 240 and 311; and Case T-73/04 *Carbone-Lorraine* v *Commission* [2008] ECR II-2661, paragraph 91).

78 Thus, according to what is now also well-established case-law, it follows from the Guidelines that horizontal agreements concerning, as here, price fixing may be classified as 'very serious' on the sole basis of their actual nature, without the Commission being required to demonstrate that the infringement had an actual impact on the market (*Prym and Prym Consumer* v *Commission*, paragraph 69 above, paragraph 75; see also, 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).

79 That conclusion is borne out by the fact that, although the description of serious infringements expressly mentions the impact on the market, the description of very serious infringements, conversely, does not mention any requirement of an actual impact on the market (*Gütermann and Zwicky* v *Commission*, paragraph 76 above, paragraph 137; see also, to that effect, *Brasserie nationale and Others* v *Commission*, paragraph 78 above, paragraph 178).

80 It is in the light of those principles, therefore, that the Court must analyse the various complaints raised by the applicant.

The failure to take the actual impact of the agreement on the market into account when determining the fine

81 The applicant first of all takes issue with the Commission for having failed to take the actual impact of the agreement on the market into account when setting the starting amount of the fine.

82 It should be observed, however, that 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 by which it undertook to be bound in the Guidelines, even though it does not expressly refer to the Guidelines in the decision.

83 As specifically regards the nature of the infringement in issue, it should be observed that the agreement between the processors had the object, in particular, of jointly fixing the prices which the processors paid for raw tobacco and the allocation of suppliers and quantities of raw tobacco. Such practices constitute horizontal restrictions of the 'price cartel' type within the meaning of the Guidelines and are therefore by nature 'very serious' infringements. As recalled at paragraph 67 above, agreements of that type are classified by the case-law as clear-cut infringements of the competition rules or particularly serious infringements since they involve direct interference with the essential parameters of competition on the relevant market.

84 It follows that in the present case the Commission was able, without making any error, to classify the agreement as a very serious infringement on the basis of its actual nature, irrespective of its actual impact on the market (see the case-law referred to at paragraphs 76 and 77 above and, in particular, *Erste Groupe Bank and Others* v *Commission*, paragraph 69 above, paragraph 103).

85 At the hearing, the applicant asserted, however, that, contrary to its claims in its written pleadings, it did not dispute as such the classification of the infringement as very serious. Thus, it defined the scope of its complaint as follows. In substance, the applicant claimed that the threshold of EUR 20 million prescribed in the Guidelines for very serious infringements applied to the value of the total penalty for all the undertakings that took part in the agreement. As the Commission set a total starting amount of EUR 55 million for all the undertakings that participated in the agreement, it exceeded that threshold. The Commission was thus required to take the absence of any impact of the infringement on the market into consideration and to state the reason why it exceeded that threshold.

86 In that regard, it should be observed, in the first place, that the applicant's argument is based on an incorrect premiss. It is apparent from the case-law that the minimum starting amount of EUR 20 million fixed by the Guidelines for very serious infringements refers to a single undertaking and not to all the undertakings that committed the infringement (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 69 above, paragraphs 306 and 311; *Prym and Prym Consumer* v *Commission*, paragraph 69 above, paragraph 81; Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 187; and Case T-13/03 *Nintendo and Nintendo of Europe* v *Commission* [2009] ECR II-947, paragraph 44).

87 Furthermore, the conclusion that the 'likely amounts' mentioned in the Guidelines refer to the fine applicable to a single undertaking and not to the total of the fines applicable to all the undertakings participating in the agreement is borne out by a systematic interpretation of the wording of the Guidelines. The expression 'basic amount' in the Guidelines is systematically used as applying to the fine to be imposed on a single undertaking and not on all the members of the cartel. That is apparent, in particular, from the second introductory paragraph of the Guidelines, which states that the new method starts with a basic amount that will be increased or reduced to take account of aggravating or attenuating circumstances. Those circumstances are applied to each undertaking and not to all the members of the cartel, so that the expression 'basic amount' can refer only to the fine applicable to a single undertaking.

Likewise, the sixth paragraph of Section 1.A of the Guidelines, in so far as it states that '[w]here an infringement involves several undertakings …, it might be necessary in some cases to apply weightings to the amounts determined within each of the three categories [defined in the Guidelines]', confirms that those amounts refer to the amounts of the fines applicable to each undertaking participating in the infringement and not to the sum of those amounts. Last, the Commission is correct to submit that if, at Section 1.A of the Guidelines, it had actually wished, as the applicant claims, to refer to the total minimum amount of the fines applicable to all the undertakings, it would have made such an approach clear by using an explicit expression such as the 'minimum amount of the fines applicable to all the undertakings'.

88 Thus, it is clear that in the present case the Commission set the starting amount of the fine to be imposed on the applicant at EUR 10 million, which corresponds to an amount well below the threshold of EUR 20 million provided for in the Guidelines.

89 In that regard, the applicant's argument that the Commission's reasoning does not explain why, in the case giving rise to Decision C (2004) 4030 final, the starting amounts were well below the abovementioned amount of EUR 20 million. As is clear from the case-law, the amount of EUR 20 million provided for in the second subparagraph of the third indent of the second paragraph of Section 1.A of the Guidelines for very serious infringements is not a minimum threshold below which it is impossible to go (see, to that effect, *Prym and Prym Consumer* v *Commission*, paragraph 69 above, paragraph 97; see also Case T-52/02 *SNCZ* v *Commission* [2005] ECR II-5005, paragraph 42).

90 In the second place, as specifically concerns the taking into account of the actual impact on the market in the determination of the amount of the fine, it should be borne in mind that, for the purposes of such determination, it is necessary to take into account the duration of the infringements and all the factors capable of entering into the assessment of the gravity of the infringements, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size and the value of the goods concerned and also the threat that infringements of that kind pose to the objectives of the European Union (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 129, and *Dansk Rørindustri and Others* v *Commission*, paragraph 69 above, paragraph 242). It follows from this that the effect of an anti-competitive practice is not, in itself, a conclusive criterion for assessing the proper amount of a fine. In particular, factors relating to the intentional aspect may be more significant than those relating to the effects, particularly where they relate to infringements which are particularly serious, such as market sharing, a factor which is present in this case (see, to that effect, Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 118; *Prym and Prym Consumer* v *Commission*, paragraph 69 above, paragraph 96; and judgment of 12 November 2009 in Case C-554/08 P *Carbone-Lorraine* v *Commission*, not published in the ECR, paragraph 44).

91 In the present case, it must be held that analysis of the part of the contested decision relating to the impugned facts shows that the processors knowingly implemented the anti-competitive conduct in respect of which they were fined (see, in particular, recitals 124, 132, 133 and 141 to the contested decision). It follows from recitals 363 and 473 to the contested decision, moreover, that that consideration is supported by the fact that the cartel was secret.

92 It also follows from the contested decision, moreover, that the processors agreed on several occasions on measures intended to ensure the effective implementation of the agreement, such as sending each other the invoices received from their respective suppliers (recitals 122 and 129 to the contested decision), an obligation to consult in the event of purchases outside the agreements (recital 139 to the contested decision),

and obligations to control their employees in order to ensure that they did not take decisions without the necessary coordination (recital 140 to the contested decision). In that regard, it follows from recital 383 to the contested decision that the Commission also established that the cartel had been implemented.

93 Thus, the present case is characterised by the presence not only of a very serous infringement of the competition rules but also by factors relating to the intentional aspect, such as those mentioned at paragraphs 91 and 92 above.

94 It follows from recital 376 to the contested decision, moreover, that the starting amount of the fine imposed on the applicant corresponds to an amount much lower than the amount which, under the Guidelines, the Commission could have envisaged for very serious infringements.

95 In those circumstances, the applicant cannot rely on an error on the Commission's part in the determination of the fine applied to it in that the Commission did not consider the claim that the infringement had no impact on the market, even on the assumption that such impact could be measured.

96 In the third place, it must be held that, in setting the starting amount of the fine, the Commission took account of the likely effects of the unlawful conduct of each undertaking concerned. It follows from recital 370 to the contested decision that the Commission considered it appropriate to set the fines by reference to the market position of each party in order to take into account, in addition to its specific weight, the likely effect of the unlawful behaviour of each of them.

97 It follows from the case-law that the market share of each of the undertakings concerned in the market which formed the subject-matter of a restrictive practice constitutes an objective factor which, even in the absence of proof that the infringement had an actual effect on the market, gives a fair measure of the responsibility of each of them as regards the potential harmfulness of that practice for the normal operation of competition (see, to that effect, 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 196 to 198). Thus, according to the case-law, for the purposes of setting the amount of the fine, the market shares held by an undertaking are relevant in order to determine what influence it may exert on the market (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 139, and *Prym and Prym Consumer* v *Commission*, paragraph 69 above, paragraph 62).

98 In accordance with those principles, in the present case, in setting the starting amount of the fine by reference to the market shares held by each party to the cartel, the Commission used a criterion which, according to the case-law, is relevant in order to determine the influence which the applicant's behaviour could have had on the market.

99 In the fourth place, as regards the data mentioned in the contested decision which, in the applicant's submission, prove that the cartel had no effects on the market, it follows from the case-law that, in order to assess the gravity of the infringement, it is decisive to ascertain that the cartel members had done all they could to give concrete effect to their intentions. What then happened, so far as the market prices actually obtained were concerned, was liable to be influenced by other factors outside the control of the cartel members, which cannot benefit from external factors which counteracted their own efforts by turning them into factors justifying a reduction of the fine (see *Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 71 above, paragraph 287, and *Gütermann and Zwicky* v *Commission*, paragraph 76 above, paragraph 130 and the case-law cited).

100 Thus, in the present case, as the cartel members adopted measures in order to give concrete effect to their anti-competitive objectives (see paragraphs 91 and 92 above), a change in market prices such as the increase in tobacco prices to which the applicant

refers cannot in itself justify a reduction of the fine. Indeed, it cannot be precluded that, in the absence of the cartel, the increase in prices would have been greater than the increase referred to above.

101 Last, as regards the argument that the activity and stability of the cartel were often disrupted by the applicant, which, in the applicant's submission, reinforces the argument that the infringement had no effects on the market, it is sufficient to observe that the applicant's 'disruptive' behaviour vis-à-vis the cartel was evaluated by the Commission as an attenuating circumstance (recital 380 to the contested decision).

Breach of the principles of equal treatment and proportionality

102 As regards, first of all, the alleged breach of the principle of equal treatment, it should be borne in mind that, in accordance with settled case-law, there is a breach of that principle only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case T-161/05 *Hoechst* v *Commission* [2009] ECR II-3555, paragraph 79).

103 However, it must be pointed out that in the present case the applicant merely asserts that observance of the principle of equal treatment requires that the Commission differentiate the fines according to the actual impact of the agreements on the market, penalised on a case-by-case basis. However, the applicant fails to explain how the Commission breached that principle vis-à-vis the applicant. It should be observed, moreover, that, according to settled case-law, decisions relating to other cases, which

the applicant does not even mention, are purely indicative as regards the possible existence of discrimination, since it is unlikely that the circumstances specific to those decisions, such as the markets, products, undertakings and periods concerned, will be the same (see, to that effect, Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraphs 201 and 205; Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 60; and Case T-12/03 *Itochu* v *Commission* [2009] ECR II-883, paragraph 124).

104 As regards, next, the alleged breach of the principle of proportionality, it should be borne in mind that that principle requires that measures adopted by the institutions must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 96; and judgment of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer* v *Commission*, not published in the ECR, paragraph 223).

105 In the procedures initiated by the Commission in order to penalise infringements of the competition rules, the application of that principle requires that fines must not be disproportionate to the objectives pursued, that is to say, by reference to compliance with those rules, and that the amount of the fine imposed on an undertaking for an infringement in competition matters must be proportionate to the infringement, seen as a whole, having regard, in particular, to the gravity thereof (see, to that effect, 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 532, and *Prym and Prym Consumer* v *Commission*, paragraph 104 above, paragraphs 223 and 224 and the case-law cited). In particular, the principle of proportionality requires the Commission to set the fine

proportionately to the factors taken into account for the purpose of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 226 to 228, and Case T-446/05 *Amann & Söhne and Cousin Filterie* v *Commission* [2010] ECR II-1255, paragraph 171).

106 In that regard, it must be pointed out that the applicant has not demonstrated the absence of harm to customers and to final consumers on which it bases its complaint alleging breach of the principle of proportionality. Indeed, the data which it has invoked in the context of the present plea do not prove such absence of effects, since they may have been influenced by other factors (see paragraphs 99 and 100 above).

107 Nor can the applicant claim that the Commission breached the principle of proportionality by setting the starting amount of the fine at EUR 10 million, since the infringement is a very serious and deliberate infringement of the competition rules. The proportionate nature of the starting amount imposed in this case is confirmed by the fact that it was set at a level well below the minimum threshold provided for in the Guidelines for an infringement of that type.

The failure to state reasons and the illogical nature of the reasoning

108 As regards the present complaint, it should be observed that the applicant alleged failure to state reasons or illogical reasoning in the heading of the plea, but did not develop any argument in support of the complaint in the body of the plea. In answer to a question put by the Court at the hearing, the applicant stated that it claimed the

existence of illogical reasoning in that the Commission had imposed a penalty above the minimum provided for in the Guidelines without having analysed the impact of the cartel on the market.

109 In that regard, it should be borne in mind that it follows from the case-law that, in the context of the setting of fines for infringement of competition law, the obligation to state reasons is fulfilled where the Commission indicates in its decision the elements of assessment which enabled it to measure the gravity and the duration of the infringement. In the case of a decision imposing fines on a number of undertakings, the scope of the duty to state reasons must be assessed inter alia in the light of the fact that the gravity of the infringement depends on numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of the fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375 ('*PVC II*'), paragraphs 463 and 465).

110 In the present case, the Commission stated, at recitals 365 to 376 to the contested decision, the factors which it took into account when setting the starting amounts of the fines imposed on the various undertakings concerned. The Commission stated at those recitals, in particular, the criteria on the basis of which, first, it assessed the gravity of the infringement and, second, it then set the starting amount, classifying the undertakings according to their importance on the market, determined by their market share, taking account of the specific weight of each undertaking and the likely effects of their unlawful conduct. The conditions laid down by the case-law with respect to the obligation to state reasons have thus been satisfied.

111 Last, in so far as it has been observed (see paragraph 88 above) that the Commission set the starting amount of the fine to be imposed on the applicant at an amount well below the minimum threshold provided for in the Guidelines for very serious infringements, the argument alleging illogical reasoning cannot succeed.

112 In the light of the foregoing considerations, the first plea must be rejected.

3. *Third plea, alleging failure to state reasons and to carry out an investigation and also failure to observe the burden of proof with respect to the finding of the duration of the applicant's participation in the alleged infringement*

Arguments of the parties

113 The applicant maintains that in fixing the duration of its participation in the infringement at two years and eight months — namely from October 1997 to 19 February 2002, with an interruption from 5 November 1999 to 29 May 2001 — the Commission made a manifest error of assessment of the facts. In that regard, the applicant submits that it claimed during the administrative procedure that its participation in the cartel was interrupted in February 1999 and was never subsequently resumed. The duration of its participation in the infringement was therefore a little over one year. The applicant also takes issue with the Commission for having based its findings on inappropriate evidence and for not having stated sufficient reasons in that regard.

114 As regards, in the first place, the final phase of the first period of its participation in the cartel, the applicant submits that the following points ought to be taken into consideration:

— contrary to settled case-law, recitals 157 to 201 to the contested decision do not mention any evidence of the applicant's participation in meetings or other activities in 1999;

— it follows from the evidence adduced by the Commission that the last meeting in which the applicant participated was the meeting held on 14 December 1998 (recital 155 to the contested decision); furthermore, an internal Dimon Italia memorandum dated 20 October 1998 (recital 145 to the contested decision) and overlooked by the Commission states that on 16 October 1998 the 'multinationals' were complaining that the applicant was ignoring the rules of conduct laid down by the cartel;

— in spite of the fact that the cartel was very active in 1999, the contested decision does not show that the applicant took part in it; indeed, according to the contested decision: (i) the other processors, namely Deltafina, Transcatab, Dimon Italia and Trestina Azienda Tabacchi, brought continuous pressure to bear on APTI in order to influence the negotiations for the conclusion of interprofessional agreements (recital 165 to the contested decision); (ii) various cartel meetings took place in 1999 between Deltafina, Transcatab and Dimon Italia, including, in particular, a number of particularly important meetings in October, which the applicant did not attend and to which it was not invited (recital 184 to the contested decision); and (iii) a memorandum relating to the Bright and Burley varieties of raw tobacco was approved solely by certain processors (recital 186 to the contested decision).

115 As regards, in the second place, the period from 29 May 2001 to 19 February 2002, the applicant makes the following observations:

— the decisive evidence of the applicant's resumption of its participation in the cartel was the receipt of a fax sent to it by Deltafina on 29 May 2001 and stating the price at which Deltafina would sign contracts for the Bright variety with the producers' associations; however, that communication was not anti-competitive in nature; indeed, it was an isolated contact intended to enable the applicant to overcome the difficulty in understanding the market values that prevailed in contracts between growers and processors, and the procedure for the signing of those contracts, which was governed by the rules of the common agricultural policy, which had been the subject of significant amendments;

— the commercial initiatives undertaken by the applicant were closely followed at the cartel meetings, in which the applicant did not participate (recital 209 to the contested decision); in addition, the cartel's relations with the applicant even appeared in an agenda, sent by Dimon Italia to Deltafina and Transcatab, proposed for a meeting to take place on 18 September 2001, that is to say, after the date of receipt of the fax (recital 212 to the contested decision);

— the applicant's alleged participation in the cartel was limited, as is clear from Transcatab's statements at the inspection carried out on 18 April 2002, to two meetings, on 16 November 2001 and 8 January 2002; the applicant participated in those meetings, since Deltafina, Dimon Italia and Transcatab invited it to act as 'mediator' in order to lift the objection raised by the 'consortium for the protection and promotion of Burley Campano tobacco' ('the Burley consortium') to the introduction of an auction system for the sale of the tobacco, promoted by Unitab and APTI, which was administered by the national committee for the management of Burley tobacco ('Cogentab'); for its part, the applicant invited the interested parties to the meeting held on 8 January 2002 (recital 222 to the contested decision), which was preceded on the previous day by another meeting at which Deltafina, Dimon Italia and Transcatab probably discussed among themselves, in the absence of the applicant and the suppliers belonging to the Burley consortium, the common position that they would adopt in the negotiations the following day.

116 The Commission submits, in the first place, that it took 5 November 1999 as the date on which the applicant interrupted its participation in the cartel because a handwritten note of Deltafina's purchasing officer concerning a meeting held on the same date showed that the applicant was on the agenda as an entity now outside the cartel.

117 In that regard, the Commission rejects the applicant's argument that the date to be taken into consideration for the interruption of its participation in the cartel is 14 December 1998 (the date of the last cartel meeting in which it took part) or should be determined on the basis of the Dimon Italia internal memorandum of 20 October 1998 referred to at recital 145 to the contested decision. First, the applicant itself acknowledged in its response to the statement of objections that it participated in the cartel at least until February 1999 and, second, the Dimon Italia memorandum cannot constitute evidence of the interruption of the applicant's participation in the cartel in 1998, since, according to consistent case-law, until the time when an undertaking publicly distances itself from what is discussed at the meetings it remains fully liable owing to its participation in the cartel. In the absence of evidence to that effect, the contested decision therefore correctly established that the applicant's participation in the cartel continued at least until 5 November 1999.

118 In the second place, the Commission claims that it took 29 May 2001 as the date on which the applicant resumed its participation in the cartel, since it was on that date that the applicant received a fax informing it of the price at which Deltafina would sign the contracts with the producers' associations.

119 Such a communication between competitors constitutes evidence of the resumption of the applicant's participation in the cartel, regard being had to the fact that it had already formed part of the cartel until 1999 and that shortly afterwards, that is to say, on 16 November 2001, it would resume its participation in the cartel meetings.

120 In its rejoinder, moreover, the Commission rejects the applicant's argument that the application clearly reveals the applicant's intention to contest not only the duration of the period during which it was part of the cartel but also the assertion that it was again part of the cartel during the period from May 2001 to the beginning of 2002. The Commission contends, first, that it is only in the reply that the applicant disputes for the first time the unlawful nature of those meetings, denying that it rejoined the cartel in 2001. That complaint is inadmissible, under the combined provisions of Articles 44(1)(c) and 48(2) of the Rules of Procedure. Second, the Commission maintains

that the complaint is unfounded in any event. Transcatab's statement of 18 April 2002 (document 38281/03488) contains a list of the various meetings held between the members of the cartel; on that list the meeting of 16 November 2001 is designated as a 'restricted' meeting (a type of meeting in which the delegated administrators participate) and the meeting of 8 January 2002 is designated as a 'working' meeting (a type of meeting in which the purchasing officers took part). In the Commission's submission, those two meetings therefore were anti-competitive in nature and had an anti-competitive object and were thus part of the cartel's activities. The fact that the possibility of introducing a system of selling tobacco by auction was also discussed at those meetings does not necessarily mean that questions relating to the cartel were not discussed at them or that the applicant was not involved in those discussions. Nor has the applicant adduced any evidence that it publicly distanced itself during those meetings from the discussions which had an anti-competitive object.

121 In the third place, the Commission maintains that the plea is in any event ineffective. Even if this plea were to be upheld, the only consequence would be that the starting amount of the fine established for the applicant ought to have been increased by 15 % and not by 25 %, which would have no impact on the final amount of the fine, since it was reduced to EUR 2.05 million in accordance with the maximum limit of 10 % laid down in Article 23(2) of Regulation No 1/2003.

Findings of the Court

122 As regards the duration of the applicant's participation in the infringement (recitals 302 and 378 to the contested decision), it should be observed, first of all, that the parties agree that the applicant joined the cartel in October 1997. On the other hand, the parties disagree, in substance, first, on the question whether the Commission

correctly established that the applicant's participation had ended on 5 November 1999 and, second, on the question whether the Commission correctly established that the applicant joined the cartel again from 29 May 2001 until the end of the infringement, on 19 February 2002.

123 Next, it should be observed that, in the Commission's submission, the argument whereby the applicant disputes the illegality of the meetings held on 16 November 2001 and 8 January 2002 is a new plea in law, raised in the reply, which is therefore inadmissible.

124 In that regard, the Court points out that, under the first subparagraph of Article 48(2) of the Rules of Procedure, the introduction of a new plea in law in the course of proceedings is not allowed unless it is based on matters of law or of fact which came to light in the course of the procedure. In that connection, a plea which amplifies a submission previously made, either expressly or by implication, and is closely connected with that submission, will be declared admissible (Case T-195/00 *Travelex Global and Financial Services and Interpayment Services* v *Commission* [2003] ECR II-1677, paragraphs 33 and 34, and Case T-151/01 *Duales System Deutschland* v *Commission* [2007] ECR II-1607, paragraph 71).

125 In the present case, it must be held that the plea which is considered new by the Commission constitutes an amplification of the arguments developed by the applicant in answer to the arguments put forward by the Commission in its defence under the third plea, concerning the duration of the applicant's participation in the cartel. Thus, the objection of inadmissibility raised by the Commission must be rejected.

126 In addition, it should be noted that the applicant does not expressly seek annulment of Article 1(b) of the contested decision, which defines the duration of its participation in the cartel.

127 None the less, in the present case it is apparent from its written pleadings that the applicant disputes, in substance, the legality of the contested decision in that the Commission finds, as stated in Article 1(b) of the operative part, that the infringement lasted, in the applicant's case, from October 1997 until 5 November 1999 and from 29 May 2001 until 19 February 2002. Thus, the applicant submitted in its written pleadings that the duration of its participation in the cartel should be fixed at a little over one year, namely from October 1997 to February 1999, and that in stating that the infringement committed by the applicant was of a greater duration the Commission '… made an error in finding the facts and in appraising the evidence adduced by [the applicant]'. It is common ground, moreover, that the applicant disputed the duration of its participation in the infringement during the administrative procedure, notably in its response to the statement of objections (see, to that effect and by analogy, *Groupe Danone* v *Commission*, paragraph 78 above, paragraph 212).

128 In the light of the foregoing, it should therefore be held that, by the present plea, the applicant seeks not only the cancellation or reduction of the fine but also the partial annulment of the contested decision, in particular Article 1(b), in that the Commission wrongly held there that the infringement lasted from October 1997 until 19 February 2002, with an interruption from 5 November 1999 until 29 May 2001 (see, to that effect and by analogy, *Groupe Danone* v *Commission*, paragraph 78 above, paragraph 213).

129 It follows from the case-law that it is for the Commission to prove not only the existence of the cartel but also its duration (see Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 2802 and the case-law cited). More particularly, as regards proof of an infringement of Article 81(1) EC, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of the facts constituting an infringement (see, to that effect, *Baustahlgewebe* v *Commission*, paragraph 97 above, paragraph 58; Case C-49/92 P *Commission* v *Anic Partecipazione* [1999] ECR I-4125, paragraph 86; and *Groupe Danone* v *Commission*, paragraph 78 above, paragraph 215). Any doubt in the mind of the Court must operate to the

advantage of the undertaking to which the decision finding the infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment and/or variation of a decision imposing a fine. Indeed, in the latter situation, it is necessary to take account of the principle of the presumption of innocence, which is part of the fundamental rights protected in the legal order of the European Union and has been enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1). Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 149 and 150; see also, to that effect, *Groupe Danone* v *Commission*, paragraph 78 above, paragraphs 215 and 216). It is thus necessary for the Commission to produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see *Groupe Danone* v *Commission*, paragraph 78 above, paragraph 217 and the case-law cited).

130 It has consistently been held that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see *JFE Engineering and Others* v *Commission*, paragraph 105 above, paragraph 180 and the case-law cited).

131 Furthermore, it is normal for the activities which anti-competitive agreements entail to take place clandestinely, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of meetings, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, in most

cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 55 to 57, and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 51).

132 The case-law requires, moreover, that if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79; see *Peróxidos Orgánicos* v *Commission*, paragraph 55 above, paragraph 51 and the case-law cited).

133 In the present case, in the light of the complaints raised, the question arises whether the Commission had at its disposal sufficient evidence to conclude that the applicant participated in the cartel during the period from October 1997 to 5 November 1999 and that it resumed its participation during the period from 29 May 2001 to 19 February 2002.

The date on which the applicant's participation in the infringement ceased in 1999

134 It should be observed, as a preliminary point, that it is not disputed that the applicant interrupted its participation in the cartel in 1999. On the other hand, the parties dispute the precise date of that interruption. The applicant denies having participated in

the cartel after 19 February 1999, the date of the last meeting in which it states it participated, whereas the Commission set the date of the applicant's withdrawal at 5 November 1999. That date was determined on the basis of the information in the handwritten notes drawn up on 5 November 1999 by a Deltafina employee concerning a cartel meeting held on the same date (see footnote 263 to the contested decision). In the applicant's submission, it is apparent from those notes that relations between the cartel members and the applicant were among the points to be dealt with at that meeting, which shows that the applicant was regarded as an entity outside the cartel.

135 It should be observed, however, that those handwritten notes, on the basis of which the Commission established the date on which the applicant interrupted its participation in the cartel in 1999, contain no reference to the date on which that participation ceased. The only certain date that can be inferred from those notes is the date on which their author wrote them.

136 It should be made clear, therefore, that the facts on which the author of those notes expresses his views implicitly, namely the fact that the applicant had become an entity outside the cartel, necessarily precede, as the Commission itself acknowledges, moreover, at footnote 263 to the contested decision, the date on which those notes were drawn up.

137 Contrary to what the Commission maintains in the contested decision, therefore, those notes do not substantiate the finding that 5 November 1999 was the date on which the applicant interrupted its participation in the cartel.

138 In that regard, it should be observed, first of all, that at recital 157 to the contested decision, which is to be found at the beginning of the part of the contested decision devoted to examination of the alleged facts in 1999, the Commission asserts that 'Deltafina, Dimon [Italia] and Transcatab maintained informal contacts on a regular basis to discuss forecasts and evolution of purchase prices in Italy', but does not mention the applicant (which is clear, moreover, from paragraph 2.3 of Dimon Italia's

leniency application of 4 April 2002 (document 38281/04998), referred to at recital 7 to the contested decision). Next, at recitals 165, 184 and 185 to the contested decision, the Commission refers to a number of contacts between those three processors in 1999, but none of those contacts concerns the applicant. Furthermore, as stated at recital 186 to the contested decision, in October 1999 Deltafina, Dimon Italia and Transcatab '[reached an agreement] on Bright and Burley, which is very similar in its structure and content to the Villa Grazioli agreement'. According to the Commission, '[t]he main thrust of [that] agreement consisted of fixing purchasing prices of raw tobacco … from third packers, allocating third packers with defined quantities to each processor and boycotting third packers that had not joined Cogentab'. As the Commission itself observes at footnote 263 to the contested decision, it is apparent from Transcatab's written statements of 18 April 2002, provided by Transcatab during the inspection carried out at its premises (see also paragraph 159 below), that the applicant left the cartel because 'it did not agree with the establishment of Cogentab', which was an association created by APTI and Unitab in October 1999 pursuant to the interprofessional agreement for the 1999 crop of Burley (recital 182 to the contested decision). It follows from recital 159 to the contested decision, moreover, that at the two meetings of processors held in Rome (Italy) in February 1999, when the applicant was not among the participants, those present 'also discussed … the creation of a joint purchasing committee …, which was later to be called Cogentab'.

139 All in all, in the contested decision the Commission adduces no evidence showing that the applicant participated in the cartel until 5 November 1999.

140 Only at the hearing did the Commission make reference for the first time to the applicant's alleged participation in an 'operational' meeting on 22 July 1999, which it had not mentioned either in the statement of objections or in the contested decision.

141 Conversely, it follows only from the contested decision that the applicant 'left the cartel' in 1999 '[because] it did not agree with the establishment of Cogentab' (recital 302 and footnote 263 to the contested decision) and that the creation of Cogentab had been discussed at the two meetings held in February 1999 (see recital 159 to the contested decision), although the Commission did not establish in the contested decision that the applicant had participated in those meetings.

142 The Commission therefore made an error of assessment of the facts when it considered, in the contested decision, that the applicant had ceased to participate in the cartel on 5 November 1999.

143 Thus, in the light of the preceding considerations, having failed to establish a precise date on which the applicant's participation in the cartel ceased, the Commission was not entitled to take 5 November 1999 as the date on which the applicant's participation ceased and it is therefore appropriate, in accordance with the principle *in dubio pro reo* (see paragraph 129 above), to take February 1999 as the last month in which the applicant participated in the cartel.

144 That finding cannot be called in question by the Commission's argument that, in accordance with the case-law, in the absence of evidence that the applicant publicly distanced itself from the other members of the cartel in 1998, or in any event in February 1999, the Commission was correct to establish that the applicant's participation in the cartel had continued until 5 November 1999, taking into account the evidence indicating that on that date the other cartel members considered that the applicant had put an end to its participation.

145 In that regard, it is sufficient to recall that in the contested decision the Commission did not establish that, during 1999 and specifically until 5 November 1999, the applicant participated in meetings at which anti-competitive agreements were concluded

or implemented (see, to that effect and by analogy, *Aalborg Portland and Others* v *Commission*, paragraph 131 above, paragraph 81). On the contrary, with respect to the meetings held in February 1999, it is stated at recital 159 to the contested decision that, apart from Deltafina, Dimon Italia and Transcatab, the presence of other processors, including the applicant, could not be 'clearly established'.

146 Furthermore, the Commission's argument is inconsistent with the finding made in the contested decision, on the basis of Transcatab's written statements of 18 April 2002 (see footnote 263 to the contested decision), that on 5 November 1999 the applicant 'had already left the cartel' because it did not approve of the creation of Cogentab. It also follows from the findings made in the contested decision (see recital 159 to the contested decision) that first discussions concerning the creation of Cogentab had already been broached at the meetings held in February 1999 (see also paragraphs 138 and 141 above).

147 Likewise, the Commission's argument — put forward, for the first time, at the hearing — that it was 'generous' to the applicant by taking 5 November 1999 into account, since, according to recital 199 to the contested decision, the applicant had participated on 22 November 1999 in a meeting of processors the content of which was 'probably' anti-competitive, is irrelevant. Neither in the statement of objections nor in the contested decision did the Commission attribute to the applicant's possible participation in such a meeting a probative value that would enable the Commission to characterise it as incriminating evidence, which is why it did not adopt that assertion in the appraisal of the duration of the applicant's participation in the cartel and concluded that on 5 November 1999 the applicant 'had already left the cartel' (footnote 263 to the contested decision). That assessment is confirmed, moreover, by Dimon Italia's leniency application of 4 April 2002 and also by Transcatab's statements of 18 April 2002 (see paragraph 138 above).

148 Nor, last, has the Commission established that during 1999 the applicant participated in the implementation of the interprofessional agreements concerning the different varieties of tobacco or the processors' meetings aimed at defining a common position which they would then defend within APTI in order to condition APTI's position during the negotiations with Unitab concerning those agreements (see recital 165 to the contested decision).

149 In the light of the foregoing considerations, the complaint alleging that the Commission was wrong to find that the applicant ceased its participation in the cartel on 5 November 1999 must be upheld, as the evidence assessed in that regard in the contested decision and the other material in the file enabled the Commission only to consider that the applicant's participation was established only until February 1999 (recital 159 to the contested decision and footnote 263).

The applicant's participation in the cartel between 29 May 2001 and 19 February 2002

150 As regards the period during which the applicant is alleged to have resumed its participation in the cartel, namely from 29 May 2001 to 19 February 2002, it should be observed that the Commission based its assessment on three factors. As regards the date on which the applicant resumed its participation, the Commission took the date of 29 May 2001, since it was on that date that a Deltafina employee sent the applicant a fax containing information about the price, per kilogram, at which Deltafina would sign the cultivation contracts for the Bright variety (recitals 211 and 302 to the contested decision). That circumstance, taken with the applicant's participation in two meetings held on 16 November 2001 (recital 213 to the contested decision) and 8 January 2002 (recital 222 to the contested decision), then led the Commission to consider that the applicant, like Deltafina, Transcatab and Dimon Italia, had participated in the cartel until 19 February 2002.

— The fax sent by Deltafina on 29 May 2001

151 As regards, in the first place, the fax of 29 May 2001, it should be observed that that fax indicated only the prices that Deltafina would insert in the cultivation contracts with the producers' associations for the Bright tobacco variety, depending on its quality grade.

152 In that regard, it should be observed, first, that it is not apparent from the contested decision that those prices were determined in the context of the cartel, or that Deltafina was instructed by the cartel to communicate such prices. The fax is therefore an isolated contact between Deltafina and the applicant concerning sensitive commercial information, which was none the less limited to the prices to be inserted in the cultivation contracts for a single variety among others referred to at recital 87 to the contested decision. Nor did that fax specify the regions to which those prices related, although the Commission itself stated, at recital 99 to the contested decision, that 'prices of raw tobacco greatly differ by region depending on the variety'.

153 Second, it should be observed that the price stated in Deltafina's fax, which refers explicitly to cultivation contracts, can only be a 'contractual price'. Indeed, it is apparent from the contested decision that that price is mentioned in contracts of that type — which are generally entered into, between producers or associations of producers and processors, between March and May of the harvest year — and represents 'the price that the processors commit to pay according to the quality of the tobacco' (recitals 90 and 91 to the contested decision).

154 As explained at recital 92 to the contested decision, that price is different from the price that is 'actually paid upon receiving the tobacco and which results as a direct proportion of quality grades and other factors'. That price, called the 'delivery price', is 'usually determined in the period December-February'. Furthermore, it is apparent

from recital 279(a) to the contested decision that the single and continuous infringement implemented by the processors included, inter alia, the practice consisting in 'the setting of common purchase prices which processors would pay to producers at the delivery of tobacco'.

155 Third, it should be observed that the receipt of that fax by the applicant was preceded by the establishment by Dimon Italia, on 10 May 2001, of an agenda, discussed internally within that undertaking and dealing with a meeting which was to take place in its offices two weeks later, which envisaged, among the various points to be dealt with, a discussion concerning 'Romana Tabacchi/ATI' (recital 209 to the contested decision). Furthermore, after the applicant had received that fax, an agenda was sent by Dimon Italia to Deltafina and Transcatab on 14 September 2001, concerning a meeting, which actually took place on 18 September 2001, in which the applicant did not participate. That agenda includes a point worded as follows: 'Ns. rapporti Versus ATI, ETI, ROM TAB' ('Our relationship toward ATI/ETI and Romana Tabacchi') (see recital 212 to the contested decision). As the same agenda includes a first point stating 'Ribadire ns. rapporti' ('Reinforce our relationships'), the assertion contained therein can be considered only to confirm that, as the applicant claims, the applicant was outside the cartel. Indeed, the use of the word 'toward' and the exhortation to reinforce relationships between members of the cartel do not raise any doubts as to the applicant's position vis-à-vis Dimon Italia, Transcatab and Deltafina. In addition, it is also apparent from recital 204 to the contested decision that another operational meeting of the cartel took place in Caserte (Italy) on 5 June 2001, that is to say, between the date of receipt of Deltafina's fax and the meeting of 18 September 2001, and was not attended by the applicant.

156 If Deltafina's fax cannot be regarded as an element proving that the applicant was again in contact with a member of the cartel in order to obtain specific information about the 'contract price' of a particular variety of tobacco to be inserted in the

cultivation contracts which it was going to enter into with the associations of producers, that element does not in itself give sufficient indication that the applicant was again involved in the cartel, particularly in the light of the context described at paragraphs 152 to 155 above.

— The meetings of 16 November 2001 and 8 January 2002

157 It should be noted that the applicant admits having participated in the meetings held on 16 November 2001 and 8 January 2002. It maintains, however, that it was 'summoned' by Dimon Italia to a meeting, held in APTI's offices on 16 November 2001, during which it was asked to act as 'mediator' with a view to removing the Burley consortium's objection to the auction system for the sale of tobacco — the promoters of which were Unitab and APTI — which ought to have been administered by Cogentab. It was therefore on that basis that the applicant subsequently invited the interested parties to the meeting held at its offices on 8 January 2002.

158 In that regard, it should be borne in mind that, according to consistent case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking gave the other participants to believe that it subscribed to what was decided there and would comply with it (see *Aalborg Portland and Others* v *Commission*, paragraph 131 above, paragraphs 81 and 82 and the case-law cited).

159 First, it should be observed that in its statements of 18 April 2002 Transcatab asserts that the applicant left the cartel in 1999, when the 'Cogentab auction system' was introduced, in order, according to Transcatab, to win market share from the other processors, which in the meantime had created the Burley consortium with the essential aim of countering the Cogentab system and the introduction of the 'auction system'. Transcatab also states the following:

'After approximately two years, Romana Tabacchi, given inter alia the marketing agreements obtained with ATI [which was the "leaf" division of the former Italian monopoly (see recital 39 to the contested decision) and had become a member of Cogentab in 2001 (see recital 183 to the contested decision)], considers it necessary to ask to be admitted to APTI. It therefore finds it necessary to comment on the purchasing policy within Cogentab and also on the application of the auction system. Thus, a series of meetings took place in late 2001 and early 2002 at APTI and at the premises of Romana Tabacchi, during which the latter altered its position vis-à-vis the auctions and stated that it was in favour of mediation between the position of the [Burley consortium] and that of Cogentab.'

160 In that regard, the parties agree that an adaptation of the auction system for the purchase of raw tobacco, which was discussed at the end of 2001, was envisaged, several months later, by Council Regulation (EC) No 546/2002 of 25 March 2002 fixing the premiums and guarantee thresholds for leaf tobacco by variety group and Member State for the 2002, 2003 and 2004 harvests and amending Regulation (EEC) No 2075/92 (OJ 2002 L 84, p. 4).

161 It therefore follows from Transcatab's statements that the applicant definitively left the cartel in 1999 and that in 2001, after requesting to be admitted to APTI, it participated in the meetings in question in order to discuss the auction system and to promote mediation between the Burley consortium and Cogentab with respect to that system. Thus, according to Transcatab, the applicant participated in those meetings

with a particular aim in view and therefore with a different prospect from that of the cartel members, which does not reveal the existence of an anti-competitive spirit on its part.

162 Second, as already observed at paragraph 138 above, it is apparent from paragraph 2.3 of Dimon Italia's leniency application of 4 April 2002 that, with respect to the period from 1999 to 2002, only the three 'main processors', namely Deltafina, Dimon Italia and Transcatab, had regular contacts concerning the object of the cartel. Conversely, the applicant is not identified by Dimon Italia as an active member of the cartel during that period. It must therefore be held that, after its reconstruction of that period of cartel activity, Dimon Italia had not perceived the applicant's participation in the meetings in question as having been inspired by an anti-competitive spirit.

163 Third, the Commission acknowledged at the hearing that during the period between 29 May 2001 and February 2002 there were six meetings and that the applicant participated in only two of them, including the meeting held on 16 November 2001, which was not strictly speaking a cartel meeting, but an APTI meeting. As regards, moreover, the meeting held on 8 January 2002, the second meeting in which the applicant participated during the entire period from 29 May 2001 until the date on which the infringement ceased, it should be observed, first, that according to Transcatab's statements of 18 April 2002, in addition to Transcatab itself, Dimon Italia, Deltafina and the applicant, a representative of another entity was also present at that meeting. Second, it should be observed that that meeting was preceded on the previous day by another meeting, in which only Dimon Italia, Transcatab and Deltafina participated (see recital 222 to the contested decision). Having regard to the assertions contained in Transcatab's statements and Dimon Italia's leniency application, respectively (see, in particular, paragraphs 161 and 162 above), the Commission has therefore not established to the requisite legal standard that the meeting of 8 January 2002 constituted a cartel meeting.

164 In the light of the foregoing considerations, it must be concluded that, in a context such as that described above, the Commission did not have evidence or a body of indicia having sufficient probative force with respect to the applicant's involvement in the cartel during the period between 29 May 2001 and 19 February 2002. On

the contrary, as is also clear from the contested decision, a number of elements in the administrative file were liable to lead the Commission to a different conclusion from that which it eventually adopted with regard to the duration of the applicant's participation.

165 Since the body of indicia on which the Commission relies is not sufficient to conclude that the applicant participated in the cartel during the abovementioned period, it must be held that the Commission made an error of assessment of the facts in that it considered that the applicant had participated in the cartel during the period from 29 May 2001 to 19 February 2002, which corresponds to the date on which the infringement ceased.

166 Having regard to all the foregoing, the present plea must be upheld. It follows that Article 1(b) of the contested decision, in that it establishes the infringement committed by the applicant after February 1999, must be annulled. The consequences that must be drawn for the determination of the amount of the fine will be examined at paragraph 265 et seq. below.

4. *Second plea, alleging illogical reasoning and breach of the principle of equal treatment in the gradation of the starting amount of the fine*

Arguments of the parties

167 The applicant claims, first, that the Commission ought not to have chosen 2001 as the reference year for the purpose of determining its market share. Since its participation in the infringement was fragmented, either the Commission ought to have taken as the basis for its calculation the average of the market shares held over the entire

period under consideration — which, in the applicant's case, came to 4.69 % of the market — which is all the more appropriate in the case of infringements of short duration, or it ought, at most, to have taken into account the applicant's market share in 1998 and not its market share in 2001, a year during which its participation, even on the assumption that it is established, lasted for only part of the year. The applicant also claims that, as its market share was lower than Transcatab's or Dimon Italia's, it ought not to have been placed in the same category of undertakings as that in which those undertakings were placed, for which the Commission set the same starting amount of EUR 10 million. Even before the application of a multiplier, the Commission ought therefore to have set starting amounts which were themselves also differentiated.

168 The applicant disputes, in particular, the use of the market share held during the last full year of the infringement as a reference criterion for the purpose of establishing the specific weight of an undertaking. The use of such a market share should be adapted in all cases in which, as in the present case, an undertaking's participation in the cartel has been interrupted. In such a case, the market share relating to the last full year of the infringement reflects not only the profits made by the undertaking by virtue of its anti-competitive conduct but also the profits obtained by virtue of its activity on the market during the periods when it did not participate in the cartel. That is precisely the case here, as the greatest increase obtained by the applicant was recorded between 1999 and 2000, a period during which it is accepted that the applicant was not part of the cartel.

169 Since the Commission used the same calculation method for the applicant as for the other undertakings, whose participation in the cartel was not interrupted, the contested decision is vitiated by a breach of the principle of equal treatment and by the illogicality of the reasoning in the relevant part.

170 The Commission contends that the applicant's arguments should be rejected.

171 First, it observes that, according to the case-law, the application of the same starting amount to undertakings holding a market share in a low bracket — such as in this case — does not constitute a breach of the principle of equal treatment. Furthermore, when setting fines the Commission has a wide discretion and is not required to apply a precise mathematical formula. In any event, that argument is ineffective, since the final amount of the fine imposed on the applicant was ultimately reduced to EUR 2.05 million, pursuant to Article 23(2) of Regulation No 1/2003.

172 Second, as regards the argument whereby the applicant disputes the use of the market share held during the last full year of the infringement as a reference criterion, the Commission claims that, according to the case-law, it does not exceed the limits of its discretion where it acts in a coherent and objectively justified manner when placing the undertakings concerned in categories for the purpose of setting the fines. The market shares held during the last full year of the infringement constitute an appropriate indication of the specific weight and of the impact on competition of the unlawful conduct, since they can, in particular, be the result, at least in part, of the infringement itself.

173 Third, as regards the argument that, for infringements of average duration, it would be more appropriate to take as a reference criterion the average of the market shares held by the undertakings concerned during the years of the infringement, the Commission contends, first of all, that the infringement was not in this case of 'average' duration but of 'long' duration. Next, it observes that it is specifically because the applicant suspended its participation in the cartel for a certain period that the average of market shares cannot constitute a parameter by which to place the undertakings concerned into categories in order to set the fines. In order to calculate that average,

moreover, the Commission would have had to obtain from each of the undertakings involved in the cartel not only the data relating to their own raw tobacco purchases for 1995 to 2000 inclusive but also the total value of purchases of raw tobacco for each of those years, which would also correspond to the purchases of any other processor of Italian tobacco during the six years of the cartel, with all the problems that that could entail.

174 In any event, even wishing to take into consideration the average of the market shares of the undertakings concerned during the years of the cartel, and on the assumption that the applicant's market share were around 5 %, a bracket of between 5 % and 11 % would not be significantly wider than that between 11 % and 18 %, which has been deemed reasonable by the case-law. Furthermore, the applicant's argument would not even be envisageable if, for example, it had participated in the infringement only during the last year of the cartel. There is thus no justification for the applicant to be able to derive any advantage, in terms of a reduction of the fine, from the fact that its participation in the cartel's activities lasted longer than one year.

175 Fourth, as regards the argument that the use of market share for the last full year of the infringement should be adapted in all cases in which participation in the cartel was interrupted, the Commission observes that the contested decision has already taken into account the shorter duration of the applicant's participation in the calculation of the basic amount of the fine imposed on it. Therefore, in the Commission's submission, it is unclear why that lesser participation, in terms of duration, should also be taken into consideration as an attenuating circumstance.

Findings of the Court

176 It should be observed, first of all, that, as regards the choice of the reference year for the purpose of establishing the relative weight of the undertakings, while the Guidelines provide, at the fourth and fifth paragraphs of Section 1.A, for the differentiated treatment of undertakings according to their economic size, they do not specify the year by reference to which the relative weight of the undertakings must be established. In that regard, the only section of the Guidelines which provides that the year preceding the year in which the decision is adopted is to be taken into account is the second paragraph of Section 5(a) of the Guidelines, which, however, applies only to the determination of turnover for the purpose of complying with the limit of 10 % laid down in the second subparagraph of Article 23(2) of Regulation No 1/2003. It follows that it is not applicable for the purpose of determining the relative weight of the undertakings that participate in the cartel.

177 It follows from the case-law that the Commission is required to choose a calculation method that enables it to take account of the size and economic power of each undertaking concerned and also of the scope of the infringement committed by each of them, in the light of the economic reality as it appeared at the time when the infringement was committed. Furthermore, according to the case-law, the period to be taken into consideration should be ascertained in such a way that the resulting turnovers, and market shares, are as comparable as possible. It follows that the reference year need not necessarily be the last full year during which the infringement was in existence (see, to that effect, judgment of 13 September 2010 in Case T-26/06 *Trioplast Wittenheim* v *Commission*, not published in the ECR, paragraphs 81 and 82 and the case-law cited).

178 As stated at recital 372 to the contested decision, which deals with the determination of Deltafina's market share, 2001, which was chosen as the reference year for the purpose of establishing the relative weight of the undertakings, was the last full year of the infringement committed by the processors.

179 Thus, the Commission placed Deltafina, with a market share of 25 % in 2001, in a category (recital 372 to the contested decision), and grouped Dimon Italia, Transcatab and the applicant together, with respective market shares in 2001 of 11.28 % (recital 35 to the contested decision), 10.8 % (recital 37 to the contested decision) and 8.86 % (recital 40 to the contested decision), in a different category (recital 373 to the contested decision). Following that classification, and after applying a multiplier of 1.5 for Deltafina and 1.25 for Transcatab and Dimon Italia, the starting amounts were set at EUR 37.5 million for Deltafina, EUR 12.5 million for Transcatab and Dimon Italia and EUR 10 million for the applicant (recital 376 to the contested decision).

180 In that regard, it should be borne in mind that, according to the case-law, the method of dividing the members of a cartel into categories in order to apply differential treatment when setting the starting amounts of the fines, even though it ignores the differences in size between undertakings in the same category, results in a flat-rate starting amount for all the undertakings in the same category (see Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 83 and the case-law cited, and *Itochu* v *Commission*, paragraph 103 above, paragraph 73).

181 However, such division into categories must observe the principle of equal treatment, according to which comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (see, in that regard, the case-law cited at paragraph 102 above). Furthermore, according to the case-law, the amount of the fine must at least be proportionate in relation to the factors taken into account in the assessment of the gravity of the infringement. In order to ascertain whether the division of the members of a cartel into categories is consistent with the principles of equal treatment and proportionality, it is appropriate to examine whether that division is coherent and objectively justified (see, to that effect, *Daiichi Pharmaceutical* v *Commission*, paragraph 180 above, paragraphs 84 and 85, and *Itochu* v *Commission*, paragraph 103 above, paragraph 74).

182 According to the contested decision, the applicant participated in the cartel during a first period, from October 1997 until 5 November 1999, and during a second period, from 29 May 2001 until 19 February 2002, whereas the other members participated in the cartel, without interruption, from 29 September 1995 until 19 February 2002. Yet, although the Commission observed that the applicant participated in the cartel for a shorter, and fragmented, period — the precise duration of which, as stated in the context of the third plea, above, is disputed by the applicant — by comparison with the other cartel members, the Commission relied on the market shares held by the undertakings concerned, including the applicant, in 2001, the last full year of the infringement, irrespective of the fact that, according to the wording of the contested decision, the applicant had resumed its participation in that infringement only from 29 May 2001.

183 In using, for the purpose of determining the starting amount of the fines, the criterion of market share relating to the last full year of the infringement, the Commission therefore treated different situations in the same way. The applicant's situation was different from that of the other three processors in that, in the words of the contested decision, first, it had globally participated in the cartel for a shorter, and fragmented, period and, second, it had participated in the cartel for only a limited part of 2001, whereas the other processors had continued to participate in the infringement, without interruption, from September 1995 until February 2002. Thus, the choice of 2001 as the reference year constitutes unequal treatment to the applicant's disadvantage.

184 Such unequal treatment has no objective justification. While it is permissible for the Commission to take account of the market shares held by an undertaking belonging to a cartel in the last full year of the infringement found in order to evaluate its size and its economic power in a specific market and also the scope of the infringement committed by it (see paragraph 177 above), it must none the less ensure that the market shares of each of the undertakings involved properly reflect economic reality as it appeared at the time when the infringement was committed. As a general rule, in the case of infringements of long duration, as in the present case, it is only where the last full year of the infringement, as taken into account by the Commission, coincides with the duration of the participation of each of those undertakings that the

associated market shares are capable of serving as relevant indications in that regard and of enabling results as comparable as possible to be obtained, especially for the purpose of dividing the undertakings involved into categories.

185 In the present case, however, the Commission indicates no valid justification in the contested decision for its choice to divide the four processors concerned into two categories and, in particular, to group the applicant and also Transcatab and Dimon Italia, subsidiaries, respectively, of the multinational groups SCC and Dimon, together in the same category on the basis of their respective market shares in 2001. In that regard, the Commission merely states that, as Transcatab, Dimon Italia and the applicant held smaller market shares, 'the starting amount of the fine to be imposed on them should be lower' by comparison with Deltafina (recital 373 to the contested decision). On the other hand, in view of the different duration of their participation in the cartel, including during 2001, the distinct roles which they played in conceiving and implementing the cartel and their different sizes and economic powers, there was no objective justification for the Commission to treat the applicant in the same way as Dimon Italia and Transcatab and to include those three undertakings in the same category and apply the same starting amount of the fine to them.

186 In those circumstances, and regard being had to the considerations set out at recitals 301 and 302 to the contested decision concerning the duration of the infringement, the Commission could not take 2001 as the last full year of the infringement found without committing a breach of the principle of equal treatment vis-à-vis the applicant, since, according to the Commission, the applicant had participated in the infringement only from 29 May of that year (see, to that effect and by analogy, Case T-319/94 *Fiskeby Board* v *Commission* [1998] ECR II-1331, paragraph 43).

187 That is all the more true in the light of the considerations developed at paragraphs 150 to 165 above, in the assessment of the third plea, where it was held that the Commission was wrong to consider that the applicant had resumed its participation in the cartel on 29 May 2001 and had taken part in the infringement until it ceased.

188 In the light of all the foregoing considerations, it must be concluded that, by using the criterion of market share in relation to the last full year of the infringement, namely 2001, for all the undertakings involved, which is at the origin of the Commission's decision to group the applicant, Mindo and Transcatab together in the same category and to apply the same starting amount to them, the Commission breached the principle of equal treatment.

189 The arguments put forward by the Commission are not capable of calling that conclusion into question.

190 In the first place, as regards the argument that the market shares relating to the last full year of the infringement constitute an appropriate indication of the specific weight and the impact on competition of the unlawful conduct, even in consideration of the fact they could normally be the result, at least in part, of the actual infringement, it is sufficient to state that that is specifically not the case where the undertaking in question did not participate in the infringement throughout that last year (see paragraph 184 above). It should be observed, moreover, that such a finding cannot prevent an undertaking from demonstrating, as is the case here, that the market share held during the period in question does not constitute, for reasons specific to it, an indication of its real size and its economic power or of the scope of the infringement which it has committed (see, to that effect, *Fiskeby Board* v *Commission*, paragraph 186 above, paragraph 42). Indeed, the market share held by the applicant in 2001, compared with the remarkable increase in its market shares during the period when it was not part of the cartel, cannot be regarded as the result of its participation in the infringement or, at least, it could be so regarded only to a limited extent, as the Commission acknowledged at the hearing. In that regard, the argument put forward by the Commission at the hearing that, in any event, the applicant participated in the cartel in the decisive part, that is to say, the second part of 2001, cannot succeed. That argument was not supported by the Commission and, in substance, contradicts

the Commission's choice in the contested decision to refer to the last full year of the infringement. In any event, as stated in the context of the assessment of the third plea (see paragraphs 150 to 165 above), the Commission has not proved to the requisite legal standard that the applicant had participated in the cartel during the second half of 2001.

191 In the second place, as regards the argument designed, in substance, to dispute the use of average market shares, because the Commission would have had to obtain certain information which would have been difficult to get, it is sufficient to observe that, as regards the market shares which it used for 2001, the Commission merely used the information provided to it by the undertakings themselves. It follows from recitals 31, 35, 37 and 40 to the contested decision that the respective market shares of Deltafina, Dimon Italia, Transcatab and the applicant that were used by the Commission at recitals 372 and 373 to the contested decision in order to determine the starting amount of the fines and the differentiated treatment correspond to the estimates provided by each of those undertakings. Furthermore, as is apparent from the documents which the Commission placed on the file at the Court's request, it had in its possession data relating to those undertakings' market shares for the years 1999 to 2002, which had been sent to it during the administrative procedure following its express request. Thus, the argument that it would have been particularly difficult for the Commission to acquire other data cannot succeed, since it is apparent from the contested decision that the Commission based that decision on data, relating to the years 1999 to 2002, which the Commission itself considered it appropriate to request from the processors and which were provided to it by them.

192 In the third place, as regards the argument that the contested decision already took into account the shorter duration of the applicant's participation in the calculation of the basic amount of the fine imposed on the applicant, it is sufficient to state that the

present plea seeks, in reality, to challenge the setting of the starting amount, which is done on the basis of the gravity of the infringement and not its duration. Contrary to the Commission's assertion, moreover, the applicant did not require that its lesser participation, in terms of duration, be taken into consideration as an attenuating circumstance.

193 In the fourth place, as regards the Commission's argument that the present plea necessarily assumes that the applicant's participation in the cartel lasted well over one year and that it is therefore difficult to justify that the applicant should derive from that circumstance any advantage in terms of a reduction of the fine, it must be held that that is a purely hypothetical argument with no probative value. Indeed, on the supposition, to which the Commission refers, that an undertaking's participation in a cartel were limited to the last year, only the market share relating to that year could be taken into consideration. As that was not the case here, however, the Commission has failed to explain how and to what extent the applicant was capable of deriving an advantage from the fact that its participation in the cartel considerably exceeded the last year of the infringement.

194 Last, as regards the reading of the value of the applicant's purchases in 2001, which the Commission proposed at the hearing and which was intended to demonstrate that the applicant's market share in 2001 was, in substance, underestimated, it is sufficient to observe that that argument must be rejected in so far as it calls into question what was established by the Commission in the contested decision.

195 The second plea must therefore be upheld, in that, in basing the starting amount attributed to the applicant on the market share which it held in the reference year 2001, the Commission breached the principle of equal treatment. The consequences that must be drawn for the determination of the amount of the fine will be examined at paragraph 265 et seq. below.

5. *Fourth plea, alleging insufficient reduction of the amount of the fine in order to take account of the 'disruptive' role played by the applicant and failure to take other attenuating circumstances into account*

196 The applicant takes issue with the Commission for having applied a reduction of only 30 % to the basic amount of the fine.

197 The applicant's argument consists of two parts. In the first part, the applicant claims that the Commission disregarded the attenuating circumstances relating to the pressure applied to it and also the purely passive role which it played in the infringement. In the second part, the applicant asserts that, in recognising the attenuating circumstance consisting in the 'frequent disruption of the objectives of the cartel', the Commission did not give appropriate weight, under the Guidelines, to the fact that in reality the applicant had not systematically applied the cartel's decisions.

First part, alleging that the Commission disregarded, as attenuating circumstances, the pressure applied to the applicant and also the purely passive role which it played

Arguments of the parties

198 The applicant recalls that it has already explained during the administrative procedure that its official involvement in the cartel was the result of the pressure applied by the other processors and that the fear of retaliation by them had induced it to adopt an attitude of apparent compliance with the demands of the 'hard core' of the cartel, represented by Deltafina, Dimon Italia and Transcatab.

199 In support of its assertion, the applicant observes that it supplied the following evidence:

— the internal Dimon Italia memorandum of 9 October 1997 (document 39281-4670/4671), referring to Deltafina's initiative designed to reach agreement between the 'big five' Italian processors, which shows the existence of pressure applied by Deltafina on all the undertakings in the sector with a significant presence on the market with a view to creating a cartel between the processors;

— the document relating to the 1997 harvest (document 38281-434/435), sent by Deltafina to the other processors, referring to 'the intention to act together against any external disruptions of the market';

— the memorandum submitted by Transcatab on 9 April 2002 (document 38281-04103), in which that undertaking admitted having agreed with Deltafina and Dimon Italia in 1996 to 'use all possible pressure so that [anti-competitive] strategies would also be adopted by the other processors operating in Italy';

— the email sent on 10 May 2001 by an employee of Dimon Italia to a colleague in the same undertaking (document 38281-04856), in which it is stated that Dimon Italia intended to visit, jointly with Transcatab, certain customers (buyers) in order to discuss with them the 'situation with regard to the market' and the risks associated with buying tobacco from other processors (not forming part of the cartel), probably including the applicant, which at the time was operating in complete autonomy and was perceived as a disruptive element on the market.

200 In addition, the applicant asserts that it also maintained during the administrative procedure that its participation was from the outset passive and/or 'follow my leader' and so remained throughout the infringement period found against it.

201 In spite of such evidence and the applicant's specific assertions during the administrative procedure, the contested decision contains no reference to the constraint applied to it by Deltafina and the other two members of the 'hard core' of the cartel.

202 In the reply, the applicant states that, in setting the fine, the Commission is required to take into account all the attenuating circumstances on which an undertaking has proved that it was able to rely and not to disregard one or more of them without stating reasons for its decision to do so.

203 The failure to take the pressure sustained by the applicant into account also constitutes a breach of the duty to conduct the investigation diligently and impartially.

204 Last, the applicant disputes the application to it of the judge-made principle that denies the exclusively passive nature of the involvement of an undertaking in the infringement on the sole ground that it did not denounce the cartel. Indeed, the application of that principle with the same severity to 'large undertakings' and family undertakings is iniquitous and disproportionate.

205 The Commission contends that the first part of the fourth plea should be rejected.

Findings of the Court

206 It should be observed, first of all, that the applicant's argument does not draw a clear distinction between, on the one hand, the fact, mentioned several times, that it was forced, under threat of reprisals, by the 'hard core' of the cartel, to participate in the cartel, in so far as it was in a situation of structural weakness by comparison with its competitors, and, on the other hand, the fact that it chose to participate in the cartel but maintained a 'low profile', so that its participation was merely a facade and its conduct was passive and/or 'follow my leader'.

207 The two elements to which the applicant refers should be examined separately. Although the two elements may be closely linked and may be understood as one being the consequence of the other, as the 'low profile' may be an expression and a manifestation of a situation of constraint, the fact none the less remains that they are inherent in two different situations and times, as the pressure experienced by the applicant took concrete form in particular at the time preceding its 'forced' accession to the cartel and the 'passive' and/or 'follow-my-leader' conduct came afterwards.

208 Accordingly, the Court will examine, in turn, the complaints alleging failure to take into account, first of all, the forced nature of the applicant's participation in the cartel and, next, the attenuating circumstance deriving from its exclusively passive or 'follow-my-leader' role in committing the infringement.

209 In particular, it must be established whether the Commission was correct, and did not breach its obligation to state reasons, in refusing, first, to acknowledge that the applicant had been forced to participate in the cartel and, second, that it had played a passive role in its implementation.

— The complaint alleging failure to take the forced nature of the applicant's participation in the cartel into account

210 The applicant claims that, although the evidence obtained during the administrative procedure demonstrated the existence of threats or pressure against it, essentially by Deltafina, but also by the other members of the 'hard core' of the cartel, the Commission did not take them into account.

211 It must be pointed out, first of all, that the existence of threats and pressure designed to induce an undertaking to participate in an infringement of competition law is not among the attenuating circumstances listed in the Guidelines.

212 It follows from the case-law that the pressure exerted by undertakings and designed to induce other undertakings to participate in an infringement of competition law does not, no matter how great, relieve the undertaking concerned of its liability for the infringement committed, does not alter the gravity of the cartel and cannot constitute an attenuating circumstance for the purpose of the setting of fines, since the undertaking concerned could have reported any pressure to the competent authorities and made a complaint to them (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 69 above, paragraphs 369 and 370, and Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraph 63).

213 The Commission was not therefore required to take threats, as alleged in the present case, into account as an attenuating circumstance (see, to that effect, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, paragraph 640).

214 That conclusion cannot be affected by the other arguments put forward by the applicant.

215 Indeed, while it is apparent from the file that, although the applicant may have been the victim of pressure on the part of the other undertakings, which had already established the cartel in question, when, in 1997, it entered the market as an independent operator, it is not however apparent from the file that the applicant attempted, at least, to report the pressure to the competent authorities or, moreover, that it sustained the pressure, especially at the initial stage, wholly passively (see paragraphs 221 to 224 below).

216 In the light of the foregoing, this complaint must be rejected.

— The complaint alleging failure to take the applicant's exclusively passive or 'follow-my-leader' role into account

217 The first indent of Section 3 of the Guidelines states that the basic amount of the fine will be reduced where there are attenuating circumstances, for example where the undertaking concerned has played an 'exclusively passive or "follow-my-leader" role in the infringement'.

218 In that regard, it is clear from the case-law that one circumstance that may indicate the adoption by an undertaking of a passive role within a cartel is where the undertaking's participation in cartel meetings is significantly more sporadic than that of the other members of the cartel (Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 168; see *Tokai Carbon and Others* v *Commission*, paragraph 97 above, paragraph 331 and the case-law cited), likewise its belated entry to the market affected by the infringement, irrespective of the duration of its participation therein (see, to that effect, Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 100, and *Carbone-Lorraine* v *Commission*, paragraph 77 above, paragraph 164 and the case-law cited), or again the existence of express declarations to that effect

made by representatives of other undertakings that participated in the infringement (see *Tokai Carbon and Others* v *Commission*, paragraph 97 above, paragraph 331 and the case-law cited). In addition, this Court has held that 'an exclusively passive role' of a member of a cartel implies that it adopts a 'low profile', that is to say, it does not actively participate in the making of the anti-competitive agreement or agreements (see *Jungbunzlauer* v *Commission*, paragraph 105 above, paragraph 252 and the case-law cited).

219 First of all, it should be observed that, in the light of the conclusions drawn in the context of the third plea, concerning the date on which the applicant's participation in the cartel ceased in 1999 and its participation during the period from 29 May 2001 to 19 February 2002, the Court must rule solely on whether the applicant adopted an exclusively passive or 'follow-my-leader' role during the period from October 1997 to February 1999.

220 In the first place, as regards that infringement period, the applicant cannot validly maintain that it was forced to participate in the cartel in order to claim the benefit of attenuating circumstances. Even on the presumption that it were established that the other members of the cartel — those the applicant defines as the 'hard core' — exerted economic pressure on the applicant to join in the cartel arrangements, the fact remains that — once it had joined the cartel — it complied with the decisions of the cartel members without adopting an exclusively passive or 'follow-my-leader' role in the implementation of the infringement. In the Guidelines, the Commission points out that only an 'exclusively' passive or follow-my-leader role can give rise to a reduction of the amount of the fine. It is therefore not sufficient that, during certain periods of the cartel, or with respect to certain of its agreements, the undertaking concerned adopted a 'low profile', even on the assumption that that were established (see, to that effect, *Jungbunzlauer* v *Commission*, paragraph 105 above, paragraph 254, and *Carbone-Lorraine* v *Commission*, paragraph 77 above, paragraph 179).

221 In the second place, that assessment is confirmed by the fact that during the period concerned the applicant very regularly participated in the cartel meetings. As the Commission states, between October 1997 and December 1998 the applicant participated in 10 of 12 meetings (see, in that regard, recitals 124, 128, 129, 131, 132, 142, 144, 146 and 155 to the contested decision), the only meetings in which it did not participate during that period being those held on 16 and 22 October 1998 (recitals 145 and 152 to the contested decision). Furthermore, two of those meetings took place at the applicant's premises, namely the meetings of 20 October 1997 (recital 128 to the contested decision) and 2 December 1998 (recital 146 to the contested decision). Last, it is apparent from recital 150 to the contested decision that the applicant agreed, on 2 July 1998, with Dimon Italia, Deltafina and Transcatab, on the maximum price to offer in a call for bids issued by ATI.

222 In the third place, it is also apparent from the contested decision (see recital 131) that on 29 May 1998 the applicant invited the chairmen of Deltafina, Dimon Italia and Transcatab to participate in a meeting on 4 June 1998. Following that meeting, the applicant called another meeting for 2 July 1998, which, however, took place on 4 July 1998. During that meeting, the applicant concluded a written agreement, prepared or transcribed by the applicant's representative, the 'Villa Grazioli' agreement, designed to fix the purchase prices of raw tobacco for the Burley, Bright and DAC varieties (recital 132 to the contested decision).

223 In that regard, the applicant is wrong to downplay its role as chair of those meetings of the cartel held for the purpose of preparing that agreement by claiming that its role involved, in substance, only administrative tasks and did not confer any influence on the applicant from the aspect of the conception and drafting of the agreement. Indeed, convening meetings, proposing an agenda and distributing preparatory documents for meetings are incompatible with a passive, 'follow-my-leader' role adopting a low profile. Such initiatives show that the applicant took a favourable and active approach to the constitution, continuation and control of the cartel. Furthermore, in that regard, the fact that the applicant's chairman, Mr B. (who held control of the company), himself participated in the cartel meetings is not without significance, in spite of the fact that within that undertaking there was no hierarchical structure equivalent to that of the other cartel members. Those factors are not, in any event,

such as to show that the applicant's role was 'exclusively passive or "follow my leader"' (see, to that effect and by analogy, *Jungbunzlauer* v *Commission*, paragraph 105 above, paragraph 257).

224 Nor does the applicant put forward any specific circumstances, or evidence, such as declarations made by other cartel members, that might show that its attitude at the meetings in question was significantly different from that of the other cartel members owing to its purely passive or 'follow-my-leader' nature.

225 Furthermore, where an undertaking has participated, even without playing an active role, in more meetings having an anti-competitive object, it must be regarded as having participated in the cartel unless it proves that it publicly distanced itself from the unlawful concertation. Indeed, by its presence at the meetings the applicant subscribed, or at least gave the other participants to believe that it subscribed, in principle to what was decided there (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 131 above, paragraphs 81, 82 and 85).

226 In that regard, the applicant's assertion that, in substance, it would be iniquitous and disproportionate to apply that case-law with the same severity to large undertakings, which have legal and economic knowledge and infrastructures that enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, and to small family undertakings, which do not necessarily perceive certain conduct as unlawful, cannot succeed. It is sufficient to observe that, according to consistent case-law, the fifth paragraph of Section 1.A of the Guidelines enables the Commission to increase the fines imposed on large undertakings, but does not require it to reduce those imposed on undertakings of modest size. Moreover, given that the incompatibility of the cartel in question with the competition rules is clear from the express provisions of Article 81(1)(a) to (c) EC and that it is enshrined in settled case-law, the applicant cannot

claim that it was not sufficiently familiar with the relevant law. Furthermore, it is apparent from the contested decision that the impugned undertakings were well aware of the illegality of a cartel that was concerned with price fixing, market sharing and customer allocation (see, to that effect and by analogy, *SNCZ* v *Commission*, paragraph 89 above, paragraph 82).

227 In any event, according to the case-law, for an infringement of the competition rules to be regarded as having been committed intentionally, it is not necessary for an undertaking to have been aware that it was infringing those rules; it is sufficient that it could not have been unaware that its conduct was aimed at restricting competition (Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 41, and *SNCZ* v *Commission*, paragraph 89 above, paragraph 83).

228 Nor is the Commission under any obligation to reduce the fines where the undertakings concerned are small or medium-sized enterprises (SMEs). The size of the undertaking is taken into consideration by virtue of the upper limit laid down in Article 23(2) of Regulation No 1/2003 and the provisions of the Guidelines. Apart from those size-related considerations, there is no reason to treat SMEs differently from other undertakings. The fact that the undertakings are SMEs does not relieve them of their duty to comply with the competition rules. (see, to that effect, *SNCZ* v *Commission*, paragraph 89 above, paragraph 84; see also, to that effect, Case T-18/03 *CD-Contact Data* v *Commission* [2009] ECR II-1021, paragraph 115).

229 Consequently, the Commission did not infringe the Guidelines in refusing the applicant the benefit of attenuating circumstances by reason of the exclusively passive or 'follow-my-leader' role which it claims to have played in the infringement.

— The failure to state reasons

230 The applicant claims, in substance, that the contested decision fails to state reasons with respect both to the applicant's passive role within the cartel and the existence of pressure that forced it to participate in the cartel.

231 In that regard, it should be observed, first, that of the factors on which the applicant expressly relied as attenuating circumstances in its response to the statement of objections there is only the factor relating to the passive role which it played in the infringement and, second, that the Commission did not indeed deal with that attenuating circumstance in the contested decision.

232 However, no argument can be derived from the fact that, in the part of the contested decision dealing with attenuating circumstances, the Commission did not provide an explanation of the reasons why it considered that it did not have to accept certain factors relied on as attenuating circumstances by the applicant in its response to the statement of objections.

233 In that regard, it should be borne in mind that it is settled case-law that, although Article 253 EC requires the Commission to state the reasons for its decisions and to mention the facts forming the basis of the decision and the considerations which led it to adopt the decision, it does not require the Commission to discuss all the points of fact and of law dealt with during the administrative procedure (Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraphs 14 and 15, and *Fiskeby Board* v *Commission*, paragraph 186 above, paragraph 127).

234 It is apparent from recital 380 to the contested decision that the Commission reduced by 30 % the basic amount of the fine to be imposed on the applicant, having made a global assessment of the appropriateness of a reduction of the fine for attenuating circumstances and taking all the relevant circumstances into account.

235 This complaint must therefore be rejected. It follows that the first part of the fourth plea must be rejected in its entirety.

Second part, alleging failure by the Commission to take proper account of the attenuating circumstance consisting in 'frequent disruption of the objectives of the cartel' entailing systematic non-implementation of the cartel's decisions

Arguments of the parties

236 The applicant claims that, in the administrative procedure, it also maintained that it had not implemented the cartel's decisions. The non-implementation of the agreements was total and systematic, not only during virtually the whole of 1999 but also during the period from May 2001 to February 2002. As for the period from October 1997 to February 1999, it is also possible to claim partial and erratic application of the cartel's decisions by the applicant, which deserved a reduction of the fine for the attenuating circumstance consisting in the non-implementation in practice of the offending agreements or practices.

237 In fact, the Guidelines state that such a circumstance is applicable only in the case of total and systematic non-implementation. It is thus contrary to the principles of non-discrimination and proportionality not to recognise that a participant in the cartel implemented the restrictive agreements only partially, as that would amount to failure to observe the obligation to distinguish the different levels of gravity of the individual conduct of the undertakings involved in an infringement.

238 In conclusion of the present plea, the applicant thus requests the Court to reconsider the amount of the reduction applied to the basic amount of the fine imposed on it and significantly increase that reduction in order to take into account the attenuating circumstance of the constraint applied to the applicant and its exclusively passive and 'follow-my-leader' role and also the real impact of the attenuating circumstance of the frequent disruption of the objectives of the cartel.

239 The Commission contends that the second part of the fourth plea should be rejected.

Findings of the Court

240 By this part of the plea, the applicant seeks a reduction of its fine on the ground of 'non-implementation in practice of the offending agreements or practices', which is one of the attenuating circumstances referred to at the second indent of Section 3 of the Guidelines. The applicant submits that the reduction by 30 % of the basic amount of the fine does not fully reflect that attenuating circumstance inherent in the frequent disruption of the objectives of the cartel, which in reality was a systematic non-implementation of the cartel's decisions.

241 According to settled case-law, the Commission is required to recognise the existence of an attenuating circumstance owing to the failure to implement a cartel only where the undertaking relying on that circumstance is able to demonstrate that it clearly and substantially opposed the implementation of that cartel, to the point of having disrupted its very operation, and that it did not give the impression of subscribing to the agreement and thus encourage other undertakings to implement the cartel in question (*Daiichi Pharmaceutical* v *Commission*, paragraph 180 above, paragraph 113, and *Carbone-Lorraine* v *Commission*, paragraph 77 above, paragraph 196). 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 of 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 73 above, paragraphs 277 and 278, and *Itochu* v *Commission*, paragraph 103 above, paragraph 145).

242 Nor do the Guidelines state that the Commission must systematically take separate account of each of the attenuating circumstances set out at Section 3 of the Guidelines. It follows, according to that case-law, that the Commission is not required to grant an automatic additional reduction on that basis, as the appropriateness of any reduction of the fine for attenuating circumstances must be assessed from a global point of view that takes all the relevant circumstances into account.

243 In the present case, the Commission stated at recital 380 to the contested decision:

'Romana Tabacchi did not take part in certain aspects of the cartel (mainly those relating to direct purchases from producers from whom it only started buying small quantities in 2000) … Also, [Romana Tabacchi's] behaviour often disrupted the purpose of the cartel to the point that the other participants jointly discussed how to

react to [its] conduct … In consideration of these elements, the basic amount of the fine to be imposed on Romana Tabacchi should be reduced by 30 %.'

244 As the Commission correctly claims, it is apparent merely on reading that recital that the circumstance on which the applicant relies in this complaint has already been properly taken into account.

245 It follows from all the foregoing considerations that the complaints and arguments which the applicant formulates in the context of this plea must be rejected as unfounded.

6. *Fifth plea, alleging that the fine is unjust and disproportionate by reference to the applicant's financial structure and its ability to pay*

Arguments of the parties

246 The applicant maintains that the fine imposed on it, which is equivalent to almost twice its share capital, is unjust and disproportionate. In particular, the present case reveals an exemplary case of 'maladministration' on the part of the Commission. The abuse of its discretion in setting fines assumes unusual gravity in the present case, since it is accompanied by the application of a leniency policy towards the biggest and most powerful members of the cartel, resulting in an overall outcome of rare iniquity. The Commission's negligence and superficial attitude towards the applicant gave rise

to a paradoxical situation in which the applicant has received the heaviest penalty in terms of percentage, namely 10 % of its turnover, and is condemned, in substance, to leaving the market, although it was the only undertaking to have jeopardised the stability of the cartel and to have taken part in it for a short time, while, moreover, its participation was limited to a few aspects of the cartel.

247 The unequal division made by the contested decision between the members of the 'hard core' of the cartel, which were granted leniency by the Commission, and the applicant is the result of a mechanical and formalistic application of the Guidelines which is contrary to the requirement that penalties must fit the offence and be gradated.

248 In that regard, the applicant also emphasises that the amount of its fine, before the application of the maximum limit of 10 % of turnover provided for in Article 23(2) of Regulation No 1/2003 (EUR 8.75 million) was equivalent to more than 42 % of its turnover in 2004/05, whereas the fine imposed on Deltafina (EUR 30 million) represented only 31 % of its turnover for that period. The Commission ought to have prevented such 'collateral effects' by paying maximum attention when applying the Guidelines, at the stage of the final decision.

249 Not only does the fine imposed on the applicant breach the principle of proportionality, moreover, but it is, in substance, devoid of practical effect, in so far as it would irreparably jeopardise the applicant's existence. In effect, since that fine is equivalent to around twice the applicant's share capital it would be likely, if enforced, to result in the applicant's liquidation.

250 Furthermore, the applicant refers to Section 5(b) of the Guidelines, which ought to be interpreted as meaning that an undertaking is to be regarded as being unable to pay if the imposition of a financial penalty in a high amount is likely to cause it the most serious financial and economic harm or even to cause its immediate placing in liquidation or its insolvency, entailing its bankruptcy. The applicant observes, moreover, that, according to the case-law, an undertaking's real ability to pay applies only in its specific social context, made up of the consequences that payment of the fine would have with respect to the increase in unemployment or the deterioration of the economic sectors upstream and downstream of the undertaking concerned. In the applicant's submission, the fine imposed on it is such as to entail such a deterioration of the upstream market.

251 Indeed, as the statement made on 16 January 2006 by Mr F., Director of the Agro-alimentary Cooperative Centre (Centro cooperativo agroalimentare, CECAS) and Vice-President of the National Federation of Agricultural and Agro-alimentary Cooperatives (Federazione nazionale delle cooperative agricole e agroalimentari, Fedagri) and also President of the 'Tobacco' committee (Consulta Tabacco) within that organisation, the applicant's disappearance from the market would have the consequence of eliminating or drastically reducing exports of tobacco cultivated by operators established in Italy, for which the applicant represents a reference point for exporting to certain 'niche markets'. The applicant claims that its disappearance would have disastrous consequences on the sector for Italian black tobacco and the Burley tobacco variety produced in the Benevento area (Italy). If the applicant were to disappear, the undertakings producing the varieties which it markets would no longer find outlets, which would have an impact on employment and, more generally, on the economy in what are predominantly agricultural regions.

252 Furthermore, the applicant's disappearance from the market would not correspond with the objective of promoting competition and the market, where the degree of concentration would increase. Since Dimon and SCC merged in the United States on 13 May 2005 to form Alliance One, which involved the exit from the market of their

respective Italian subsidiaries Dimon Italia and Transcatab, the Italian tobacco market would henceforth be in the hands of a single processor, Deltafina. Payment of the fine of EUR 2 million imposed by the Commission would thus have the effect of causing the applicant to disappear from the market to the greater advantage of Deltafina, which would be the last processor of significance present in Italy.

253 In imposing such a disproportionate penalty, the Commission in the present case ignored the 'special prevention' aspect and imposed an unlawful 'exemplary' penalty.

254 The Commission contends that the plea should be rejected.

Findings of the Court

255 In substance, the applicant claims that, in the contested decision, the Commission imposed on it a fine which, as such, breaches the principle of proportionality and fails to take account of the applicant's real ability to pay in a specific social context.

256 In that regard, first, the applicant claims, generally, that in the contested decision the Commission imposed on it a fine that was iniquitous and disproportionate by reference to both its turnover and its share capital, which seriously jeopardises its existence.

257 However, it should be borne in mind, first, that the applicant's assertion that a penalty equivalent to the maximum limit of 10% of its total turnover, provided for in Article 23(2) of Regulation No 1/2003, is equivalent to a maximum penalty is incorrect. As the case-law shows, that limit has a distinct and autonomous objective by comparison with the criteria of gravity and duration of the infringement, namely to prevent fines being imposed which it is foreseeable that the undertakings, owing to their size, as determined, albeit approximately and imperfectly, by their total turnover, will not be able to pay (*Dansk Rørindustri and Others* v *Commission*, paragraph 69 above, paragraphs 280 and 282, and judgment of 8 July 2008 in Case T-52/03 *Knauf Gips* v *Commission*, not published in the ECR, paragraph 452). Thus, contrary to the impression given by the applicant, that limit, laid down by the legislature, is uniformly applicable to all undertakings and arrived at according to the size of each of them and seeks to ensure that the fines are not excessive or disproportionate (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 69 above, paragraph 281, and *Knauf Gips* v *Commission*, paragraph 453 and the case-law cited). The only possible consequence of such a limit is that the amount of the fine calculated on the basis of the criteria of gravity and duration of the infringement will be reduced to the maximum permitted level where it exceeds that level. Its application implies that the undertaking concerned will not pay the full amount of the fine which in principle would be payable if it were assessed on the basis of those criteria (see *Knauf Gips* v *Commission*, paragraph 454 and the case-law cited).

258 Next, as regards the argument that the fine imposed on the applicant would seriously jeopardise its existence and could lead to its liquidation, it should be observed that, according to the case-law, the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking concerned, since recognition of such an obligation would be tantamount to giving an unjustified competitive advantage to undertakings least well adapted to the market conditions (*Dansk Rørindustri and Others* v *Commission*, paragraph 69 above, paragraph 327, and Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5997, paragraph 105; see also *Union Pigments* v *Commission*, paragraph 212 above, paragraph 175 and the case-law cited, and Case T-452/05 *BST* v *Commission* [2010] ECR

II-1373, paragraph 95). Nor, in the present case, did the applicant even put forward such an argument during the administrative procedure.

259 Second, as regards the argument whereby the applicant seeks, more specifically, to compare the starting amount of its fine, equivalent to more than 42 % of its turnover, to the starting amount of the fine imposed on Deltafina, which represented only 31 % of that undertaking's turnover, it should be borne in mind that it is only the fine eventually imposed that must be reduced to the maximum level referred to in Article 23(2) of Regulation No 1/2003. That provision does not prevent the Commission from referring, in the course of its calculation, to an intermediate amount in excess of that limit, provided that the fine eventually imposed does not exceed it (see, to that effect, *PVC II*, paragraph 109 above, paragraphs 592 and 593, and *Dansk Rørindustri and Others* v *Commission*, paragraph 69 above, paragraph 278; see also, to that effect, *Tokai Carbon and Others* v *Commission*, paragraph 97 above, paragraph 367). It follows that the Commission cannot be required, at any stage in the application of the Guidelines, to ensure that the intermediate amounts of the fines adopted reflect all existing differences between the overall turnover figures of the undertakings concerned (Case T-116/04 *Wieland-Werke* v *Commission* [2009] ECR II-1087, paragraph 87). Furthermore, as the Commission is not required to ensure that the final amounts of the fines to which its calculations lead for the undertakings concerned reflect every difference between those undertakings with respect to their turnover, the applicant cannot in the present case take issue with the Commission because it was fined an amount higher, as a percentage of overall turnover, than that imposed on Deltafina (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 69 above, paragraph 315; see also, to that effect, *SNCZ* v *Commission*, paragraph 89 above, paragraph 114).

260 Contrary to the applicant's contention, moreover, Article 23(2) of Regulation No 1/2003 does not require that, where fines are imposed on several undertakings involved in the same infringement, the fine imposed on a small or medium-sized undertaking must not be greater, as a percentage of turnover, than those imposed on the larger undertakings. It is clear from that provision that, both for small or medium-sized undertakings and for larger undertakings, account must be taken,

in determining the amount of the fine, of the gravity and duration of the infringement. In that regard, it should again be emphasised that, as already observed at paragraph 228 above, the Commission is under no obligation to reduce the fines where the undertakings concerned are SMEs. There is no reason to treat SMEs differently from other undertakings. The fact that undertakings are SMEs does not exempt them of their duty to comply with the competition rules.

261 Third, as regards the applicant's arguments relating to the need for the Commission to take into account the applicant's real ability to pay in a 'specific social context', within the meaning of Section 5(b) of the Guidelines, it must be pointed out that, however relevant those arguments may be, there is nothing in the file to indicate that during the administrative procedure the applicant alleged the existence of such a 'context' or raised questions inherent in its real ability to pay.

262 It was only during these proceedings that the applicant claimed that its disappearance from the market, owing to the high amount of the fine, would entail, on the one hand, a deterioration of the upstream market, in so far as the applicant's disappearance would mean the elimination or drastic reduction of exports of tobacco cultivated by certain operators established in Italy and, second, disastrous effects for employment and the economy in certain regions concerned having a predominantly agricultural role, in so far as the applicant is the only purchaser of black tobacco sold by the largest consortium of cooperatives of that production and also of a tobacco variety (Burley) produced in the Benevento area.

263 Consequently, the applicant cannot now take issue with the Commission for having made an error of investigation with respect to the application of Section 5(b) of the Guidelines, the scope of which, for example, was assessed at recital 384 to the contested decision with respect to an argument raised in that regard by Transcatab in response to the statement of objections.

264 It follows from all the foregoing considerations that the complaints and arguments put forward by the applicant in the context of the fifth plea must be rejected as unfounded.

7. *The Court's exercise of its unlimited jurisdiction and the determination of the final amount of the fine*

265 The unlimited jurisdiction conferred on the Court, in application of Article 229 EC, by Article 31 of Regulation No 1/2003 empowers the Court, in addition to carrying out a mere review of the lawfulness of the penalty, which enables the Court only to dismiss the action for annulment or to annul the contested measure, to substitute its own appraisal for the Commission's and, consequently, to vary the contested measure, even without annulling it, by taking into account all the factual circumstances, by amending, in particular, the fine imposed where the question of the amount of the fine is before it (see, to that effect, Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 61 and 62, and *Prym and Prym Consumer* v *Commission*, paragraph 69 above, paragraph 86 and the case-law cited).

266 In that regard, it should be observed that, by its nature, the fixing of a fine by the Court is not an arithmetically precise exercise. Furthermore, the Court is not bound by the Commission's calculations or by its Guidelines when it adjudicates in the exercise of its unlimited jurisdiction (see, to that effect, *BASF and UCB* v *Commission*, paragraph 55 above, paragraph 213 and the case-law cited), but must make its own appraisal, taking account of all the circumstances of the case.

267 It follows from the appraisal made by the Court in the context of the second and third pleas above that, when calculating the amount of the fine, the Commission made errors of assessment of the facts with respect to the duration of the applicant's

participation in the cartel and, furthermore, breached the principle of equal treatment in assessing the specific weight of that participation.

268 As regards the illegality committed by the Commission with respect to the calculation of the duration of the infringement in the applicant's case, it should be borne in mind that, as stated at paragraph 30 above, the Commission took issue with the applicant for having participated in the processors' cartel from October 1997 until 19 February 2002, the latter date corresponding to the date on which the infringement came to an end, while its participation was suspended between 5 November 1999 and 29 May 2001 (recitals 302 and 378 to the contested decision). As the applicant's participation had lasted more than two years and eight months, the Commission applied an increase of 25 % to the fine to be imposed on it. The basic amount of the fine was therefore fixed at EUR 12.5 million (see recital 379 to the contested decision).

269 As the Court observed in its appraisal of the third plea (see paragraphs 134 to 143 and 150 to 165 above), the Commission was wrong to take the view that the applicant had participated in the cartel during that period and had suspended its participation between November 1999 and May 2001. In effect, as regards the period to 5 November 1999, it follows from the considerations developed, in particular, at paragraphs 134 to 149 above that the Commission was not correct to take that date as the date on which the applicant's participation in the cartel ceased, since the evidence which it assessed in that regard in the contested decision, and also the other material in the file, only allowed it to consider that that participation had lasted only until February 1999.

270 As regards the alleged resumption of the applicant's participation in the infringement during the period from 29 May 2001 to 19 February 2002, it follows from the considerations developed, in particular, at paragraphs 150 to 164 above that all the indicia which the Commission had at its disposal were not sufficient for it to conclude that the applicant participated in the cartel during that period and that, consequently, the Commission made an error of assessment of the facts in that it considered that the applicant had joined the cartel again during that period.

271 Regard being had to the foregoing considerations, the duration of the infringement to be taken into account for the purpose of fixing the fine must be reduced to 16 months.

272 As regards the other illegality committed by the Commission, it follows from paragraphs 176 to 195 above that the contested decision contains a breach of the principle of equal treatment, in that the Commission took, with respect to the applicant, 2001 as the reference year for the determination of the starting amount of the fine.

273 In effect, if follows from recitals 370 to 373 to the contested decision that the Commission determined the relative weight of the undertakings that had participated in the cartel by reference to the market shares which they held in the last full year of the infringement.

274 However, the choice of 2001, which, for the reasons set out at paragraphs 182 to 186 above, could not in any event be regarded as the last full year of the applicant's participation in the infringement, induced the Commission to take into account a market share held by the applicant of 8.86 % (see recital 40 to the contested decision). However, that market share was appreciably higher than the applicant's market share during the last full year of its participation in the infringement, namely a market share of 2.71 % in 1998, as is apparent from the communication from the applicant — which the Commission placed on the file following a measure of organisation of procedure adopted by the Court — mentioned at footnote 21 to the contested decision (see also, in that regard, paragraph 191 above).

275 Thus, as the difference between the applicant's market share taken into consideration by the Commission and those held by Mindo and Transcatab, respectively, in 2001 were allegedly not significant, since they were all within a range of around 9 to 11 % (see recital 373 to the contested decision), the Commission considered that those

three undertakings could be grouped together in the same category, for which the starting amount of the fine was set at EUR 10 million, an amount which, in the light of the foregoing considerations, did not reflect the applicant's 'specific weight' and the likely repercussions of its unlawful conduct.

276 It follows that the error which the Commission made in applying the market share which the applicant held in 2001 determined the applicant's wrongful classification in a category of undertakings in which it did not belong, which ultimately led the Commission to determine a starting amount of the fine to be imposed on the applicant that was disproportionate by comparison with its actual relative weight in the infringement.

277 Consequently, the errors made by the Commission with respect, first, to the duration of the applicant's participation in the infringement and, second, to the determination of the applicant's market share and thus to its classification in the same category as undertakings of a different size and thus having a different weight in the cartel, induced the Commission to attribute to the applicant, in substance, a role in the cartel similar to that of the other three processors, namely Deltafina, Dimon Italia and Transcatab.

278 In that regard, it should be observed that the applicant's participation in the cartel is quite different from that of the other three processors, which all belonged to multinational groups. Those three processors are in fact the only ones to have set up the cartel and to have participated in all its aspects from the beginning of the infringement until it ceased. Unlike the applicant, moreover, those three processors were all members of APTI (recital 45 to the contested decision), whose conduct they attempted to condition (recital 244 to the contested decision). Last, as is clear from the contested decision (see, in particular, recital 380), the applicant not only did not participate continuously in the cartel, but when it did participate it often disrupted its functioning.

279 It should be borne in mind, moreover, that it is settled case-law that the fines imposed for infringements of Article 81 EC, as laid down in Article 23(2) of Regulation No 1/2003, are designed to penalise the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other economic operators from infringing, in future, the rules of European Union competition law (see, to that effect, Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraph 102 and the case-law cited). Thus, the purpose of taking into consideration the size and global resources of the undertaking in order to ensure that the fine has sufficient deterrent effect lies in the impact which the fine is intended to have on that undertaking and the sanction must not be negligible in the light, in particular, of its financial capacity (see, to that effect, *Lafarge* v *Commission*, paragraph 104).

280 It should be borne in mind, moreover, that the principle of proportionality requires that measures adopted by the institutions must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see the case-law referred to at paragraph 104 above). It follows that fines must not be disproportionate to the objectives pursued, that is to say, by reference to compliance with the competition rules, and that the amount of the fine imposed on an undertaking for an infringement in competition matters must be proportionate to the infringement, seen as a whole, having regard, in particular, to the gravity thereof (see the case-law referred to at paragraph 105 above).

281 In the present case, the applicant is a small undertaking whose share capital came to only EUR 1.1 million in 2005 and whose shareholding structure is that of a family company, as its capital is held by only two natural persons, Mr and Mrs B. (order in *Romana Tabacchi* v *Commission*, paragraph 45 above, paragraphs 70 and 123). It also follows from the findings made in the interim measures proceedings concerning the present case that in 2005, in order to contribute to a reserve to cover the risk of payment of a fine of EUR 1 million, the applicant had to sell a factory in Cerratina, in the municipality of Pianella (Italy), thus reducing the value of the immovable assets

to a sum below the amount of the fine imposed by the Commission (order in *Romana Tabacchi* v *Commission*, paragraph 45 above, paragraphs 87 and 107).

282 As regards the effects of entering a fine of EUR 2.05 million in its accounts, the applicant also claimed during the interim measures proceedings, without being disputed on that point by the Commission, that, pursuant to Article 2447 and the fourth paragraph of Article 2484 of the codice civile (Italian Civil Code), the effect of the entry in the balance sheet of a liability equivalent to double the share capital, as is the case here, is to reduce that capital to nothing. More particularly, where the share capital of a company limited by shares (SpA) is reduced to a level below the statutory minimum, that company has essentially the following choice: it must arrange its winding-up or recapitalise (see, to that effect, order in *Romana Tabacchi* v *Commission*, paragraph 45 above, paragraphs 88 and 123). In that regard, it follows from the statements made in the interim measures proceedings that from 13 July 2006 the applicant demonstrated to the requisite legal standard that it, and its two shareholders, were not in a position to provide even a bank guarantee for payment of the fine of EUR 2.05 million imposed by the Commission (order in *Romana Tabacchi* v *Commission*, paragraph 45 above, paragraphs 100 to 122). It should be observed, in particular, that it emerged that the applicant's shareholders are unable to provide a bank guarantee for the whole amount of the fine and cannot therefore, in any event, make a sufficient contribution to the company's capital to avoid its being placed in liquidation (see, to that effect, order in *Romana Tabacchi* v *Commission*, paragraph 45 above, paragraph 123). The applicant's usual banks had also suspended their credit lines owing to the deterioration in the situation (order in *Romana Tabacchi* v *Commission*, paragraph 45 above, paragraph 85). Furthermore, there is no indication in the present case that that deterioration has a fraudulent origin designed to avoid payment of the fine.

283 In the light of those circumstances, the Court considers that a fine in the amount of EUR 2.05 million, as imposed by the Commission on 20 October 2005, is such as to entail, as such, the liquidation of the applicant and, consequently, its disappearance from the market, which appears, moreover, to be likely to have significant repercussions, to which the applicant refers in its fifth plea.

284 In the light of the foregoing considerations, and taking account in particular of the cumulative effect of the illegalities previously found and also of the applicant's weak financial capacity, the Court considers that an equitable assessment of all the circumstances of the case will be made if it sets the final amount of the fine imposed on the applicant at EUR 1 million. In effect, a fine in such an amount makes it possible to penalise the applicant's unlawful conduct effectively, in a manner which is not negligible and which remains sufficiently deterrent. Any fine above that amount would be disproportionate to the infringement found against the applicant appraised as a whole.

285 In the present case, a fine of EUR 1 million constitutes a fair penalty for the applicant's conduct.

286 In the light of all the foregoing, it is appropriate, first, to annul Article 1(b) of the contested decision, in that it concerns the infringement found against the applicant for the period after February 1999; second, to fix the amount of the fine imposed on the applicant at EUR 1 million; and, third, to dismiss the action as to the remainder.

Costs

287 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.

288 In the present case, it should be observed that the form of order sought by the applicant was essentially granted. The Court will therefore make an equitable assessment of the case in ruling that the Commission is to bear its own costs and to pay the costs incurred by the applicant.

289 As regards the interim measures proceedings in Case T-11/06 R, the Court considers, in the light of the order of the President of the Court of 13 July 2006, that the Commission should be ordered to bear its own costs and to pay the costs incurred by the applicant in connection with those proceedings.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls Article 1(b) of Commission Decision C (2005) 4012 final of 20 October 2005 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.281/B.2 — Raw tobacco — Italy) in so far as the European Commission**

found therein that Romana Tabacchi Srl had taken part in the infringement after February 1999;

2. **Sets the amount of the fine imposed on Romana Tabacchi at EUR 1 million;**

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

4. **Orders the Commission to bear its own costs and to pay the costs incurred by Romana Tabacchi;**

5. **In Case T-11/06 R, orders the Commission to bear its own costs and to pay the costs incurred by Romana Tabacchi.**

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 5 October 2011.

[Signatures]

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