



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

27 September 2012*

(Competition — Agreements, decisions and concerted practices — Netherlands market in road pavement bitumen — Decision finding an infringement of Article 81 EC — Imputability of the unlawful conduct — Joint control — Fines — Aggravating circumstances — Role of instigator and leader — Repeated infringement — Duration of the infringement — Rights of the defence — Unlimited jurisdiction — Conduct of the undertaking during the administrative procedure)

In Case T-343/06,

Shell Petroleum NV, established in The Hague (Netherlands),

The Shell Transport and Trading Company Ltd, established in London (United Kingdom),

Shell Nederland Verkoopmaatschappij BV, established in Rotterdam (Netherlands),

represented initially by O. Brouwer, W. Knibbeler and S. Verschuur, and subsequently by O. Brouwer, W. Knibbeler and P. van den Berg, lawyers,

applicants,

v

European Commission, represented by F. Castillo de la Torre, acting as Agent, assisted by L. Gyselen, lawyer,

defendant,

APPLICATION, principally, for annulment of Commission Decision C(2006) 4090 final of 13 September 2006 relating to a proceeding under Article 81 [EC] (Case COMP/F/38.456 — Bitumen (Netherlands)) in so far as it concerns the applicants, and, in the alternative, for reduction of the fine imposed on the applicants by that decision,

THE GENERAL COURT (Sixth Chamber),

composed of M. Jaeger, President, N. Wahl and S. Soldevila Fragoso (Rapporteur), Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearings on 25 May 2011 and 26 January 2012,

gives the following

* Language of the case: English.

Judgment

The facts

1. *The applicants*

- 1 Until 2005, the Shell group, which brings together energy companies and petrochemical companies at the global level, was owned by the group's two parent companies, Koninklijke Nederlandsche Petroleum Maatschappij NV ('KNPM') and The Shell Transport and Trading Company plc ('STT plc'). They wholly owned, holding 60% and 40% respectively, The Shell Petroleum Company Ltd ('SPCo') and Shell Petroleum NV ('SPNV'), a holding company which itself owned all of the shares in Shell Nederland BV. The latter wholly owned the Shell Nederland Verkoopmaatschappij BV ('SNV'), which is the legal entity of the Shell group responsible for marketing road pavement bitumen in the Netherlands. Shell International BV, established in the Netherlands, is one of the group companies responsible for providing support for the whole group, the holding companies and its operating companies, in particular in legal matters.
- 2 On 20 July 2005, Royal Dutch Shell plc, based in The Hague (the Netherlands), purchased all of the shares in the group's two former parent companies, KNPM and STT plc. KNPM was completely absorbed by the company SPNV and no longer exists as a legal entity. The parent company Royal Dutch Shell plc now owns almost all of the shares in SPNV, which itself still owns all of the shares in Shell Nederland and almost all of the shares in Shell Transport and Trading Company Ltd ('STT'), which succeeded STT plc. Shell Nederland is still the 100% parent company of SNV.

2. *Administrative procedure*

- 3 By letter of 20 June 2002, British Petroleum ('BP') informed the Commission of the European Communities of the presumed existence of a cartel with regard to the supply of road pavement bitumen in the Netherlands and submitted a request for immunity from fines in accordance with the Commission Notice of 19 February 2002 on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3, 'the Leniency Notice').
- 4 On 1 and 2 October 2002, the Commission carried out surprise inspections, in particular at the premises of SNV. On 30 June 2003, the Commission sent requests for information to several companies, including SNV, to which the latter replied on 28 August 2003.
- 5 On 8 August 2003, representatives of Shell International met the Commission services to inform them that they intended to carry out an internal investigation into the case and would send it the results of that investigation. However, no information was provided during that meeting or immediately afterwards. On 10 October 2003, SNV submitted an application under the Leniency Notice. The Commission stated that it would be useful to hear the author of the statement attached to that application only if he were able to provide evidence additional to that set out in his statement. In the end that employee was not heard.
- 6 On 10 February and 5 April 2004, the Commission sent further requests for information, to which Shell International replied on 25 February and 27 April 2004.
- 7 On 18 October 2004, the Commission initiated a proceeding under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) and adopted a statement of objections, which was sent on 19 October 2004 to several companies, including SNV, SPNV, KNPM and STT plc.

- 8 On 12 January 2005, SNV requested full access to all of the documents which had been added to the Commission's file after the statement of objections was sent, and in particular to the replies from the other undertakings to the statement of objections. On 22 February 2005, the Commission, in the person of the Hearing Officer responsible for the case, refused to agree to that request, on the grounds that the information provided at that stage did not, in principle, form part of the investigation file, as defined in the Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 [EC], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7, 'the Notice on access to the file'), and that it could, in any event, be sent to SNV if the Commission decided to use it in its decision. On 20 April 2005, SNV repeated its request and asked to have access to those documents before the hearings were held. On 4 May 2005, the Hearing Officer again reiterated the Commission's refusal. However, on 24 May 2006, the Commission granted Royal Dutch Shell, SPNV and SNV access to the passages of the reply by the company Koninklijke Volker Wessels Stevin ('KWS') on which it sought to rely in the decision, regarding contacts that took place between SNV and KWS prior to 1 April 1994. On 12 June 2006, Royal Dutch Shell, SPNV and SNV objected to the partial nature of the disclosure and repeated their request for full access to all of the replies.
- 9 On 8 May 2006, the Commission sent a further request for information to SNV, SPNV and Royal Dutch Shell, in order to obtain information regarding their turnover from road pavement bitumen, including all specialist bitumen products. On 23 May 2006, those three companies provided the figures for their turnover, which included Mexphalte C, the only specialist bitumen product which, in their view, can be linked to road construction, stating, however, that that product was not the subject of the cartel.
- 10 On 23 December 2005, the Shell group informed the Commission of the change in its structure, since it was thereafter wholly owned by Royal Dutch Shell. On 23 May 2006, it drew the Commission's attention to the fact that that company did not exist during the period of infringement and that, as it had been created in 2002 under the name of Forthdeal Ltd, when it was not part of the Shell group, and as it had become Royal Dutch Shell in October 2004, it could not be regarded as being a successor to any of the companies in the Shell group. Moreover, as Royal Dutch Shell plc had acquired all of the shares in SPNV after the end of the period of infringement, it claimed that it could not be held liable for the infringement committed by SNV.

3. Contested decision

- 11 After the hearing of the companies concerned on 15 and 16 June 2005, the Commission adopted, on 13 September 2006, Decision C(2006) 4090 final relating to a proceeding under Article 81 [EC] (Case COMP/F/38.456 – Bitumen (Netherlands), 'the contested decision'), a summary of which was published in the *Official Journal of the European Union* of 28 July 2007 (OJ 2007 L 196, p. 40), and which was notified to the applicants, SNV, SPNV and STT, on 25 September 2006.
- 12 The Commission stated, in Article 1 of the contested decision, that the companies to which it was addressed had participated in a single and continuous infringement of Article 81 EC, by regularly fixing collectively, for the periods indicated, for sales and purchases of road pavement bitumen in the Netherlands, the gross price, a uniform rebate on the gross price for participating road builders ('the large builders' or the 'W5') and a smaller maximum rebate on the gross price for other road builders ('the small builders').
- 13 The applicants were found jointly liable for that infringement, for the period from 1 April 1994 to 15 April 2002, and a fine of EUR 108 million was imposed jointly and severally upon them.

- 14 As regards the calculation of the amount of the fines, the Commission described the infringement as very serious, given its nature, even though the relevant geographic market was limited (recital 316 of the contested decision).
- 15 In order to take account of the specific weight of the unlawful conduct of each of the undertakings involved in the cartel and of its real impact on competition, the Commission made a distinction between the undertakings concerned according to their relative importance on the market concerned, measured by their market share, and grouped them into six categories. On the basis of those considerations, the Commission applied a starting amount of EUR 15 million for the applicants (recital 322 of the contested decision). In respect of the applicants, it also applied a multiplier of 2, intended to ensure the deterrent effect of the fine, taking account of the group's size and turnover (recital 323 of the contested decision).
- 16 As regards the duration of the infringement, the Commission considered that the applicants had committed an infringement of long duration, namely an infringement of more than five years, and took as a basis a total period of eight years, from 1 April 1994 to 15 April 2002, thus increasing the starting amount by 80% (recital 326 of the contested decision). The basic amount of the fine, determined according to the gravity and duration of the infringement, was therefore fixed in respect of the applicants at EUR 54 million (recital 335 of the contested decision).
- 17 The Commission applied several aggravating circumstances with regard to the applicants. In the first place, it considered that, as the Shell undertaking had been the subject of previous Commission decisions in cartel cases in 1986 (Commission Decision of 23 April 1986, Case IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1, 'the Polypropylene Decision') and in 1994 (Commission Decision of 27 July 1994, Case IV/31.865 — PVC II) (OJ 1994 L 239, p. 14, 'the PVC II Decision'), an increase of 50% in the basic amount of the fine was to be applied for repeated infringement (recitals 336 to 338 of the contested decision). In the second place, it considered that the applicants had played the role of instigator and leader of the cartel, which justified a further increase of 50% in the basic amount of the fine (recitals 342 to 349 of the contested decision).
- 18 Furthermore, the Commission considered that no mitigating circumstances could be accepted with regard to the applicants, as the fact that the infringement was terminated before the investigation was initiated did not merit any reward other than a restriction of the period of infringement (recitals 361 to 363 of the contested decision).
- 19 Moreover, the Commission rejected their request that their effective cooperation, in the form of the replies to the requests for information, the acknowledgement of the facts and the introduction of relevant disciplinary and compliance measures, should be regarded as a mitigating circumstance (recitals 367 to 371 of the contested decision).
- 20 The Commission, finally, refused to reduce the fine imposed on the applicants under the Leniency Notice, taking the view that the information they had provided did not have significant added value (recitals 394 to 396 of the contested decision).

Procedure and forms of order sought

- 21 By application lodged at the Registry of the Court on 1 December 2006, the applicants brought the present action.
- 22 Acting upon a report of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of its Rules of Procedure, requested the parties to lodge certain documents and put questions to them. The parties complied with those requests within the prescribed period.

- 23 The parties presented oral argument and answered questions put to them by the Court at the hearing on 25 May 2011.
- 24 As a member of the Sixth Chamber was unable to sit, the President of the General Court designated himself to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure of the General Court.
- 25 By order of 18 November 2011, the Court (Sixth Chamber), in its new composition, reopened the oral procedure and the parties were informed that they could present oral argument at a further hearing.
- 26 The parties submitted oral argument at that hearing which took place on 26 January 2012.
- 27 SPNV and STT claim that the Court should:
- principally, annul the contested decision in so far as it applies to them;
 - in the alternative, annul, in part, the contested decision in so far as the Commission finds therein that they infringed Article 81 EC between 1 April 1994 and 19 February 1996 and reduce the fine imposed on them;
 - in the alternative, reduce the fine imposed on them in the contested decision;
 - order the Commission to pay the costs, including costs associated with payment in whole or in part of the fine or constituting a bank guarantee;
 - order any other measures that the Court considers to be appropriate.
- 28 SNV claims that the Court should:
- annul, in part, the contested decision in so far as the Commission finds therein that it infringed Article 81 EC between 1 April 1994 and 19 February 1996 and reduce the fine imposed upon it;
 - reduce the fine imposed on it in the contested decision;
 - order the Commission to pay the costs, including costs associated with payment in whole or in part of the fine or constituting a bank guarantee;
 - order any other measures that the Court considers to be appropriate.
- 29 The Commission contends that the Court should:
- dismiss the action;
 - order the applicants to pay the costs.

Law

- 30 In support of their action the applicants put forward four pleas in law. Thus, they allege that the Commission made errors of fact and law in holding SPNV and STT (formerly STT plc) liable for the infringement committed by SNV, infringed an essential procedural requirement and the rights of the defence on which they were entitled to rely by refusing to send the applicants all of the replies given by the other undertakings to the statement of objections, made errors of fact and law in calculating

the basic amount of the fine and determining the duration of the infringement and, finally, in classifying SNV as instigator and leader of the cartel and in increasing their fine for repeated infringement.

1. The first plea, alleging errors of law and manifest errors of assessment in imputing the infringement to the parent companies

The errors of law

Arguments of the parties

- 31 In the first place, the applicants submit that the Commission made an error of law in considering that the presumption that the parent company in fact exercised decisive influence over its wholly-owned subsidiary, acknowledged by the Courts of the European Union (Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, paragraph 29), exempted it from proving that the subsidiary that had committed the infringement had carried out the instructions given by the parent company. In the present case, the Commission merely referred to the concept of single economic entity, which is however not relevant for the purposes of holding a company other than that which is directly responsible for the infringement liable for the infringement. It was for the Commission, nevertheless, to assess whether the parent company had participated directly or indirectly in the infringement or whether it was aware of it, in order to be able to hold it liable for that infringement.
- 32 In the second place, the Commission made an error of law in relying on the presumption recognised by the judgment in *Stora Kopparbergs Bergslags v Commission*, paragraph 31 above, to hold STT (formerly STT plc) liable for the infringement committed by SNV. Indeed, during the period of infringement, STT plc, which was succeeded by STT in 2005, was one of the two ultimate parent companies of the Shell group, but owned only 40% of the holding company SPNV, which itself, through Shell Nederland, owned all of the shares in SNV, the direct perpetrator of the infringement. However, the Courts of the European Union restrict the possibility of applying that presumption to parent companies which own all of the shares in their subsidiary. The fact that the Court applied that presumption in Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, paragraph 137, is merely linked to the specific circumstances of the case, in which the two parent companies were closely involved in the commercial management of the subsidiary, which did not itself have distinct legal personality.
- 33 In the third place, the applicants dispute the Commission's interpretation of the presumption of actual decisive influence being exercised by a parent company over its wholly-owned subsidiary, according to which it is impossible to rebut that presumption, and which does not comply with the case-law.
- 34 The Commission contends that the first part of this plea should be rejected.

Findings of the Court

- 35 The Commission specified, in the contested decision, that, although SNV was the legal person which participated directly in the cartel, the statement of objections had also been addressed to SPNV, KNPM and STT plc (recital 209 of the contested decision). The Commission recalled that, until 2005, SNV was wholly owned by Shell Nederland, which was itself wholly owned by SPNV, a holding company that was jointly controlled by KNPM (60%) and STT plc (40%). The Commission also highlighted the strength of the links between those various companies, inter alia through the Committee of managing directors ('the CMD'), through the oil products business organisation of the group in Europe and, from 1998, through Shell Europe Oil Products ('SEOP'), an organisation which brought together the oil product activities of various operating companies of the group in Europe

(recitals 206 to 208 of the contested decision). The Commission then went on to state that, following organisational changes within the group in 2005, it had addressed the contested decision to SNV and to the other companies which had been addressees of the statement of objections that still existed on the date on which that decision was notified, namely SPNV and STT (formerly STT plc), and that together those companies formed part of the Shell undertaking, which was jointly and severally liable for the infringement (recital 218 of the contested decision).

– The presumption that a parent company in fact exercises decisive influence over its subsidiary

- 36 It should be noted at the outset that European Union ('EU') competition law refers to the activities of undertakings (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 59) and that the concept of undertaking within the meaning of Article 81 EC includes economic entities which consist of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (judgment of 25 October 2011 in Case T-349/08 *Uralita v Commission*, not published in the ECR, paragraph 35). The concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 40).
- 37 The anti-competitive conduct of an undertaking can be imputed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (Case C-294/98 P *Metsä Serla and Others v Commission* [2000] ECR I-10065, paragraph 27; 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 117; and Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237, paragraph 58). Thus, the conduct of a subsidiary may be imputed to the parent company where the subsidiary does not decide independently upon its own conduct in the market but carries out, in all material respects, the instructions given to it by the parent company, since those two undertakings form an economic entity (Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619, paragraphs 133 and 134).
- 38 It is therefore not because of a relationship between the parent company and its subsidiary in instigating the infringement or, *a fortiori*, because the parent company is involved in the infringement, but because they constitute a single undertaking in the sense described above that the Commission is able to address its decision to the parent company of a group of companies. It must be borne in mind that EU competition law recognises that different companies belonging to the same group form an economic entity and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not decide independently upon their own conduct on the market (Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 290).
- 39 In the specific case where a parent company has a 100% shareholding in a subsidiary which has committed an infringement, the parent company can exercise a decisive influence over the conduct of the subsidiary and, moreover, there is a rebuttable presumption that the parent company does in fact exercise such a decisive influence (see *Akzo Nobel and Others v Commission*, paragraph 37 above, paragraph 60 and the case-law cited).
- 40 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to avail itself of the presumption that the parent company exercises a decisive influence over the subsidiary's commercial policy. The Commission will then be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient

evidence to show that its subsidiary acts independently on the market (*Stora Kopparbergs Bergslags v Commission*, paragraph 31 above, paragraph 29, and *Akzo Nobel and Others v Commission*, paragraph 37 above, paragraph 61).

41 Whilst it is true that at paragraphs 28 and 29 of *Stora Kopparbergs Bergslags v Commission* the Court of Justice referred, not only to the fact that the parent company owned 100% of the capital of the subsidiary, but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the information on which the General Court had based its reasoning in that case and not to make the application of the presumption mentioned above subject to the production of additional indicia relating to the actual exercise of influence by the parent company over its subsidiary (*Akzo Nobel and Others v Commission*, paragraph 37 above, paragraph 62, and Case C-90/09 P *General Química and Others v Commission* [2011] ECR I-1, paragraph 41).

42 As regards the evidence that a parent company must adduce in order to rebut that presumption that it in fact exercises decisive influence over its wholly-owned subsidiary, the Courts of the European Union consider that it is for the parent company to put before the Commission, and, where relevant, the Courts of the European Union, any evidence which in its view is apt to demonstrate that they do not constitute a single economic entity relating to the organisational, economic and legal links between its subsidiary and itself; such evidence may vary from case to case and cannot therefore be set out in an exhaustive list (*Akzo Nobel v Commission*, paragraph 37 above, paragraphs 72 to 74).

– The application of that presumption to two parent companies jointly owing their subsidiary 100%

43 The applicants submit that, whatever interpretation of the presumption arising from the case-law set out in *Stora Kopparbergs Bergslags v Commission*, paragraph 31 above, is adopted, the Commission was not entitled to apply that presumption to STT (formerly STT plc), since STT owned only 40% – and indirectly – of the company that committed the infringement.

44 As a preliminary point, it should be noted that the mere fact that KNPM, which owned the remaining 60% of the shares in SPNV, disappeared in 2005 has no bearing on whether the presumption referred to in *Stora Kopparbergs Bergslags v Commission*, paragraph 31 above, applies, since undertakings may not escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes, in order not to compromise the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties (Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 41).

45 Moreover, the EU judicature has already held that the Commission is entitled to apply the presumption that a parent company in fact exercises a decisive influence over its subsidiary where two companies are placed in a position analogous to that in which a single company owns the entire share capital of its subsidiary (*Avebe v Commission*, paragraph 32 above, paragraph 138).

46 Similarly, in the present case, it is a matter of determining, in view of the particular nature of the structure of the group, whether the two parent companies KNPM and STT plc (now STT) were in a position analogous to that in which a single company holds the entire share capital of its subsidiary, and not of what should be decided in the case of a company owning only part of the company that committed the infringement.

47 The Court notes, first of all, as the Commission stated in the defence without being contradicted on that point by the applicants, that the existence of two parent companies in the Shell group can be explained by historical reasons, the group having grown out of an arrangement in 1907 between the

Dutch company KNPM and the British company STT plc, which merged in 2005 whilst maintaining a double structure at the head of the group, with a shareholding of 60% and 40% respectively. It is apparent from the documents before the Court, and in particular from the reference guide to the organisational structure of the group, that those two companies, which declared an identical consolidated turnover, jointly owned the two holding companies of the group, SPNV and SPCo, and jointly appointed the members of the board of directors of those two holding companies, in accordance with the terms of the contract between them, and that they met monthly with those members, inter alia to be informed of the major developments within the group.

- 48 Moreover, KNPM and STT plc (now STT) created two supervisory committees, the Group Audit Committee ('the GAC') and the Remuneration and Succession Review Committee ('the REMCO'). Each committee consisted of three members of the supervisory board of KNPM and three members of the board of directors of STT plc (now STT). The GAC was responsible for examining the principal financial developments in the group, its internal control procedures and its external audits, whilst the REMCO was responsible for making recommendations on remuneration and appointments with respect to group managing directors. It is also apparent from the documents before the Court that the boards of the holding companies of the group acted in a coordinated manner and included members of the boards of the two parent companies.
- 49 Furthermore, the CMD, a body consisting of the members of the presidium of the board of directors of SPNV and of the managing directors of SPCo, who were also board members of one of the two parent companies, played a decisive role within the group. Indeed, it is apparent from the documents before the Court that although the CMD did not have a distinct legal personality, it was responsible for coordinating the operational activity and the governance of all the group companies.
- 50 Lastly, the fact that in 2005 the two parent companies decided to merge is further evidence of the existence of a joint parent undertaking notwithstanding the coexistence of two legal entities.
- 51 In the light of all the factual elements referred to in paragraphs 47 to 50 above, the Court takes the view that the Commission was right to consider, in recitals 206 to 218 of the contested decision, that the situation was one analogous to that in which a single parent company controls fully its subsidiary, which therefore enabled the Commission to rely on the presumption that those parent companies in fact exercised decisive influence over their joint subsidiary's conduct.
- 52 Lastly, the Court must reject the applicants' argument that the Commission erred in law in applying the case-law arising from *Stora Kopparbergs Bergslags v Commission*, paragraph 31 above, to STT (formerly STT plc), on the ground that it owned, with KNPM, the entire capital of SNV only through the holding company SPNV, which owned Shell Nederland, the parent company of SNV. The Courts of the European Union have held that the existence of intermediary companies between the subsidiary and the parent company does not affect the possibility of applying the presumption that the parent company in fact exercises decisive influence over its wholly-owned subsidiary (see, to that effect, *Akzo Nobel v Commission*, paragraph 37 above, paragraphs 78 and 83, and *General Química and Others v Commission*, paragraph 41 above, paragraphs 86 and 87; Case T-354/94 *Stora Kopparbergs Bergslags v Commission* [1998] ECR II-2111, paragraphs 80 to 85). Moreover, a parent company may be held liable for an infringement committed by a subsidiary even where there is a large number of operating companies in a group (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* ('PVC II') [1999] ECR II-931, paragraph 989).

– The rebuttable nature of the presumption that a parent company in fact exercises decisive influence over its wholly-owned subsidiary

53 The applicants submit that the Commission's interpretation of the presumption that a parent company in fact exercises decisive influence over its wholly-owned subsidiary makes it impossible to rebut that presumption.

54 It is however apparent from the case-law of the Court of Justice referred to in paragraph 42 above that, in order to rebut the presumption that a parent company which owns 100% of the capital of its subsidiary in fact exercises a decisive influence over that subsidiary, as interpreted by the Commission, it is for the parent company to put before the Commission and, where relevant, the Courts of the European Union, any evidence relating to the organisational, economic and legal links between its subsidiary and itself which is apt to demonstrate that they do not constitute a single economic entity (*Akzo Nobel and Others v Commission*, paragraph 37 above, paragraph 65, and *General Química and Others v Commission*, paragraph 41 above, paragraphs 51 and 52). Contrary to the applicants' submission, it is therefore a rebuttable presumption which it is for the applicants to rebut. It follows from the case-law, moreover, that a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded (Case C-521/09 P *Elf Aquitaine v Commission* [2011] ECR I-8947, paragraph 62 and the case-law cited).

55 It follows from all the foregoing that the Commission did not err in law in imputing to STT (formerly STT plc) and SPNV liability for the infringement committed by their subsidiary SNV.

The evidence intended to rebut the presumption that a parent company in fact exercises decisive influence over its subsidiary

Arguments of the parties

56 The applicants submit that they established that STT plc (now STT) and SPNV were not aware of the infringement and that they never participated in it, directly or indirectly. However, the Commission's decision-making practice and the case-law require the parent company to have participated in the infringement in order to be able to hold the parent company liable for the activities of one of its subsidiaries. Furthermore, the Commission acknowledged in this case that the infringement was limited only to the conduct of SNV's bitumen sales manager. Moreover, the organisation of reporting within the Shell group demonstrates that SNV received no instruction from STT plc (now STT) and SPNV. STT plc (now STT) owned only 40% of SPNV, which itself owned shares in more than 500 companies, including Shell Nederland, which in turn owned over 30 subsidiaries, including SNV. One of the managing directors of SNV only gave a very brief account to the board of directors and the supervisory board of Shell Nederland, during the quarterly meetings, of the main issues concerning its business, such as the closure of a facility or disappointing financial results.

57 The Commission submits that the applicants did not succeed in rebutting the presumption that STT plc (now STT) and SPNV in fact exercised decisive influence over their joint subsidiary.

Findings of the Court

58 It is apparent from recitals 206 to 218 of the contested decision that the Commission stated, in essence, that it was entitled to apply the presumption that STT plc (now STT) and SPNV in fact exercised decisive influence over SNV during the period between 1 April 1994 and 15 April 2002 on account of the shareholding structure between those companies (100% shareholding in the case of SPNV, joint 100% ownership with KNPM in the case of STT plc (now STT)). The Commission then

took the view, for the sake of completeness, that several elements relating to the business reporting lines of the group reinforced that presumption, such as the role of the CMD, SPNV's supervisory functions over its subsidiaries or the mechanisms for appointing the managing directors of the operating companies.

- 59 It is necessary to examine whether the applicants have adduced evidence capable of rebutting the presumption that STT plc (now STT) and SPNV constituted a single economic entity with STT.
- 60 It should be borne in mind, first of all, that it is for the parties to put before the Commission and, where relevant, the General Court, any evidence which in their view is apt to demonstrate whether or not companies constitute a single economic entity relating to their organisational, economic and legal links (see paragraph 42 above).
- 61 In the first place, as regards the arguments relating to STT plc's (now STT) and SPNV's lack of direct or indirect participation in the infringement, it is sufficient to observe that those arguments are both legally and factually unfounded. The control exercised by the parent company over its subsidiary does not necessarily have to have a connection with the unlawful conduct (*Akzo Nobel and Others v Commission*, paragraph 37 above, paragraph 59, and *General Química*, paragraph 41 above, paragraphs 38, 102 and 103). It is not therefore necessary for the Court to examine whether STT plc (now STT) and SPNV in fact exercised a direct or indirect influence over SNV's unlawful conduct or whether they were aware of that unlawful conduct.
- 62 In any event, and contrary to the applicants' submission, certain material in the documents before the Court indicates that members of the Shell group who were not part of SNV were aware of SNV's anti-competitive practices during the period of infringement. An internal note of 14 July 2000, analysing the situation on the Dutch bitumen market in the light of competition law, which was seized by the Commission during its inspections at SNV's premises, was distributed outside of that company. That note, which is marked 'Most Confidential', was drawn up jointly by an SNV employee and a legal adviser of the group working for Shell International following a competition law compliance workshop during which the sales manager for bitumen had drawn attention to the Dutch bitumen market for road construction. That note was addressed inter alia to the director of the legal department for the group, who was an employee of Shell International, the Vice President Commercial Sales of the group for Europe and the Executive Vice President Oil Products Europe. It should be recalled, in that regard, that Shell International was in direct contact with the CMD, the main decision-making body of the group, which consisted of the members of the presidium of the board of directors of SPNV and the managing directors of SPCo, who were also board members of one of the two parent companies.
- 63 That note states that the Dutch bitumen market had been internally scrutinised in 1992/1993 and in February 1995, that all suppliers of bitumen in the Netherlands ('the suppliers') collectively negotiated a standard price with the W5, that an SNV employee had therefore advised that SNV should withdraw from that market, but that the market had been restructured and that SNV was still a player on that market. The note also states that Shell's conduct in relation to other grades of bitumen did not appear to infringe competition law, which implies, conversely, that the group was aware of the anti-competitive nature of SNV's conduct on the market for road pavement bitumen. That note sets out, moreover, in detail, the mechanism for setting the price of bitumen, and states that, when SNV wished to increase its prices, it contacted KWS, the main builder, before applying the increase. KWS then consulted all the other suppliers individually on price levels, and subsequently discussed that price increase with the other large builders, before informing the Centrum voor regelgeving en onderzoek in de grond-, water- en wegenbouw en de Verkeerstechniek (CROW, Information and Technology Center for Transport and Infrastructure), a not-for-profit organisation responsible inter alia for the monthly publishing of road pavement bitumen prices, of the increase. On the basis of this, in the event of a variation above a certain threshold, the builders were granted rebates by their cocontractors. The note states furthermore that SNV, like the other suppliers, granted rebates to the

W5 on the price thus set. Lastly, the authors of that note concluded by expressing the view that it was necessary to put an end to the bilateral discussions with KWS, the spokesperson for the W5, in relation to price increases, and to replace them with bilateral discussions with each builder.

- 64 In the second place, as regards the alleged independence of SNV's management resulting from the absence of a sufficiently strong reporting mechanism between STT plc (now STT), SPNV and SNV, the Court would point out that the matters put forward in this respect by the applicants are not sufficient to establish that SNV decided independently upon its own conduct on the market and, therefore, that it did not constitute an economic unit with STT plc (now STT) and SPNV for the purposes of Article 81 EC.
- 65 First of all, the applicants' assertions relating to the large number of subsidiaries owned by SPNV and Shell Nederland do not suffice to establish that STT plc (now STT) and SPNV allowed SNV sufficient independence to decide upon its conduct on the market.
- 66 Moreover, the Commission rightly refers to several factors which it had mentioned in the contested decision (recitals 207 to 214 of the contested decision) and in the statement of objections, relating to the economic, organisational and legal links between SNV, STT plc (now STT) and SPNV, in order to reject the applicants' arguments seeking to rebut the aforementioned presumption.
- 67 Thus, the group stated *inter alia*, in a report of 13 March 2006 lodged with the Securities and Exchange Commission (United States), that '[a]ll operating activities have been conducted through the subsidiaries of Royal Dutch and Shell Transport which have operated as a single economic enterprise'. Furthermore, customers and competitors were used to referring to the entire undertaking and each of its legal entities as 'Shell', thus showing that SNV was perceived by third parties and on the relevant market as being part of the Shell group.
- 68 It is also necessary to take account of the matters referred to in paragraphs 47 to 50 above, relating to the structure of the group and of its shareholding, and in particular its hierarchical organisation and the reporting mechanisms within the group.
- 69 In the statement of objections, the Commission moreover put forward the following factors: there was a considerable overlap between functions carried out in various countries and by various entities, and the bitumen manager for the Netherlands was for a long time responsible for the Belgian market; various internal competition law assessments of the Dutch market for road pavement bitumen were distributed to various entities within the group, including the legal service of Shell International, which was in direct contact with the CMD; Shell International acted as the main correspondent for the Commission throughout the administrative procedure; the managing director of KNPM was also principal director of SPNV and a supervisory director of Shell Nederland BV, the direct parent company of SNV; the parent companies are empowered to appoint and dismiss the managing directors of the operating companies; the parent companies supervise the management of the operating companies, and the managing directors of the operating companies are obliged, on request, to provide any shareholder with information about the affairs of the company and to allow shareholders access to the books and documents that they may wish to consult.
- 70 Moreover, as was noted in paragraph 49 above, the CMD played a decisive role within the undertaking. Thus, until 1998, the lines for reporting were organised on a geographic basis, the 'bitumen' manager of SNV reporting to the General Manager 'Commercial Sales', who in turn reported to the 'Country' General Manager. The latter reported to the Regional Coordinator 'Europe' in Shell International Petroleum Maatschappij NV (which was wholly owned by SPNV) who reported directly to the members of the CMD. From 1998 until the end of the period of infringement, SNV was part of the 'Construction' business of the oil products business organisation of the group in Europe, the SEOP,

which was managed by the executive vice-president Europe, who reported to the CEO Oil Products, who was a member of the CMD. Furthermore, reporting mechanisms existed between the parent companies and their subsidiaries, through the two supervisory committees, the GAC and the REMCO.

- 71 Next, the applicants acknowledged that a managing director of SNV informed the board of directors and the supervisory board of Shell Nederland, at joint quarterly meetings between those two bodies, of the main issues relating to SNV's business. Even though the applicants submit that that information was limited to certain major decisions, that assertion is not supported by any probative evidence.
- 72 Lastly, account must be taken of the fact that certain companies in the group were responsible for providing support functions to all the subsidiaries; Shell International thus provided legal support to all the group subsidiaries. Analysis of the note of 14 July 2000 shows moreover that SNV employees were among its authors and its addressees and that SNV closely supervised the subsidiaries' activities, in particular with respect to the situation on the Dutch bitumen market.
- 73 In the light of all those considerations, the Court concludes that, having regard to the evidence adduced by the applicants concerning, first, the assertion that STT plc (now STT) and SPNV were not aware of the infringement in question, did not participate in that infringement, and did not encourage their subsidiary to commit the infringement and, second, the mechanisms for reporting information from SNV to STT plc (now STT) and SPNV, in conjunction with the other relevant material in the documents before the Court set out in paragraphs 47 to 50 and 62 to 72 above, the Commission did not commit an error of assessment in taking the view that the evidence put forward by the applicants did not show that SNV decided independently upon its conduct on the market and was therefore insufficient to rebut the presumption that STT plc (now STT) and SPNV in fact exercised decisive influence over SNV's conduct.
- 74 Consequently, the Court must reject the first plea in its entirety as unfounded.

2. The second plea, alleging infringement of essential procedural requirements and the rights of the defence

Arguments of the parties

- 75 The applicants submit that, by refusing to send them all of the replies to the statement of objections and by restricting the disclosure of KWS's reply to certain passages, the Commission infringed Article 27(2) of Regulation No 1/2003 and the applicants' rights of defence. They submit that, if they had had sight of those documents, they could have influenced the outcome of the administrative procedure and altered the contested decision, in particular with regard to their role as instigator and leader.
- 76 In the first place, the applicants submit that the Commission should have granted their request for access to all of the other companies' replies to the statement of objections, which might have contained exculpatory evidence regarding their role of instigator and leader, in particular because of the horizontal and vertical nature of the cartel. The Commission, furthermore, has previously disclosed all of the replies to the statement of objections in earlier cases (Cases COMP/E-1/37.512 (OJ 2003 L 6, p. 147) and COMP/E-1/36.490 (OJ 2002 L 100, p. 1)). In any event, it is not for the Commission itself to decide which documents are of use in the defence of the undertakings concerned (*Aalborg Portland and Others v Commission*, paragraph 36 above, paragraph 74), and the Notice on access to the file is therefore illegal in so far as it states that full access to the replies to the statement of objections cannot be granted.

- 77 In the second place, the applicants submit that the Commission should have granted them full access to KWS's reply to the statement of objections, and in particular to the witness statement on which the Commission solely relied in order to classify them as instigator and leader of the cartel. The case-law thus confers on them the right to access all of the evidence held by the Commission against them (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 ('Cement'), paragraph 386).
- 78 The Commission contends that it was not required to disclose the replies to the statement of objections and rejects all the applicants' arguments.

Findings of the Court

- 79 It is apparent from the documents before the Court that, during the administrative procedure, the Commission rejected the applicants' request for full access to all of the documents which had been added to the Commission's file after the statement of objections was sent, and in particular to all of the replies from the other undertakings to the statement of objections. However, the Commission did grant them access to the passages of KWS's reply to the statement of objections on which it sought to rely in the final decision, regarding contacts that took place between SNV and KWS prior to 1 April 1994.

General principles relating to access to documents subsequent to notification of the objections

- 80 Article 27(2) of Regulation No 1/2003 is worded as follows:

'The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States.'

- 81 In the Notice on access to the file, the Commission defines in paragraph 8 the Commission file as 'all documents, which have been obtained, produced and/or assembled by the Commission Directorate General for Competition, during the investigation'. In paragraph 27 of that notice, the Commission states as follows:

'Access to the file will be granted upon request and, normally, on a single occasion, following the notification of the Commission's objections to the parties, in order to ensure the principle of equality of arms and to protect their rights of defence. As a general rule, therefore, no access will be granted to other parties' replies to the Commission's objections.

A party will, however, be granted access to documents received after notification of the objections at later stages of the administrative procedure, where such documents may constitute new evidence – whether of an incriminating or of an exculpatory nature –, pertaining to the allegations concerning that party in the Commission's statement of objections. This is particularly the case where the Commission intends to rely on new evidence.'

- 82 It is settled case-law that in all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of EU law which must be complied with even if the proceedings in question are administrative proceedings (Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, paragraph 9, and Case C-176/99 P *ARBED v Commission* [2003] ECR I-10687, paragraph 19). Indeed, Article 41 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1; 'the

Charter of Fundamental Rights'), establishes observance of the rights of the defence as a fundamental right, and a consubstantial element of the right to good administration. In that regard, Regulation No 1/2003 provides that the parties are to be sent a statement of objections which must clearly set out all the essential matters on which the Commission relies at that stage of the proceedings. That statement of objections constitutes the procedural safeguard applying the fundamental principle of EU law which requires observance of the rights of the defence in all proceedings (see, to that effect, Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others v Commission* [2009] ECR I-7191, paragraphs 34 and 35).

- 83 It must be recalled that access to the file in competition cases is intended in particular to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that, on the basis of that evidence, they can express their views effectively on the conclusions reached by the Commission in its statement of objections. Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively (see Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* [2003] ECR II-3275, paragraph 334 and the case-law cited). The right of access to the file means that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file that might be relevant for its defence (see, to that effect, Case C-199/99 P *Corus UK v Commission* [2003] ECR I-11177, paragraph 125, and Case T-30/91 *Solvay v Commission* [1995] ECR II-1775, paragraph 81). Those documents comprise both incriminating and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the Commission and other confidential information (*Hoffmann-La Roche v Commission*, paragraph 82 above, paragraphs 9 and 11, and *Aalborg Portland and Others v Commission*, paragraph 36 above, paragraph 68).
- 84 According to the case-law, it is not until the beginning of the *inter partes* administrative stage that the undertaking concerned is informed, by the notification of the statement of objections, of all the essential evidence on which the Commission relies at that stage of the procedure. Consequently, the other parties' replies to the statement of objections are not, in principle, included in the documents of the investigation file that the parties may consult (Case T-161/05 *Hoechst v Commission* [2009] ECR II-3555, paragraph 163). However, if the Commission wishes to rely on a passage in a reply to a statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 81(1) EC, the other parties involved in that proceeding must be placed in a position in which they can express their views on such evidence (see *Cement*, paragraph 77 above, paragraph 386, and *Avebe v Commission*, paragraph 32 above, paragraph 50 and the case-law cited). The same applies where the Commission relies on such a document in order to prove the role of instigator or leader of one of the undertakings concerned.
- 85 It follows from the foregoing that paragraph 27 of the Notice on access to the file is consistent with the case-law that, while, as a general rule, no access will be granted to other parties' replies to the statement of objections, a party may, however, be granted access to those replies where such documents may constitute new evidence — whether of an incriminating or of an exculpatory nature — pertaining to the allegations concerning that party in the statement of objections.
- 86 Moreover, according to the case-law relating to access to the administrative file prior to notification of the objections, the failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned shows, first, that the Commission relied on that document to support its objection concerning the existence of an infringement (Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraphs 7 and 9, and *Aalborg Portland and Others v Commission*, paragraph 36 above, paragraph 71) and, second, that the objection could be proved only by reference to that document (Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, paragraphs 24 to 30, and *Aalborg Portland and Others v Commission*, paragraph 36 above, paragraph 71; *Solvay v Commission*, paragraph 83 above, paragraph 58). In this respect, the Court of Justice has established a distinction between incriminating documents and exculpatory documents. In the case of an incriminating

document, it is for the undertaking concerned to show that the result at which the Commission arrived would have been different if that document had been disallowed. By contrast, where an exculpatory document has not been communicated, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the Commission's decision (see, to that effect, *Aalborg Portland and Others v Commission*, paragraph 36 above, paragraphs 73 and 74). That distinction also applies in respect of documents subsequent to notification of the objections (Case T-43/02 *Jungbunzlauer v Commission* [2006] ECR II-3435, paragraphs 351 to 359). The applicants therefore misinterpret paragraph 383 of *Cement*, paragraph 77 above, in asserting that the Commission automatically infringes the rights of the defence by refusing to communicate documents subsequent to notification of the objections where those documents have been requested by a company. According to that case-law, such refusal is unlawful, in the case of an exculpatory document, only if that company has established that non-disclosure of that document was able to influence the course of the proceedings and the content of the Commission's decision to its disadvantage.

- 87 Similarly, as regards the question whether, when it is used by the Commission as evidence in its decision, a document subsequent to notification of the objections has or does not have to be communicated in its entirety, the Court would point out that it is apparent from the case-law, and in particular from paragraph 386 of *Cement*, paragraph 77 above, that the Commission is required, in order to enable the undertaking concerned to express its views effectively on that evidence, to communicate to it only the relevant passage of the document in question, placed in context if that is necessary to understand it.
- 88 The Court would also point out that systematic failure to communicate other undertakings' replies to the statement of objections is not contrary to the principle of the observance of the rights of the defence. As was stated above, that principle means that the Commission must, during the administrative procedure, disclose to the undertakings concerned all the facts, circumstances or documents on which it relies, so as to enable them to make known their views on the truth and relevance of the facts and circumstances put forward and on the documents used by the Commission in support of its allegations. Thus, the Commission may base its decision only on facts on which those undertakings have had the opportunity of stating their views.
- 89 Moreover, the applicants may not rely on the case-law that it cannot be for the Commission alone, which notifies any objections and adopts the decision imposing a penalty, to determine the documents of use in the defence of the undertaking concerned (*Aalborg Portland and Others v Commission*, paragraph 36 above, paragraph 126; *Solvay v Commission*, paragraph 83 above, paragraphs 81 and 83; and *Atlantic Container Line and Others v Commission*, paragraph 83 above, paragraph 339). That argument, relating to documents within the file compiled by the Commission, cannot apply to the replies given by other parties concerned to the statement of objections.
- 90 Lastly, the Court would point out that, contrary to the applicants' submission, the Commission, in any event, is not bound by its practice in earlier decisions in relation to full notification of the replies to the statement of objections, since the lawfulness of its decisions is assessed solely on the basis of the rules applicable to the Commission, including, in particular, Regulation No 1/2003, Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18), and the Notice on access to the file, as interpreted by the Courts of the European Union.

Application in the present case

- 91 In the present case, it should be borne in mind that, on 24 May 2006, the Commission allowed the applicants to acquaint themselves with the passages of KWS's reply on which it sought to rely in the final decision, regarding contacts that took place between SNV and KWS prior to 1 April 1994 and a proposal for preferential rebates to the W5, sent to KWS.
- 92 As regards, first, the argument seeking to establish that access to all of KWS's reply to the statement of objections ought to have been authorised, the Court would point out, as a preliminary point, that, contrary to the applicants' assertion, it is apparent from recitals 343 to 348 of the contested decision that the Commission did not rely only on the passages in question of KWS's reply to the statement of objections in order to impute to them the role of instigator and leader of the cartel. In any event, it is clear from an examination of the excerpts from that document sent by the Commission to the applicants that they are perfectly understandable without it being necessary to place them in a wider context. It should be emphasised that, in the contested decision, the Commission used only two of the seven points of that document, both of which were sent to the applicants. Moreover, since it is a document by KWS based on a statement of a witness, one of its former employees, a document which KWS supplied voluntarily to the Commission for the purposes of its defence, highlighting SNV's role of instigator and leader in the cartel and minimising its own role, it is not conceivable that it might have contained any exculpatory evidence for SNV.
- 93 As regards, second, the argument based on failure to communicate the replies of the other undertakings to the statement of objections, which might have contained exculpatory evidence, the Court would point out that, in accordance with the case-law cited in paragraph 86 above, it was for the applicants to provide *prima facie* evidence indicating that their non-disclosure was able to influence, to their disadvantage, the course of the proceedings and the content of the Commission's decision. However, the applicants merely submitted in a general and purely speculative manner that the replies of the other undertakings to the statement of objections might have provided them with exculpatory evidence regarding their role of instigator and leader of the cartel. Apart from the horizontal and vertical nature of the cartel, those replies did not provide any specific information that might constitute *prima facie* evidence in support of this. Furthermore, as the Commission states, it is very unlikely, in a cartel, that a company would produce evidence likely to minimise the role of another company in the cartel, even though, in the present case, the fact that the cartel was organised between two groups with interests liable to be potentially and partially divergent, the large builders and the suppliers, explains why each party had a tendency to minimise its role in the cartel to the detriment of other parties. In any event, according to the case-law, the mere fact that, in their replies to the statement of objections, other undertakings might have minimised the suppliers' role to the detriment of the large builders cannot constitute exculpatory evidence (*Jungbunzlauer v Commission*, paragraph 86 above, paragraphs 353 to 356). Thus, the applicants have not adduced any *prima facie* evidence that communication of the replies of the other companies to the statement of objections might have been useful.
- 94 It follows from the foregoing that the Commission was right to refuse to communicate to the applicants all the replies to the statement of objections and to limit disclosure of KWS's reply to certain passages. The second plea must therefore be rejected.

3. The third plea, alleging errors of fact and law in the calculation of the basic amount of the fine and the determination of the duration of the infringement

The gravity of the infringement

Arguments of the parties

- 95 The applicants submit that, by placing the undertakings in categories in order to take account of their economic capacity to cause significant damage to competition, the Commission made errors of fact and law in determining Shell's turnover relating to road pavement bitumen in the Netherlands by wrongly including in that figure the turnover for Mexphalte C and, in any event, provided an insufficient statement of reasons in respect of that point in the contested decision. They therefore ask the Court to reduce the fine imposed on them, excluding the value of sales of Mexphalte C from its calculation; they take the view that it is contrary to the principles of equal treatment and proportionality for the basic amount of their fine to be greater than that of Kuwait Petroleum ('Kuwait Petroleum') when their market share was smaller than its market share.
- 96 The applicants thus point out that the only reason that the Commission could rightly have taken into account the turnover from specialist bitumen products used in road construction is that their price is directly related to and at a premium above the general market price for standard road pavement bitumen. In contrast, they submit that the Commission should not have included the turnover for Mexphalte C, given that it is not composed of bitumen, there is no correlation between its price and that of standard road pavement bitumen and that it is sold in a different market from that in which standard road pavement bitumen is sold, as the two products are not substitutable. Those assertions are based inter alia on a statement by the director of SNV of 30 November 2006 and on a table of comparisons between the changes to prices of standard road pavement bitumen and of Mexphalte C from 1995 to 2002.
- 97 The applicants criticise the Commission, furthermore, for failing to set out, in the contested decision, the reasons why the sales value of Mexphalte C was taken into account, even though they had stated, in their reply of 23 May 2006 to the Commission's request for information of 8 May 2006, that Mexphalte C was not linked to the infringement. Moreover, during the administrative procedure, the Commission never stated that it intended to include the sales value of Mexphalte C in the calculation of the fine and never referred to that product in the statement of objections. A document from the administrative file does, nevertheless, state that Mexphalte C is a synthetic binder which can be used to produce coloured asphalt, and is not a synthetic bitumen.
- 98 The Commission rejects all the applicants' arguments.

Findings of the Court

- 99 The Commission stated in the statement of objections of 18 October 2004 (recitals 1 to 6 of the contested decision) that the product which is the subject of the proceeding is bitumen used for road construction and similar applications (for example airfield landing strips), which encompasses bitumen of varying degrees of hardness for various uses, as well as bitumen of different grades, including specialty types of bitumen with improved performance, which are nevertheless made from standard road pavement bitumen, and whose price therefore depends on the price of the latter. Only two companies, BAM NBM Wegenbouw BV and Hollandsche Beton Groep ('HBG'), disputed in their reply to the statement of objections the inclusion of bitumen products used in road construction other than standard road pavement bitumen. By contrast, the applicants did not react on this point in their reply to the statement of objections.

- 100 On 8 May 2006, the Commission sent a request for information to SNV, SPNV and Royal Dutch Shell in order to obtain information regarding their turnover from road pavement bitumen, including all specialist bitumen products. On 23 May 2006, those three companies provided the figures for their turnover, which included Mexphalte C, the only specialist bitumen product which, in their view, can be linked to road construction, stating, however, that that product was not the subject of the cartel. In the contested decision (recitals 4 to 6), the Commission upheld the analysis set out in the statement of objections, stating that the prices of other bitumen products used in road construction were directly related to the general market price for bitumen of standard paving grade. In reaching that conclusion, it used the statements of two companies, BP and ExxonMobil, the latter a bitumen supplier on which the Commission imposed no fine, as well as documents seized during inspections, inter alia at the premises of KWS and SNV.
- 101 The Commission stated, in the defence, that it relied on several factors in order to include Mexphalte C in the bitumen products which were the subject of the cartel. Several SNV documents thus show Mexphalte C in its price list relating to bitumen under the heading 'transparent, pigmentable bitumen'; moreover, in its letter of 23 May 2006 to the Commission, SNV stated that the only specialty bitumen which could be linked to road pavement bitumen is Mexphalte C and provided a turnover figure of EUR 12 113 015 for the 'total retail sales value of road pavement bitumen, including Mexphalte C', in 2001; a Shell document containing product information about Mexphalte C and which is part of the administrative file describes it as a synthetic, pigmentable bitumen; another document in the administrative file shows that the price list for road pavement bitumen products, sent in 2001 by SNV to its customers, was accompanied by a standard letter stating that the changes in the price of the products featuring in that list, which included Mexphalte C, were due to price developments on the oil market.
- 102 The applicants submitted for the first time before the Court two documents which, in their submission, establish that the Commission ought not to have taken into account the turnover from Mexphalte C when determining Shell's turnover relating to road pavement bitumen in the Netherlands. The first document contains a table comparing the price development of standard road pavement bitumen during the period 1995-2002 as well as letters by SNV, dating from that period, announcing to its customers that those price increases were due to the price development of raw materials. The second document consists of a statement by the director of SNV dated 30 November 2006 indicating that Mexphalte C is not a product manufactured from bitumen, that the price development of that product could be affected only to a very small extent by oil quotations, that the market on which that product is sold is a market separate from that of road pavement bitumen and that SNV was the only undertaking supplying that type of product in the Netherlands.
- 103 Although the applicants have not expressed a clear view in this respect, the Court considers that, in the present case, it is appropriate to examine their arguments, first, under the review of legality and, second, on the basis of the exercise of the Court's unlimited jurisdiction under Article 31 of Regulation No 1/2003.

– Examination of the applicants' arguments in the context of the review of legality

- 104 It is settled case-law that, in the context of an application for annulment, the legality of the contested measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted, and in particular on the basis of the information available to the Commission when it was adopted (Joined Cases 15/76 and 16/76 *France v Commission* [1979] ECR 321, paragraph 7). No one, therefore, can rely before the Courts of the European Union on matters of fact which, since they were not put forward in the course of the administrative procedure, could not be taken into account at the time of adoption of that measure (see, to that effect, *France v Commission*, paragraph 7; T-58/05 *Centeno Mediavilla and Others v Commission* [2007] ECR II-2523, paragraph 151; and Case T-268/06 *Olympiaki Aeroporia Ypiresies v Commission* [2008] ECR II-1091,

paragraph 55). In the present case, it is apparent from the investigation that, at the time of adoption of its contested decision, the Commission did not have in its possession the two documents cited in paragraph 102 above, which were submitted by the applicants for the first time before the Court, as was stated in that paragraph.

105 In so far as this plea seeks annulment of the contested decision, it is therefore necessary to examine it without taking account of those documents.

106 In that context, the Court would point out that the Commission clearly stated, in the statement of objections, that it considered that the cartel covered all bitumen products used for road construction and similar applications, including specialist bitumen products, with the exception of bitumen products for industrial use. The applicants did not however react on this point in their reply to the statement of objections, unlike other undertakings. Moreover, when the Commission asked the applicants to provide their turnover, the applicants provided, on 23 May 2006, the figures for their turnover, which included Mexphalte C, whilst stating that, even though that product was not in itself the subject of the cartel, it was the 'the only specialty bitumen which could be linked to road pavement'.

107 As was stated in paragraph 100 above, in order to define the relevant market as encompassing all specialist road pavement bitumen products in the contested decision, the Commission relied on documents of BP, ExxonMobil, KWS and SNV, showing that the price lists sent to customers related to all bitumen products, including specialist bitumen products, and that any price increases also related to all those products. Accordingly, the Commission was right to consider, on the basis of the material in its possession at the time of adoption of the contested decision, that sales of Mexphalte C should be included in its calculation of Shell's turnover relating to road pavement bitumen in the Netherlands.

108 Moreover, as regards review of compliance with the obligation to state reasons, it has consistently been held that the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case T-220/00 *Cheil Jedang v Commission* [2003] ECR II-2473, paragraph 216 and the case-law cited).

109 As regards the scope of the obligation to state reasons as it applies to the setting of a fine imposed for infringement of the competition rules, first, it should be borne in mind that that obligation is particularly important and that it is for the Commission to state the reasons for its decision and, in particular, to explain the weighting and assessment of the factors taken into account (Case C-386/10 P *Chalkor v Commission* [2011] ECR I-13085, paragraph 61). That obligation falls to be determined in the light of Article 23(3) of Regulation No 1/2003, under which, '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'. In this respect, the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65 [CS] (OJ 1998 C 9, p. 3; 'the Guidelines on the method of setting fines') and the Leniency Notice indicate what factors the Commission takes into consideration in measuring the gravity and duration of an infringement (*Cheil Jedang v Commission*, paragraph 108 above, paragraph 217). In those circumstances, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which it took into account in accordance with the Guidelines on the method of setting fines and, where appropriate, the Leniency Notice and which enabled it to determine the gravity of the infringement and its duration for the purpose of calculating the amount of the fine (*Cheil Jedang v Commission*, paragraph 108 above, paragraph 218).

- 110 The Courts of the European Union have furthermore specified that the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up. In addition, when fixing the amount of each fine, the Commission has a margin of discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose. When it finds in a decision that there has been an infringement of the competition rules and imposes fines on the undertakings participating in it, the Commission must, if it systematically took into account certain basic factors in order to fix the amount of fines, set out those factors in the body of the decision in order to enable the addressees of the decision to verify that the level of the fine is correct and to assess whether there has been any discrimination (Case T-295/94 *Buchmann v Commission* [1998] ECR II-813, paragraphs 162 to 164, 171 and 173).
- 111 Lastly, the Courts of the European Union have made it clear that the fact that more specific information, such as the turnover achieved by the undertakings or the rates of reduction applied by the Commission, were communicated subsequently, at a press conference or during the judicial proceedings before the General Court, is not such as to call in question the adequacy of the statement of reasons in the decision. Where the author of a contested decision provides explanations to supplement a statement of reasons which is already adequate in itself, that does not go to the question whether the duty to state reasons has been complied with, though it may serve a useful purpose in relation to review by the Courts of the European Union of the adequacy of the grounds of the decision, since it enables the institution to explain the reasons underlying its decision (Case C-248/98 P *KNP BT v Commission* [2000] ECR I-9641, paragraphs 41, 42 and 44).
- 112 In the light of that case-law, it is apparent that the Commission provided a sufficient statement of reasons for the contested decision.
- 113 In the contested decision, the Commission provided various criteria for measuring the gravity of the infringement. It therefore took account of the nature of the infringement, stated why it was unable to measure the actual impact of the cartel on the market, determined the size of the relevant geographic market, placed the undertakings concerned into several categories according to their market shares in 2001, the last complete year of the infringement, and, finally, took account of the worldwide turnover of those undertakings in the last financial year preceding the contested decision, in order to ensure that the fine had a sufficient deterrent effect (recitals 310 to 325 of the contested decision). Moreover, the Commission stated in recital 319 of the contested decision that it relied, for the purposes of calculating market shares, on the sales value for road pavement bitumen in 2001 (or purchases of road bitumen, for the builders). It is stated, in recitals 4 to 6 of the contested decision, that ‘road pavement bitumen’ must be defined as bitumen used for road construction and similar applications, namely bitumen of varying degrees of hardness for various uses, as well as bitumen of different grades, including specialty types of bitumen. The Commission replied inter alia to the objections of two undertakings by which they sought to exclude specialist bitumen products by relying on documents from several companies (BP, ExxonMobil, KWS and SNV), which indicated that price changes for standard road pavement bitumen had an influence on the prices of other bitumen products used in that sector. As the contested decision indicates (recital 6 and footnote 11), the documents seized during the inspections carried out at SNV’s premises feature among those documents. In any event, according to the case-law cited in paragraph 111 above, the Commission is entitled to provide explanations for the statement of reasons in its decision during the contentious stage, which may serve a useful purpose in relation to review by the Courts of the European Union of the adequacy of the grounds of the decision, since they enable the institution to explain the reasons underlying its decision. In the present case, the Commission therefore made it clear, in the defence, that it relied on certain specific elements in order to include Mexphalte C in the bitumen products which were the subject of the cartel (see paragraph 101 above).

114 Lastly, in the reply, the applicants put forward a complaint alleging infringement of the principle of equality, in that the Commission failed to establish that it had also taken into account the value of purchases of Mexphalte C in the calculation of KWS's market share. However, the Court would point out that, in the contested decision, the Commission considered that the product concerned for all the participants in the cartel was bitumen used for road construction and similar applications, including specialty bitumen (recitals 4 to 6 of the contested decision), and that, in order to determine the market shares of each undertaking concerned, it had sent to them requests for information which had enabled it to draw up tables showing the value of sales and purchases of bitumen by each undertaking in the Netherlands, in 2001, and that the total of the builders' purchases was equal to the total of the suppliers' sales (recitals 29, 319 and 320 of the contested decision). Since the applicants did not moreover adduce any evidence indicating that the Commission applied a different definition of the products concerned by the cartel in its determination of KWS's market share, this complaint must be rejected as unfounded.

115 Thus, in their action for annulment, none of the arguments put forward by the applicants relating to the inclusion of Mexphalte C in the products concerned by the cartel is capable of justifying annulment of the contested decision.

– Examination of the applicants' arguments in the context of the Court's unlimited jurisdiction

116 It should be borne in mind that the review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union were afforded by Article 17 of Regulation No 17 and which is now recognised by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed. The review provided for by the Treaties thus involves, in accordance with the requirements of the principle of effective judicial protection in Article 47 of the Charter of Fundamental Rights, review by the Courts of the European Union of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine (Case C-272/09 P *KME Germany and Others v Commission* [2011] ECR I-12789, paragraphs 103 and 106; *Chalkor v Commission*, paragraph 109 above, paragraphs 63 and 67; and Case C-389/10 P *KME Germany and Others v Commission* [2011] ECR I-13125, paragraphs 130 and 133). Moreover, the Court would point out that, as regards the application of Article 81 EC, there is no requirement that the addressee of the statement of objections must challenge, during the administrative procedure, the various matters of fact or law contained therein, if it is not to be barred from doing so later at the stage of judicial proceedings (Case C-407/08 P *Knauf Gips v Commission* [2010] ECR I-6371, paragraph 89).

117 It is therefore for the Court, in the exercise of its unlimited jurisdiction, to assess, on the date on which the Court adopts its decision, whether the applicants received a fine whose amount properly reflects the gravity of the infringement in question (Case T-156/94 *Aristrain v Commission* [1999] ECR II-645, paragraphs 584 to 586; Case T-322/01 *Roquette Frères v Commission* [2006] ECR II-3137, paragraphs 51 to 56 and 293 to 315; and Case T-217/06 *Arkema France and Others v Commission* [2011] ECR II-2593, paragraphs 251 to 253), and in particular whether the Commission correctly determined the applicants' turnover relating to road pavement bitumen in the Netherlands.

118 However, it should be borne in mind that, in order to ensure the effectiveness of Article 18(2) and (3) of Regulation No 1/2003, the Commission is entitled to compel undertakings to provide all necessary information concerning such facts as may be known to them and to disclose to the Commission, if necessary, such documents relating thereto as are in their possession, on condition only that an undertaking is not compelled to provide the Commission with answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove (Case 374/87 *Orkem v Commission* [1989] ECR 3283, paragraphs 34 and 35). An undertaking to

which the Commission addresses a request for information pursuant to Article 18 of Regulation No 1/2003 is therefore bound by an obligation to cooperate actively and may be punished by a specific fine laid down in Article 23(1) of that regulation, which may represent up to 1% of total turnover if it provides, intentionally or negligently, incorrect or misleading information. It follows that, in the exercise of its unlimited jurisdiction, the Court may take account, where relevant, of an undertaking's lack of cooperation and consequently increase the fine imposed on it for infringement of Articles 81 EC or 82 EC, on condition that that undertaking has not been punished in respect of that same conduct by a specific fine based on the provisions of Article 23(1) of Regulation No 1/2003.

- 119 That could for example be the case where, in reply to a request to that effect from the Commission, an undertaking has failed to submit, intentionally or negligently, during the administrative procedure, decisive evidence for the setting of the amount of the fine and which was or might have been in its possession at the time of adoption of the contested decision. Although, in the exercise of its unlimited jurisdiction, the Court is not prevented from taking such evidence into consideration, the fact remains that an undertaking which relies on such evidence only at the judicial stage of the proceedings, thus prejudicing the purpose and the proper conduct of the administrative procedure, exposes itself to the risk that that factor will be taken into consideration when the Court determines the appropriate amount of the fine.
- 120 It is therefore necessary, first, to examine whether the material provided by the applicants at the judicial stage of the proceedings makes it possible to establish that turnover from Mexphalte C ought not to have been taken into account in the calculation of the amount of the fine.
- 121 The first document, which contains a table comparing the price development of standard road pavement bitumen and Mexphalte C during the period 1995-2002 as well as letters by SNV, dating from that period, announcing to its customers that those price increases were due to the price development of raw materials, proves only that increases in the price of Mexphalte C sometimes corresponded to those of standard road pavement bitumen, even though that was not systematically the case (parallel price variations in May and June 1999, February 2000, April and September 2002), which can be explained by considerations of commercial policy (for example, on 27 May 1999, SNV granted a special rebate to its customers on Mexphalte C in order to encourage its use). In addition, the letters sent by SNV to its customers accompanying those price increases stated that those increases were due to price developments on the oil market.
- 122 The second document, which consists of a statement by the director of SNV dated 30 November 2006, permits the conclusion only that Mexphalte C is manufactured from resin, extracts of lubricating oil and polymers. In reply to a written question put by the Court, the applicants moreover stated that Mexphalte C essentially consists of two components, BFE and Nevchem 2338, which are themselves derived from crude oil, and which are produced according to a production process different from the bitumen production process. It is apparent from those documents that, even though Mexphalte C is produced according to a manufacturing process separate from that of bitumen and that its components are not derived from bitumen, crude oil is still the original raw material of its components, as is the case with bitumen.
- 123 Moreover, the applicants did not adduce any probative evidence which makes it possible to establish that Mexphalte C constitutes a market different from the standard road pavement bitumen market. The applicants merely asserted that Mexphalte C was, in general, purchased by municipalities and that it was not used for motorways. However, they have not adduced sufficiently probative evidence to establish that the price development of Mexphalte C was independent of the price development of standard road pavement bitumen during the period of infringement.
- 124 In conclusion, the applicants have not adduced before the Court any evidence capable of establishing that Mexphalte C did not form part of the products making up the market which constituted the subject of the cartel, whereas various material in the documents before the Court shows that the price

of Mexphalte C was closely linked to the price of standard road pavement bitumen. Accordingly, nothing permits the inference that turnover relating to Mexphalte C should be excluded from the applicants' turnover to be taken into consideration in the assessment of the gravity of the infringement.

125 Second, it is necessary to determine whether the applicants failed to fulfil their obligation to cooperate during the administrative procedure by submitting the material set out above only at the judicial stage of the proceedings and not during the administrative procedure.

126 It is apparent from the letter sent by the applicants to the Commission on 23 May 2006 that they provided the figures for their turnover, which included Mexphalte C, the only specialist bitumen product which, in their view, can be linked to road construction, stating, however, that that product was not itself the subject of the cartel. Although that wording is somewhat ambiguous and the applicants have not adduced any probative evidence in support of those assertions, it is not disputed that they made it clear to the Commission that they were of the opinion that turnover for Mexphalte C ought not to be taken into account in the determination of their fine. Given that the Commission did not send the applicants a request for additional information in this respect, it is not apparent, in the present case, that the applicants failed to fulfil their obligation of sincere cooperation during the administrative procedure by not providing the documents described in paragraphs 121 and 122 above, although those documents could have been submitted during that procedure.

127 Accordingly, the Court considers that the applicants did not fail to fulfil their obligation to cooperate flowing from Article 18 of Regulation No 1/2003.

128 The first part of the third plea must therefore be rejected.

The duration of the infringement

Arguments of the parties

129 The applicants submit that the Commission made an error of fact in taking the view that the infringement began on 1 April 1994. That assertion is based only on two internal notes of HBG dated 28 March and 8 July 1994, which do not however establish the existence of price agreements between the suppliers. In their view, the contacts with KWS to which those two notes refer were therefore purely bilateral in nature. In respect of 1995, the Commission itself acknowledged in the contested decision that it had no evidence of any anti-competitive contacts between the suppliers. The applicants accept, however, that the cartel began during the first anti-competitive meeting, which took place on 19 February 1996. They submit, in any event, that they should be given the benefit of the doubt (Case T-279/02 *Degussa v Commission* [2006] ECR II-897, paragraph 115). .

130 The Commission submits that it did not make an error of fact in taking the view that the infringement began on 1 April 1994 and continued in 1995.

Findings of the Court

131 In the present case, the Commission considered that the applicants had committed an infringement of long duration, namely an infringement of more than five years, and took as a basis a total period of eight years, from 1 April 1994 to 15 April 2002, thus increasing the starting amount by 80% (recital 326 of the contested decision).

- 132 It is apparent from the contested decision that the Commission used several consistent items of evidence in taking the view that the cartel had begun as early as 1994 (recitals 93 to 99 and 175 to 178 of the contested decision).
- 133 First, the Commission thus relied on two internal HBG notes of 28 March and 8 July 1994, which refer to the announcement by Shell of the setting of the price of bitumen from 1 April 1994 until 1 January 1995, with a maximum rebate for the W5 (and a smaller rebate for the small builders), and to the existence of price agreements concluded between the oil companies and the W5 even prior to March 1994. Contrary to the applicants' assertion, those two notes do not merely refer to purely bilateral contacts between Shell and KWS, but refer unequivocally to the existence of agreements between the suppliers and the W5.
- 134 Second, the Commission relied on two internal SNV notes of 6 and 9 February 1995. The note of 6 February 1995, which gives an historical description of the development of the road construction market in the Netherlands, refers inter alia to the 'origins of the cartel' since 1980, to the share of responsibility borne by both the public authorities and the builders/suppliers for the emergence of certain agreements, to the phasing out of the cartel in its initial form in 1993 and to the fact that the builders demanded greater price stability in 1995, so that volumes and market allocation would return approximately to their level of 1993. The note of 9 February 1995 mentions an attempt by SNV to end its participation in the cartel going back to 1992, which did not however succeed, as well as the conclusion of price agreements between the W5 and the suppliers, to the detriment of contracting authorities and non-W5 undertakings. That note envisages the various options which could enable SNV to withdraw from that cartel, whilst noting the difficulties inherent in doing so. The statement of a Kuwait Petroleum employee of 9 October 2003 also provides confirmation that the agreements between the suppliers and the large builders already existed in March and April 1994 at the time when that employee joined the bitumen department of that company. Lastly, in its corporate statement of 10 October 2003, SNV itself stated that, after 1993, the large builders had found a different method to avoid disruptions in the road construction market, by organising meetings with the suppliers (recital 91 of the contested decision).
- 135 Third, several documents seized by the Commission provide confirmation that the systems of rebates and sanctions operated in 1995. The Commission thus seized an internal HBG note of 7 July 1995, which stated that Kuwait Petroleum Nederland BV ('KPN') and Wintershall AG offered an extra rebate to HBG, and an internal Wintershall report of 4 March 1996, relating to an interview with Heijmans, mentioning the amount of the rebate owed to that company (recital 98 of the contested decision). In addition, that Wintershall report states that, in 1995, it was found that the suppliers had granted undue rebates to the small builders (recital 82 of the contested decision).
- 136 Fourth, KWS's reply to the statement of objections dated 20 May 2005 shows also that the agreements between the suppliers and the large builders existed as early as 1993 (recitals 96 and 97 of the contested decision).
- 137 Fifth, and lastly, the applications of three undertakings pursuant to the Leniency Notice provide confirmation that the agreements were in existence at least from 1 April 1994. The applications in question are Kuwait Petroleum's statement of 9 October 2003, the reply of the Nynas undertaking of 2 October 2003 to a request for information and BP's statement of 12 July 2002.
- 138 With respect to 1995, the Court would point out that, contrary to the applicants' assertion, the Commission did not acknowledge in any way that it had no evidence of any anti-competitive contacts between the suppliers, but only that it did not have evidence that new agreements had been concluded in 1995 or that the earlier agreements had come to an end in that year, and that it had therefore concluded from this that the arrangements concluded in 1994 were still in force in 1995 (recitals 98 and 99 of the contested decision).

139 It is therefore apparent from all those consistent items of evidence that the Commission was right to consider and demonstrated to the requisite legal standard that the infringement committed by the applicants began on 1 April 1994. The Court therefore rejects the third plea in its entirety.

4. *The fourth plea, alleging errors of fact and law regarding aggravating circumstances*

140 As a preliminary point, it should be made clear that the Courts of the European Union consider that it is necessary, when examining the role of an undertaking in an infringement, to distinguish between the concept of leader in and that of instigator of an infringement and to carry out two separate analyses to check whether the undertaking was one or the other. Whereas instigation is concerned with the establishment or enlargement of a cartel, leadership is concerned with its operation (Case T-15/02 *BASF v Commission* [2006] ECR II-497, paragraph 316).

SNV's role as instigator

Arguments of the parties

141 The applicants submit that, by classifying SNV, along with KWS, as instigator of the cartel, the Commission made errors of fact and of law which justify the cancellation in full or in part of the 50% increase in the fine imposed on them.

142 The Commission points out that the Courts of the European Union draw a distinction between the role of instigator and that of leader and that, if the Court were to hold that the evidence is insufficient as regards one of the two roles, it could, nonetheless, maintain the 50% increase in the fine (*BASF v Commission*, paragraph 140 above, paragraphs 342 to 349). As regards the finding that SNV played the role of instigator, the Commission states that it relied, first, on the fact that SNV submitted a proposal to KWS to give a special rebate to the large builders, and thus played a role in the setting-up of the cartel and, secondly, that SNV tried to persuade ExxonMobil to join the cartel. The Commission used three pieces of concordant evidence, namely a passage from a 1992 internal report by Wintershall, two sections of KWS's reply to the statement of objections and, lastly, two internal ExxonMobil notes from 1993. It submits, lastly, that the Courts of the European Union do not require it to have information regarding the development or the detailed planning of the cartel to find that an undertaking played the role of instigator (Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, paragraph 578, and *BASF v Commission*, paragraph 140 above, paragraph 321).

– The proposal made to KWS to grant special rebates to the W5

143 In order to establish that SNV was at the origin of the cartel, the applicants consider that the Commission relied solely on a witness statement by a KWS employee, supplied in KWS's reply to the statement of objections, stating that SNV had proposed, for the first time in 1993, that the suppliers should grant a special rebate to the W5. None the less, after that witness statement was sent to SNV, its bitumen sales manager made a sworn statement on 22 November 2006 contradicting that assertion and stating, in particular, that the W5, which had already demanded preferential rebates at the time of his appointment in 1992, was at the origin of those preferential rebates.

144 The Commission raises, as a preliminary issue, a question concerning the admissibility of that statement, which, in its submission, cannot constitute valid evidence. The applicants point out that SNV's bitumen sales manager was not heard by the Commission following SNV's application pursuant to the Leniency Notice, as the Commission had indicated to SNV that that hearing was necessary only in so far as that person was able to provide additional information, which was not the case. Thus, although he remained at its disposal, the Commission did not consider it necessary to hear him during the administrative procedure.

- ¹⁴⁵ The applicants submit moreover that KWS's statement is not particularly reliable and recall that it was disputed by SNV's bitumen sales manager and that it is not corroborated by any other evidence. They submit, in addition, that the Commission infringed their right to a fair hearing and to an impartial investigation by failing to verify the credibility of KWS's claims and that the Commission made an error of fact and law and failed to fulfil its obligation to state the reasons in considering that it was possible to establish from that statement of KWS that SNV had been the instigator of the cartel.
- ¹⁴⁶ According to the Commission, first, it is not clear from its file that KWS was the only company to initiate the cartel and, secondly, the applicants did not establish that SNV endeavoured to end its participation in previous anti-competitive agreements. Conversely, the Commission considers that the two groups of undertakings had an economic interest in the operation of the cartel, one on the supply side, the suppliers, and the other on the demand side, the builders. The suppliers thus had an interest in the cartel as it provided them with a guarantee that prices would increase and remain stable and enabled them to prevent any new suppliers from entering the market which might have been able to propose lower prices on an individual basis to builders, and therefore reduce their market share.
- ¹⁴⁷ In order to establish that SNV played the role of instigator by submitting a proposal to KWS to grant a special W5 rebate, the Commission states that it relied, as permitted by the Courts of the European Union, on several documents from the time of the cartel and subsequent to it, which corroborate the information that appears in KWS's reply to the statement of objections (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 v Commission* [2007] ECR II-947, paragraph 563). It therefore took into account, first, the internal Wintershall report of 20 February 1992 referring to contacts between SNV and KWS, as SNV was responsible for submitting proposals for future cooperation between the suppliers and the W5, and secondly, an internal HBG note of 28 March 1994 concerning the communication by SNV of agreed prices and rebates.
- ¹⁴⁸ The fact that other information made it possible to corroborate KWS's witness statement also explains the differing treatment given by the Commission to ExxonMobil when the latter was challenged by other companies.
- Attempts to persuade ExxonMobil to join the cartel
- ¹⁴⁹ The applicants submit that the Commission could not rely solely on the two internal ExxonMobil notes to establish that SNV tried to persuade ExxonMobil to join the cartel and that it therefore played the role of instigator.
- ¹⁵⁰ In the Commission's view, the two internal ExxonMobil notes are sufficient to establish that SNV attempted to persuade ExxonMobil to join the cartel and that it therefore played the role of instigator. It points out, first of all, that, according to the case-law, an undertaking which has suggested to another undertaking an opportunity for collusion or which has attempted to persuade it to collude may be classified as an instigator of the cartel (*BASF v Commission*, paragraph 140 above, paragraph 321). The Commission thus considers that for one trading partner to inform another about its future pricing behaviour towards customers is unlawful. It also states that this was not a single incident, as the SNV bitumen sales manager had made contact with ExxonMobil in March 1993 and March 1994, and that the assertion, assuming that it were proved, that the cartel had not yet been put in place has no effect on SNV's classification as instigator. Lastly, as regards the statement that other suppliers had contacts with ExxonMobil, that is not sufficiently established.

Findings of the Court

151 It is apparent from the contested decision that the Commission considered that SNV, within the group of suppliers, and KWS, within the W5, bore a special responsibility for their respective roles in instigating the cartel (recital 342). The Commission took the view that two factors permitted the conclusion that SNV had played the role of instigator in the cartel: first, SNV submitted a proposal to KWS to grant a special rebate to the W5, and thus played a role in the setting-up of the cartel and, secondly, SNV tried to persuade ExxonMobil to join the cartel. In reaching this conclusion, the Commission relied on three pieces of evidence, which it considers to be concordant: first, a passage from an internal report by Wintershall of 18 February 1992, stating (i) that KWS had informed Wintershall that it had contacted SNV in order to ask it to submit proposals for cooperation between the suppliers and the W5 and (ii) that SNV had therefore submitted to KWS a special rebate offer for the W5 in 1993, second, two sections of KWS's reply to the statement of objections, confirming that those initiatives by SNV had been at the origin of the cartel and, lastly, internal ExxonMobil notes relating to SNV's attempt to encourage it to join the cartel.

– General principles relating to the role of instigator

152 Where an infringement has been committed by several undertakings, it is appropriate, when setting the amount of the fines, to consider the relative gravity of the participation of each of them (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraph 623, and *Aalborg Portland and Others v Commission*, paragraph 36 above, paragraph 92), which implies in particular that the roles played by each of them in the infringement for the duration of their participation in it should be established (Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 150, and Case T-6/89 *Enichem Anic v Commission* [1991] ECR II-1623, paragraph 264).

153 It follows, in particular, that, the role of instigator or leader played by one or more undertakings in a cartel must be taken into account in setting the fine, in so far as undertakings which have played such a role must therefore bear a special responsibility by comparison with other undertakings (see, to that effect, Case T-347/94 *Mayr Melnhof v Commission* [1998] ECR II-1751, paragraph 291, and 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 (*Tokai I*), paragraph 301).

154 In accordance with those principles, Section 2 of the Guidelines on the method of setting fines lays down, under the heading of aggravating circumstances, a non-exhaustive list of circumstances which can result in an increase in the basic amount of the fine and include in particular 'the role of leader in or instigator of the infringement' (*BASF v Commission*, paragraph 140 above, paragraphs 280 to 282).

155 It should be noted that, in order to be classified as an instigator of a cartel, an undertaking must have persuaded or encouraged other undertakings to establish the cartel or to join it. By contrast, it is not sufficient merely to have been a founding member of the cartel. That classification should be reserved to the undertaking which has taken the initiative, if such be the case, for example by suggesting to the other an opportunity for collusion or by attempting to persuade it to do so (*BASF v Commission*, paragraph 140 above, paragraph 321). The Courts of the European Union do not however require the Commission to have information regarding the development or the detailed planning of the cartel. Lastly, the Courts of the European Union have made it clear that instigation is concerned with the establishment or enlargement of a cartel (*BASF v Commission*, paragraph 140 above, paragraph 316), and it is therefore conceivable that several undertakings might simultaneously play a role of instigator within the same cartel.

156 Moreover, contrary to the applicants' assertion, in principle there is nothing to prevent the Commission from relying on a single event in order to establish that an undertaking played a role of instigator in a cartel, on condition that it is possible to establish with certainty from that single event that that undertaking persuaded or encouraged other undertakings to establish the cartel or to join it. First, the Court would point out that the Commission is not bound by its practice in earlier decisions, since the legality of its decisions is assessed solely on the basis of the rules applicable to the Commission, including, in particular, Regulations Nos 1/2003 and 773/2004 and the Guidelines, as interpreted by the Courts of the European Union (see paragraph 90 above). Second, it should be noted that it is apparent from paragraph 350 of *BASF v Commission*, paragraph 140 above, only that an undertaking cannot seek to minimise its role of leader in an infringement by imputing it to another undertaking, where the latter took the initiative only once to announce a price increase agreed upon within the cartel, whereas it was not disputed that the first undertaking had itself announced those increases on several occasions.

157 It is apparent, in any event, from the contested decision (recital 342) that the Commission did not rely solely on KWS's reply to the statement of objections in taking the view that SNV played the role of instigator in that cartel, but that it also used a passage from an internal report by Wintershall of 18 February 1992, stating that KWS had informed Wintershall that it had contacted SNV in order to ask it to submit proposals for cooperation between the suppliers and the W5, and that SNV had therefore submitted to KWS a special rebate offer for the W5 in 1993, as well as internal ExxonMobil notes relating to SNV's attempt to encourage it to join the cartel.

158 It is for the Court to assess, in the light of the principles set out above, whether the Commission has adduced sufficient evidence to establish that SNV played the role of instigator in the cartel.

– Admissibility of the witness statement provided by the applicants

159 As a preliminary point, it is for the Court to rule on the admissibility of the statement of SNV's bitumen sales manager, drawn up on 22 November 2006, which states that only the W5 was at the origin of the cartel. The Commission submits that, following SNV's application of 10 October 2003 pursuant to the Leniency Notice, which included a statement by that employee, it wished to hear that person, but SNV objected to that hearing and the statement of 2006 constitutes a misuse of the procedure for the hearing of witnesses provided for by the Rules of Procedure and cannot, therefore, constitute valid evidence (Case T-172/01 *M v Court of Justice* [2004] ECR II-1075, paragraph 94).

160 However, the Court would point out that that judgment merely specifies that a distinction must be drawn between a witness statement obtained by the Court in the procedure for the hearing of witnesses provided for by Articles 68 to 76 of the Rules of Procedure and a witness statement obtained in another context, which constitutes only evidence offered in support. The General Court is moreover free in its absolute discretion to assess the value to be given to the whole of the facts and evidence which have been submitted to it or which it has itself adduced (order in Case C-360/02 *P Ripa di Meana v Parliament* [2004] ECR I-10339, paragraph 28). There is no provision that prevents an applicant from submitting evidence offered in support before the Court although it did not submit such evidence during the administrative procedure. None the less, the Court is required to take account of that circumstance when assessing the probative value of that evidence offered in support. The Court therefore considers that the statement in question is admissible.

161 As regards the probative value of that witness statement submitted by the applicants, it should be borne in mind that the activity of the Court of Justice and of the General Court is governed by the principle of the unfettered evaluation of evidence, apart from the exceptions laid down in the Rules of Procedure which are mentioned above, and that it is only the reliability of the evidence before the Court which is decisive when it comes to the assessment of its value (Opinion of Judge Vesterdorf acting as Advocate General in Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, at

II-869). In that regard, in order to assess the probative value of a document, regard should be had first and foremost to the credibility of the account it contains. Regard should also be had in particular to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears to be sound and reliable (*Cement*, paragraph 77 above, paragraph 1838). It should also be borne in mind that, although, in the administrative procedure, the Commission does not have the power to compel persons to give evidence under oath, Article 19(1) of Regulation No 1/2003 enables it to take statements from any person who consents to be interviewed.

162 In the present case, the documents in the file before the Court show that, following SNV's application of 10 October 2003 pursuant to the Leniency Notice, which included a statement by its bitumen sales manager, the Commission asked SNV whether that person was able to provide information additional to the information in that statement, to which SNV replied in the negative, whilst stating that the Commission could none the less hear him if it deemed it necessary. Although it is true that the Commission did not therefore seek permission to hear that person, the Court would point out that, in his statement of 24 September 2003 made in the context of SNV's application pursuant to the Leniency Notice, that SNV employee stated that the W5 wished to know SNV's gross price as a calculation basis for proceeding with uniform price increases on the entire market and that he was responsible for contacting KWS as soon as the need for a bitumen consultation meeting arose, whereas, in his statement of 2006, subsequent to the adoption of the contested decision, he denied having proposed establishing a special rebate system for the W5 and consulted with the other suppliers. Accordingly, it must be concluded that those elements reduce the probative value and, consequently, the credibility of the witness statement submitted by the applicants.

– The special rebate granted to the W5

163 The applicants submit first of all that the view cannot reasonably be held that the suppliers might have had an interest in putting in place such a cartel, from which it can be established that only the builders initiated the cartel. The applicants state that only the builders took enforcement measures against suppliers failing to comply with the terms of the agreements.

164 However, it is apparent from the contested decision (recitals 146 to 154) that both groups of undertakings had an economic interest in the operation of the cartel, the suppliers, on the supply side, having an advantage in guaranteeing the increase in their sale prices (even after deduction of the rebate to the W5, those prices were higher than those in neighbouring countries) as well as their stability, whilst preventing the market entry of a new supplier who might have been able to offer lower prices on an individual basis to the builders. Moreover, the argument that the suppliers had no interest in offering a preferential rebate to the W5 can be rejected, since, as the Commission correctly stated in the contested decision (recital 149), increases in the gross price suggested by the suppliers were accepted by the large builders only on condition that they be coupled with an increase in the rebate granted to the W5.

165 The applicants submit, furthermore, that SNV cannot be regarded as instigator of the cartel whereas it attempted to put an end to the cartel in 1993. That assertion is not however based on sufficiently convincing evidence. The internal note of 6 February 1995 on which the applicants rely mentions only an attempt by SNV to end a cartel, on the sales side, in 1993, but which does not appear to have succeeded, and also mentions that SNV and ExxonMobil were behind the initiation of that same cartel (and not of its termination) on the supply side.

166 The applicants submit, moreover, that the Commission relied solely on KWS's reply to the statement of objections in finding that SNV had made proposals for a special rebate to the W5 and that the witness statement of the KWS employee in that document had only very limited probative value, since it had been provided in the context of the reply to the statement of objections, which described KWS

as the sole instigator of the cartel, and its sole purpose was therefore to attribute the role of instigator to another company. The applicants submit that it is also necessary to take into account the fact that that witness statement was lodged 12 years after the events in question and that KWS's reply was, in general, not particularly credible as it contained many inaccuracies. However, the Court would point out that, contrary to the applicants' assertion, the Commission did not rely on that document alone to establish that SNV had submitted proposals for special rebates to the W5. A reading of recital 342 of the contested decision permits the conclusion that the Commission took the view that SNV played the role of instigator of the cartel amongst the suppliers by relying on five documents, namely the internal Wintershall note, KWS's reply to the statement of objections, the internal HBG note of 28 March 1994 (by reference to recital 175 of the contested decision) and the two ExxonMobil documents relating to the attempts by SNV to persuade it to join the cartel.

- 167 Some of that evidence thus mentions that SNV submitted proposals for a special rebate to the W5. The Commission first took into account an internal Wintershall report of 20 February 1992, drafted following a visit from KWS, referring to contacts between SNV and KWS, as SNV was responsible, as 'market leader', for submitting proposals for cooperation between the suppliers and the W5 amounting to a purchasing monopoly. Second, it used the internal HBG note of 28 March 1994, which referred to the communication by SNV to the other suppliers of bitumen prices and rebates agreed with the W5. Although the internal Wintershall report of 20 February 1992 confirms the passage of KWS's reply to the statement of objections in which it asserted that SNV had submitted proposals for a special rebate to the W5, the internal HBG note of 28 March 1994 shows only that SNV negotiated with the W5 and that it communicated the outcome of those negotiations to HBG. Those items of evidence do not therefore in themselves prove that SNV was at the origin of the establishment of an extra rebate to the W5. There remains a doubt as to whether SNV took that initiative unprompted or whether it did so at the request of KWS, as the Wintershall note of 1992 implies.
- 168 The applicants state moreover that the Commission misinterpreted that excerpt from KWS's reply to the statement of objections, which permits the conclusion solely that SNV played a role of spokesperson for the suppliers, and that the Commission therefore made an error of law and of fact and provided an insufficient statement of reasons in respect of that point in the contested decision. However, the Court would point out that, in that document, KWS states clearly that, in 1993, SNV, through one of its employees, informed KWS of a price proposal and, for the first time, of a proposal for a special rebate for the W5 on behalf of the suppliers.
- 169 The applicants submit, lastly, that the Commission infringed their right to a fair hearing and to an impartial investigation, since, following their employee's statement of 12 June 2006 calling in question KWS's account, the Commission ought to have verified its credibility, as it did when Kuwait Petroleum's and Nynas's statements relating to ExxonMobil's participation in the cartel were challenged by other undertakings at the administrative hearing.
- 170 As a preliminary point, it should be noted that the guarantees afforded by EU law in administrative proceedings include, in particular, the principle of sound administration, which is enshrined in Article 41 of the Charter of Fundamental Rights, which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (*Atlantic Container Line and Others v Commission*, paragraph 83 above, paragraph 404).
- 171 However, the Court would point out that neither Regulation No 1/2003, Regulation No 773/2004, nor any other legislation requires the Commission to hold fresh hearings or send new requests for information where the assertions of an undertaking are challenged by another undertaking during the administrative procedure. The only constraint on the Commission is that it must ensure that the rights of the defence are respected during that procedure, as stated in Article 27(2) of Regulation No 1/2003. The Courts of the European Union have thus considered that the Commission has a reasonable margin of discretion to decide how expedient it may be to hear persons whose evidence may be relevant to the investigation (Joined Cases 43/82 and 63/82 *VBVB and VBBB v Commission*

[1984] ECR 19, paragraph 18; Case T-86/95 *Compagnie générale maritime and Others v Commission* [2002] ECR II-1011, paragraph 468; and *HFB and Others v Commission*, paragraph 142 above, paragraph 383), and the guarantee of the rights of the defence does not require the Commission to hear witnesses put forward by the parties concerned, where it considers that the investigation of the case has been sufficient (Case 9/83 *Eisen und Metall v Commission* [1984] ECR 2071, paragraph 32, and *HFB and Others v Commission*, paragraph 142 above, paragraph 383). Similarly, where legislative texts and its own notices allow it the scope to choose, from several types of evidence or approaches which may in theory be relevant, it retains great freedom of action (Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, paragraph 519).

172 The Commission replied to that argument of the applicants by considering it from the perspective of the principle of equal treatment, which is one of the fundamental principles of EU law, and which requires that similar situations should not be treated differently unless differentiation is objectively justified (Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 13). It is true that, without referring to that principle, the applicants raised the fact that the Commission treated them differently from Kuwait Petroleum and Nynas, whose statements relating to ExxonMobil's participation in the cartel had been challenged by other undertakings at the administrative hearing, the Commission having recontacted Kuwait Petroleum and Nynas in this regard. As the Commission correctly states, the situation of those two undertakings differed from SNV's. The Commission sent Kuwait Petroleum and Nynas a request for additional information in this regard after the administrative hearing, since those two undertakings were not in a position, at that hearing, to react to the claims of several other undertakings challenging the veracity of their statements relating to ExxonMobil. By contrast, in SNV's case, the Commission took the view that, since other evidence relating to SNV's role in the cartel corroborated that set out in KWS's reply to the statement of objections, it was not necessary to take specific measures following receipt of the SNV employee's statement of 12 June 2006, calling in question KWS's account. Accordingly the Commission did not infringe the principle of equal treatment in the present case.

173 Lastly, in the alternative and in any event, it should be borne in mind that an infringement of the rights of the defence can lead to the annulment of the contested decision only if, in the absence of that infringement, there was a chance – even slight – that the applicants could have brought about a different outcome to the administrative procedure (Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 56, and *Cement*, paragraph 77 above, paragraph 383). However, the applicants have not adduced any evidence to that effect.

174 In conclusion, although the evidence used by the Commission permits the inference that SNV submitted proposals for a special rebate to the W5, it does not however suffice, in itself, to prove that SNV was at the origin of the establishment of such a rebate or that it proceeded with establishing that rebate at KWS's request. It is therefore necessary, in order to assess SNV's role of instigator in the cartel, to examine the evidence relating to SNV's attempts to persuade other undertakings to join the cartel.

– Attempts to persuade ExxonMobil to join the cartel

175 SNV's attempt to encourage ExxonMobil to join the cartel constitutes the second factor on which the Commission relied in taking the view that SNV had been at the origin of the cartel. In order to establish this, the Commission used internal ExxonMobil documents relating to two incidents.

176 The Court would point out, as a preliminary point, that one of those documents, dated 11 April 2004, was not expressly cited either by the Commission in the contested decision or in the statement of objections, but that it none the less formed part of the Commission's administrative file, to which the applicants had access after notification of the objections and that it can therefore be taken into account by the Court in the exercise of its unlimited jurisdiction (Case C-297/98 P *SCA Holding v Commission*

[2000] ECR I-10101, paragraph 55, and *Tokai I*, paragraph 153 above, paragraph 165, and, for an application of this in relation to the role of leader, *BASF v Commission*, paragraph 140 above, paragraph 354).

- 177 The first set of documents concerns (i) a meeting that took place on 22 March 1993 between the two companies, at which SNV's representative mentioned incidentally the increase in the price of bitumen scheduled for 1 April 1993, to which ExxonMobil stated that it did not react, and (ii) a telephone call from the same SNV employee, on the same day, to the ExxonMobil employee's home, informing him again of his desire to increase prices on 1 April 1993, in order 'to blow up the CROW price system'. The ExxonMobil employee's reaction to this was to tell the SNV employee to stop sending him information relating to anti-competitive practices.
- 178 Although those two items of evidence permit the conclusion that an SNV employee referred to anti-competitive practices relating to a concerted increase in the price of bitumen in 1993, the Court would however point out that there is doubt as to whether those practices relate to the cartel in question in the contested decision. It appears that the proposals submitted by SNV sought to break up the CROW price-fixing mechanism, even though, according to the contested decision, the W5 members had a strong interest in maintaining that mechanism (recital 26 of the contested decision). It should also be recalled that the Commission ultimately found in the contested decision that ExxonMobil had not participated in the cartel in question.
- 179 The second set of documents concerns 1994. A note of 28 March 1994 reports a call from an SNV employee introducing himself as being responsible for bitumen-related matters and suggesting to ExxonMobil that a meeting be organised in order to deal, inter alia, with the 'common customer strategy'. Another note, of 11 April 2004, refers to a meeting of 8 April 1994 with the same SNV employee 'in the framework of a Nabit meeting' (Nabit being the name of the professional organisation representing bitumen undertakings in the Netherlands), during which ExxonMobil asked that employee to refrain from raising certain matters 'forbidden by the policies of both Esso and Shell'. It follows that it is not possible to determine from those documents, whose content is quite vague, whether SNV was referring to the cartel in question.
- 180 Although it is not reasonable to interpret those documents as fitting into the context of normal and legal bilateral trade between two companies, as the applicants suggest, it must none the less be stated that those four documents are relatively vague and do not necessarily refer to the cartel in question. Indeed, the Commission itself chose not to mention the two documents of 1994 in the contested decision, although it had referred to that incident that occurred in 1994 in the statement of objections (point 204).
- 181 It follows that the evidence adduced by the Commission does not make it possible to conclude with certainty that SNV played the role of instigator, in particular with regard to ExxonMobil, in establishing the cartel in question.

– Conclusion relating to the role of instigator

- 182 In those circumstances, it must be concluded that the finding in the contested decision that SNV played the role of instigator in the infringement in question is insufficiently substantiated.
- 183 Since the Commission did not submit before the Court any further evidence in addition to that set out in recital 342 of the contested decision in order to prove SNV's role of instigator in the infringement in question, the Court's analysis will focus on SNV's role of leader in that infringement.

SNV's role of leader

Arguments of the parties

184 The applicants take the view that, by considering that SNV played the role of leader of the cartel, the Commission made errors of law and of fact which justify the cancellation in full or in part of the 50% increase of the fine imposed on them. According to the case-law, in order to establish that an undertaking played the role of leader, the Commission must prove that that undertaking took specific steps giving a major boost to the implementation of the collusive arrangement, thereby clearly distinguishing itself from the other participants in the arrangement (*BASF v Commission*, paragraph 140 above, paragraph 348), which the Commission was unable to do in SNV's case.

185 In the present case, the Commission relied on factors relating to five types of conduct by SNV in order to find that SNV was a leader of the cartel: the role played by SNV in negotiations with the members of the W5 on behalf of the suppliers during 1994 and 1995, the first years of the cartel; from 1996, when bitumen consultation meetings began, the fact that SNV took the initiative of announcing, bilaterally, proposed price increases to KWS, and that they discussed whether or not to hold a meeting between the suppliers and the large builders; SNV's prominent role in pre-meetings between suppliers; SNV's major role as spokesperson for suppliers during consultation meetings with the large builders, and, lastly, its role of monitoring compliance with the agreements.

– The role played by SNV during 1994 and 1995 in negotiations with KWS on behalf of the suppliers

186 The applicants submit, first of all, that the Commission made errors of fact and of law in taking the view that SNV played the role of leader of the cartel on the basis of two internal HBG notes of 28 March and 8 July 1994. They thus assert that those two notes can refer only to purely bilateral contacts between SNV and KWS. Moreover, it is not possible to conclude from those notes that there were agreements between the large builders and the suppliers through SNV and KWS, as they establish merely that a specific price had been proposed to HBG; they were not drafted by a direct witness of the negotiations, but by HBG's head of procurement, and they were not corroborated by other evidence and were also contradicted by the sworn statement made by SNV's bitumen sales manager on 22 November 2006. The Commission should therefore have demonstrated that there was a horizontal price agreement between the suppliers to stick to the terms and conditions that SNV had bilaterally agreed upon with KWS. Lastly, that theory that negotiations took place between the large builders and the suppliers, represented respectively by KWS and SNV in 1994 and 1995, does not appear in the statement of objections.

187 The Commission submits, however, that those two HBG notes refer unambiguously to the existence of an agreement concluded between the suppliers and the W5, and establish that SNV was responsible for representing the suppliers, by stating, in particular, that those suppliers intended to diverge from the agreement entered into with the large builders by increasing their prices. The Commission also states that the author of those notes was the HGB employee responsible for purchasing bitumen, who worked closely with the employee who attended the bitumen consultation meetings and that, in any event, according to the Courts of the European Union, it is irrelevant for the probative value of a document that it was drafted at the time of the facts by a person who did not attend a meeting (Case T-11/89 *Shell v Commission* [1992] ECR II-757, paragraph 86). That contemporaneous documentary evidence cannot be challenged by a statement made subsequently by an SNV employee. The Commission contends, furthermore, that, contrary to the applicants' submissions, a finding of leadership is not dependent on the fact that the attitude of the leader automatically binds the other members of the cartel, but on whether the undertaking has a sufficiently active role in the cartel. Lastly, the theory that such negotiations took place between SNV and KWS on behalf of their respective groups appears on several occasions in the statement of objections and the applicants responded to it on 20 May 2005.

– The fact that, from 1996, SNV decided in advance with KWS whether or not to hold a meeting between the suppliers and the W5

188 The applicants submit that the Commission made errors of fact in taking the view that the bilateral contacts between SNV and KWS established from 1996 were an indication of the role of leader played by SNV in the cartel. Indeed, those meetings were held in a context of instability of oil quotations and of the dollar exchange rate, when the W5 sought to renegotiate bitumen prices with their suppliers on a regular basis and obtain assurances of a certain price stability, by avoiding significant decreases and by ensuring that the increases were implemented collectively, which made it possible to trigger the price mechanism put in place by the Dutch Government for public contracts, the purpose of which was to pass on price fluctuations to the awarding authority. They therefore assert that these were normal contacts between a supplier and a customer and that the meetings relating to bitumen were the initiative of KWS alone. Thus, there were contacts between SNV's employees and the KWS secretariat only when KWS convened such a meeting. Lastly, they submit that the statements by Kuwait Petroleum, on which the Commission relied to assert that those bilateral contacts were evidence of its role as leader of the cartel, merely stem from hearsay. The statement made by the SNV employee merely states that he contacted KWS at the time of price fluctuations in the raw materials of bitumen products.

189 The Commission submits that the cartel was bilateral in nature and that the applicants fail to state that the suppliers also had an interest in an increase in the price of bitumen. It relies on several statements by undertakings, including that by SNV which is attached to its application pursuant to the Leniency Notice, to claim that Shell and KWS would discuss in advance whether there was a need for a meeting between suppliers and large builders. It also states that the statement by Kuwait Petroleum was made by a regular participant in the multilateral bitumen consultation meetings.

– SNV's prominent role in pre-meetings between suppliers

190 The applicants submit that the Commission had no evidence to claim that SNV played a prominent role in the pre-meetings between suppliers. They take the view that several suppliers were involved in the organisation, logistics and leadership of those meetings. The statement made by BP in that regard was merely a suggestion, which was not corroborated by any other information. However, other statements by BP and Kuwait Petroleum show that those meetings were led and organised not by one, but by several, suppliers. In any event, the sole statement made by BP, the accuracy of which the applicants dispute, cannot constitute sufficient evidence according to the case-law (Case T-337/94 *Enso-Gutzeit v Commission* [1998] ECR II-1571, paragraph 91, and Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering v Commission* [2004] ECR II-2501, paragraph 219). As regards the internal HBG document of 23 April 2001, the applicants submit that it has no probative force and that, in any event, it could not be taken into account in the contested decision without infringing their rights of defence, since it was merely annexed to the statement of objections, without being referred to therein (*Shell v Commission*, paragraph 187 above, paragraphs 55 and 56). Lastly, there are no grounds for considering that SNV reported on the bitumen consultations to the suppliers who had not attended those consultations and, furthermore, there is no such argument in the contested decision.

191 The Commission states that it relied on the statement which appears in BP's application pursuant to the Leniency Notice as well as on an internal HBG note of April 2001 to establish that SNV opened the pre-meetings and led the discussions in those meetings. However, it never claimed that SNV played a particular role in initiating those pre-meetings or organising the logistics for them, nor did it challenge the fact that the conclusions reached by the participants in those meetings were not imposed by SNV, but were made by compromise between them. Lastly, it considers that the Court may, in the context of exercising its unlimited jurisdiction, take into account new evidence discussed during the

court proceedings (see *Tokai I*, paragraph 153 above, paragraph 165 and the case-law cited). In any event, it submits that SNV could have inferred from the statement of objections that the Commission might use the internal HBG note annexed to it as corroborating evidence of its role as leader.

– SNV's role as spokesperson for suppliers during bitumen consultation meetings

¹⁹² The applicants submit that SNV did not play the role of leader during the consultation meetings, which were dominated by the large builders, and in particular by KWS. They point out, moreover, that the statement by the Kuwait Petroleum employee according to which SNV acted as KWS's opponent during those meetings is merely hearsay, as acknowledged by the Commission in the contested decision (recital 78), and therefore had a low probative value and did not make it possible to conclude that SNV led the meetings on behalf of the suppliers. In reality, SNV was merely questioned by the W5 members to explain the changes in prices of raw materials for road pavement bitumen and its role was limited to that of spokesperson for the suppliers, which is distinct from the voluntary role of leader. The Courts of the European Union consider that such conduct is not sufficient to classify the company concerned as leader of the cartel (*BASF v Commission*, paragraph 140 above, paragraph 427). Lastly, the applicants state that the Commission acknowledged that no bitumen supplier in particular assumed the role of leader when it came to informing other companies of the results of the consultations, but rather that several companies carried out that task.

¹⁹³ The Commission submits that the Courts of the European Union have already considered that a cartel could have two leaders (Case T-59/02 *Archer Daniels Midland v Commission* [2006] ECR II-3627, paragraphs 299 to 301). In the present case, it is clear from the statements of an SNV employee of 24 September 2003, and of a Kuwait Petroleum employee that SNV represented the suppliers that were not present, that it generally initiated the meetings on behalf of all of the suppliers and that it played the role of opponent to KWS. The statement by the Kuwait Petroleum employee has clear probative value as he had cooperated directly with the employee who participated in all of those meetings and was sometimes identified as having attended those meetings himself. It states, moreover, that the fact that the suppliers had together pre-defined a plan before each meeting has no effect on the classification of leader, as the Courts of the European Union do not require an undertaking to dictate the behaviour of others in order for it to be described as leader (*BASF v Commission*, paragraph 140 above, paragraph 374). Moreover, as regards providing information to the suppliers who did not participate directly in the meetings, the Commission does not consider that to constitute a decisive factor in classification as leader of a bilateral cartel. Lastly, it points out that it considered that SNV played the role of leader at all stages of the cartel on the basis of several factors, not merely on the fact that SNV initiated the meetings and acted as spokesperson for the suppliers.

– Monitoring the implementation of the cartel

¹⁹⁴ The Commission points out that it stated in the contested decision that SNV also acted as leader in terms of monitoring the implementation of the cartel, relying in particular on an HBG internal note of 23 April 2001 (recital 347 of the contested decision), and on an internal KWS note (recital 352 of the contested decision).

Findings of the Court

¹⁹⁵ It is apparent from the contested decision that the Commission considered that SNV, within the group of suppliers, and KWS, within the W5, bore a special responsibility for their respective roles of 'leader' of the cartel for its entire duration (recitals 343 to 349 of the contested decision).

– General principles relating to the role of leader

- 196 According to well-established case-law, where an infringement has been committed by a number of undertakings, it is necessary, in determining the amount of the fines, to establish their respective roles in the infringement throughout the duration of their participation in it (*Commission v Anic Partecipazioni*, paragraph 152 above, paragraph 150, and *Enichem Anic v Commission*, paragraph 152 above, paragraph 264). It follows, in particular, that the role of ‘ringleader’ played by one or more undertakings in a cartel must be taken into account for the purposes of calculating the amount of the fine, in so far as the undertakings which played such a role must therefore bear special responsibility in comparison with the other undertakings (Case C-298/98 P *Finnboard v Commission* [2000] ECR I-10157, paragraph 45).
- 197 In accordance with those principles, Section 2 of the Guidelines on the method of setting fines lays down, under the heading of aggravating circumstances, a non-exhaustive list of circumstances which can result in an increase in the basic amount of the fine, which includes ‘the role of leader in or instigator of the infringement’ (*BASF v Commission*, paragraph 140 above, paragraphs 280 to 282).
- 198 In order to be classified as a leader in a cartel, an undertaking must have been a significant driving force for the cartel and have borne individual and specific liability for the operation of the cartel. That factor must be assessed in the light of the overall context of the case (*BASF v Commission*, paragraph 140 above, paragraphs 299, 300, 373 and 374, and Case T-410/03 *Hoechst v Commission* [2008] ECR II-881, paragraph 423). It may, inter alia, be inferred from the fact that the undertaking, through specific initiatives, voluntarily gave a fundamental boost to the cartel (*BASF v Commission*, paragraph 140 above, paragraphs 348, 370 to 375 and 427, and *Hoechst v Commission*, paragraph 426). It may also be inferred from a combination of indicia which reveal the determination of the undertaking to ensure the stability and success of the cartel (*BASF v Commission*, paragraph 140 above, paragraph 351).
- 199 That is the case where the undertaking participated in cartel meetings on behalf of another undertaking which did not attend them and notified that other undertaking of the results of those meetings (*BASF v Commission*, paragraph 140 above, paragraph 439). The same applies where it is shown that that undertaking played a central role in the actual operation of the cartel, for example by organising various meetings, collecting and distributing information within the cartel, and by most often suggesting proposals relating to the operation of the cartel (see, to that effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others v Commission* [1983] ECR 3369, paragraphs 57 and 58, and *BASF v Commission*, paragraph 87 above, paragraphs 404, 439 and 461).
- 200 Moreover, the fact of actively ensuring compliance with the agreements concluded within the cartel is decisive evidence of the role of leader played by an undertaking (*HFB and Others v Commission*, paragraph 142 above, paragraph 577).
- 201 By contrast, the fact that an undertaking exerted pressure, or even dictated the conduct of other members of the cartel is not a necessary precondition for that undertaking to be described as a leader in the cartel (*BASF v Commission*, paragraph 140 above, paragraph 374). The market position enjoyed by the undertaking and the resources at its disposal also cannot constitute evidence of a role of leader in the infringement, even though they form part of the context in which such evidence must be assessed (see, to that effect, Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* [2003] ECR II-2597, paragraph 241, and *BASF v Commission*, paragraph 140 above, paragraph 299).
- 202 Lastly, it should be borne in mind that the General Court has already held that the Commission is entitled to find that several undertakings acted as a leader in a cartel (*Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, paragraph 201 above, paragraph 239).

203 It is therefore for the Court to assess, in the light of the principles set out above, whether the Commission has adduced sufficient evidence to establish that SNV played the role of leader in the cartel.

204 It should be recalled that the Commission relied on five types of conduct by SNV in order to find that it had been one of the leaders of the cartel, namely:

- first, the role played by SNV during 1994 and 1995 in negotiations with KWS on behalf of the suppliers;
- second, the fact that, from 1996, SNV decided in advance with KWS to discuss whether or not to hold a meeting between the suppliers and the W5;
- third, its prominent role in pre-meetings between suppliers;
- fourth, SNV's major role as spokesperson for suppliers during meetings with the W5;
- fifth, its role of monitoring the implementation of the cartel.

205 In order to establish the existence of those five types of conduct, the Commission relied on documents contemporaneous with the facts which were seized during the inspections and on statements by the applicants and other members of the cartel (recitals 343 to 349 of the contested decision).

- The role played by SNV during 1994 and 1995 in negotiations with KWS on behalf of the suppliers

206 The Commission relied on two internal HBG notes of 28 March and 8 July 1994 in order to establish that, during the first two years of the cartel, the agreements were concluded by means of bilateral contacts between SNV and KWS. Those two notes refer to agreements of March 1994, concluded between KWS, on behalf of the W5, and SNV, on behalf of the oil companies, relating to the price of bitumen, which were to stay unchanged until 1 January 1995. Contrary to the applicants' assertion, it is not possible to interpret those documents as merely referring to purely bilateral contexts between SNV and KWS. The first note includes a reference to the 'agreement that the oil companies concluded with the W5', and the second note also refers to an agreement concluded in March 'with the W5 (Mr H./KWS) and the oil companies (Mr E./SNV)'. Similarly, that second note cannot show that the suppliers proposed specific prices to HBG, but demonstrates solely that in July 1994 the oil companies had taken the risk of departing from the agreements concluded with the W5 in March 1994 by increasing their prices. Lastly, the documents attached by the applicants to the reply, which seek to show that KWS had requested, in 1987 and 1988, the company Smid and Hollander to align itself with the prices and rebates concluded between KWS and SNV, do not have any probative value, since they relate to a period well before the period of infringement.

207 The applicants contest, moreover, the probative value of those two notes, stating that they were drafted by the HBG's head of procurement, who, having never participated in any negotiations relating to bitumen, was just an indirect witness of the events reported. The Courts of the European Union consider none the less that the fact that information is reported second hand has no influence on its probative value (*Shell v Commission*, paragraph 187 above, paragraph 86) and that, under the general rules of evidence, the fact that documents drawn up immediately after the meetings concerned and clearly without any thought for the fact that they might fall into the hands of third parties must be regarded as having great significance (Opinion of Judge Vesterdorf acting as Advocate General in *Rhône-Poulenc v Commission*, paragraph 161 above). In the present case, that employee was responsible for purchasing bitumen for HBG and worked closely with the employee who participated directly in the consultations with the W5, and then in the cartel meetings. Accordingly, the Court takes the view that the notes drafted by HBG's head of procurement at the time of the facts have

significant probative value. It follows that the Commission was entitled to rely on those notes, and it was not necessary for other evidence to be adduced corroborating their content, the probative value of which cannot be called in question by the sole statement of SNV's bitumen sales manager of 22 November 2006. It should be recalled that that statement was drawn up after the contested decision had been adopted and that its author was employed by the applicants when he made it.

208 The applicants submit, moreover, that the Commission did not set out in the statement of objections its theory that negotiations took place between KWS and SNV on behalf of their respective groups. However, that argument has no factual basis. It is apparent from points 111, 139 and 201 of the statement of objections that the Commission had already informed the undertakings of that analysis.

209 It follows from the foregoing that the Commission was entitled to find that, in 1994 and 1995, the agreements were concluded by means of bilateral contacts between SNV and KWS.

210 Although SNV therefore played a particular role in the operation of the cartel during those first two years, it is none the less necessary to examine, in order to prove its role of leader, the other evidence used by the Commission and which relates to the entire period of infringement.

– The fact that, from 1996, SNV decided in advance with KWS whether or not to hold a meeting between the suppliers and the W5

211 The Commission relied on four documents in order to establish that, from 1996, when the multilateral bitumen consultation meetings began, SNV took the initiative of announcing, bilaterally, proposed price increases to KWS, and that they discussed whether or not to hold a meeting between the suppliers and the large builders (recitals 344 and 345 of the contested decision).

212 The first document is the applicants' reply to the statement of objections of 20 May 2005, in which the applicants acknowledged that SNV had often been the first to contact KWS in order to seek a price increase, owing to its position as the largest bitumen supplier on the Dutch market. However, it must be stated that it is possible to establish from that document only that SNV contacted KWS in order to seek a price increase, but that it provides no information on its role in the decision to convene cartel meetings.

213 Similarly, as regards, second, the SNV employee's statement of 24 September 2003, attached to the applicants' application of 10 October 2003 pursuant to the Leniency Notice, it states that '[SNV's] bitumen sales manager was asked by road companies to indicate changes in upstream commodity prices to KWS, which in a number of cases triggered an invitation by KWS to the relevant companies to attend a meeting'. However, that statement does not make it possible to establish that SNV and KWS discussed whether or not to hold a cartel meeting.

214 As regards, third, Kuwait Petroleum's statement of 1 October 2003, according to which, '[u]sually [a Shell employee] and [a KWS employee] lobbied in a pre-meeting if there was sufficient ground for a meeting', it must be stated that, since Kuwait Petroleum might have had an interest in minimising its own role in the operation of the cartel, that statement can be taken into account to support the argument that SNV played the role of leader only on condition that it is corroborated by other documents.

215 Fourth, and lastly, it is not possible to conclude from KWS's note of 1 October 2002 relating to the activities of its management secretariat, which was seized during inspections at KWS's premises, according to which '[i]n this composition sometimes a meeting [took] place with the bitumen suppliers' and '[t]he initiative [came] from Shell', that SNV and KWS discussed whether or not to hold a cartel meeting.

216 The applicants submit that it was the large builders that turned those bilateral meetings into collective negotiations and that KWS played a prominent role in the decision to hold them. Thus, the applicants submit that the contacts between SNV's employees and the KWS secretariat took place only when KWS decided to convene such a consultation. It is true that, with the exception of Kuwait Petroleum's statement mentioned in paragraph 214 above, the evidence used by the Commission makes it possible to establish only that SNV was the first to contact KWS in order to seek price increases, but does not mention whether KWS alone decided to hold cartel meetings or whether it decided to do so jointly with SNV. Accordingly, notwithstanding the bilateral nature of the cartel (see paragraph 164 above) and the fact that the suppliers also had an interest in an increase in the price of bitumen, the Court considers that the evidence used by the Commission is not sufficient in itself to establish that SNV initiated the holding of the cartel meetings.

217 It is therefore necessary, in order to assess SNV's role of leader in the cartel, to examine the other items of evidence used by the Commission.

– SNV's prominent role in pre-meetings between suppliers

218 The Commission took the view, in the contested decision, that SNV opened and led discussions at the pre-meetings between suppliers, relying on two items of evidence in this regard. As the Commission states, it never claimed however that SNV played a particular role in initiating and organising them, or that SNV imposed its conclusions on those meetings.

219 The contested decision is thus based in this respect on BP's statements of 12 July 2002, according to which SNV initiated the meeting and led discussions, and on the HBG internal document of 23 April 2001, referring to SNV as the 'leader'. The applicants describe BP's statement as purely hypothetical, and submit that it is not corroborated by any other information and cannot constitute sufficient evidence of a leadership role. Moreover, they submit that, since the Commission made no mention of the HBG document in the statement of objections and merely attached it as an annex, that document cannot be regarded as a valid item of evidence without infringing their rights of defence.

220 In the first place, as regards the HBG document of 23 April 2001, it should be borne in mind that, in the exercise of its limited jurisdiction recognised by Article 261 TFEU and Article 31 of Regulation No 1/2003, the Court has the power to assess the appropriateness of the amounts of fines, on the basis inter alia of additional information which is not mentioned in the statement of objections or the Commission's decision (*SCA Holding v Commission*, paragraph 176 above, paragraph 55; *Tokai I*, paragraph 153 above, paragraph 165, and, for an application of this in relation to the role of leader, *BASF v Commission*, paragraph 140 above, paragraph 354).

221 That document consists of an internal HBG email exchange, in which a regular participant in the bitumen consultation meetings, replying to one of his colleagues who had signalled to him a problem about the settlement of bitumen rebates in the north of the Netherlands, suggested to that colleague that the problem be discussed at the following cartel meeting, and stated that it would be advisable to arrange a meeting in this respect with Mr E., an SNV employee, who was described as 'leader'.

222 First, it is apparent from the documents before the Court that HBG itself, a large builder and the author of the document in question, took the view, in its reply of 23 September 2003 to a request for information by the Commission, that its description of the SNV employee as 'leader' referred only to SNV's position as number one on the market. Second, although that document may constitute evidence relating to SNV's role in monitoring the implementation of the cartel, it does not however appear to be relevant to the assessment of SNV's role at the pre-meetings between suppliers.

223 In the second place, it is necessary to examine the other item of evidence relied on by the Commission in order to establish SNV's role at the pre-meetings between suppliers.

224 It is apparent from BP's statement of 12 July 2002 that, in reply to the question of who made price proposals and who led the pre-meetings between suppliers, the BP employee who had attended those meetings identified Mr E., an SNV employee, on several occasions. Since it is a statement by another supplier which might have had an interest in minimising its own role in the operation of the cartel, the Court takes the view that that item of evidence can be taken into account to support the argument that SNV played the role of leader only on condition that it is corroborated by other documents. Although it is apparent from the contested decision that the Commission relied on other evidence to impute to SNV the role of leader of the cartel (paragraph 204 above), it is none the less apparent from the foregoing that the Commission did not adduce any other probative evidence from which it is possible to establish the particular role played by SNV at the cartel pre-meetings.

225 It is therefore necessary, in order to assess SNV's role of leader in the cartel, to examine the other items of evidence used by the Commission.

– SNV's role as spokesperson for suppliers during bitumen consultation meetings

226 As a preliminary point, the Court would point out that the Commission confirmed, in the reply, that it had not relied as evidence of SNV's role of leader on the circumstance that like other undertakings, it usually informed the suppliers that did not attend of what was discussed at the meetings.

227 On the other hand, the Commission took the view, relying on Kuwait Petroleum's statements of 1 and 9 October 2003, that SNV 'would give the introduction on behalf of the bitumen suppliers and rather play the part of opponent [to KWS] and 'thereby [took] the lead within the group of suppliers)' (recital 347 of the contested decision).

228 However, it should be borne in mind that statements by another supplier which might have had an interest in minimising its own role in the operation of the cartel can be taken into account to support the argument that SNV played the role of leader only on condition that they are corroborated by other documents. Although it is apparent from the contested decision that the Commission relied on other evidence to impute to SNV the role of leader of the cartel (paragraph 204 above), it is none the less apparent from the foregoing that the Commission did not adduce any other probative evidence from which it is possible to establish the particular role played by SNV at the bitumen consultation meetings.

229 It is therefore necessary, in order to assess SNV's role of leader in the cartel, to examine the other items of evidence used by the Commission.

– Monitoring the implementation of the cartel

230 The Commission states that it mentioned, in the contested decision (recitals 347 and 352), that SNV also acted as leader in terms of monitoring the implementation of the cartel, the Courts of the European Union considering that the fact of actively ensuring compliance with the agreements concluded within the cartel is decisive evidence of the role of leader played by an undertaking (*HFB and Others v Commission*, paragraph 142 above, paragraph 577).

231 The Commission relied for that purpose, first, on the HBG internal document of 23 April 2001 (paragraphs 221 and 222 above), relating to a problem about the settlement of bitumen rebates by certain suppliers, in which the advisability of approaching SNV in order to settle that problem was raised, and, second, on an internal KWS note (recital 352 of the contested decision), showing that certain suppliers had not complied with the rebates provided for and that SNV had reacted by talking about 'correct punishment for suppliers going out of line'.

232 It should be pointed out, in this respect, that that internal HBG document can be taken into account by the Court in the exercise of its limited jurisdiction (see paragraph 220 above).

233 However, the Court takes the view that, although those two documents permit the conclusion that SNV was an active member of the cartel, they do not suffice to establish that SNV in fact ensured compliance with the agreements concluded within the cartel, or that it did so in a particularly active manner.

– Conclusion relating to SNV's role of leader

234 It follows from all the foregoing that, although SNV had a particular role during the first two years of operation of the cartel, it is not possible to conclude with certainty from the evidence adduced by the Commission that SNV played the role of leader from the time that the cartel operated in a multilateral manner.

235 That being so, it must be concluded that, in the particular circumstances of this case, the Commission's finding in the contested decision that SNV played the role of leader in the infringement in question is insufficiently substantiated.

236 Since the Commission did not submit before the Court any further evidence in addition to that set out in recitals 343 to 348 of the contested decision in order to prove SNV's role of leader in the infringement in question, it must be concluded that there is insufficient evidence in the documents before the Court to support a finding that the applicant was a leader.

237 It follows that the increase in the basic amount of the fine imposed on the applicants must be cancelled as regards both SNV's role of instigator (see paragraph 182 above) and of leader (see paragraphs 233 and 234 above). The consequences that must be drawn for the determination of the amount of the fine will be examined in paragraph 277 et seq. below.

The repeated infringement

Arguments of the parties

238 The applicants submit that the Commission made an error of law and that it did not provide a sufficient statement of reasons for its decision in applying a 50% increase to the amount of the fine for repeated infringement on the grounds that the Shell undertaking, through its subsidiary Shell International Chemicals Co. Ltd ('SICC'), was the subject of the Polypropylene and PVC II Decisions (recitals 336 to 338 of the contested decision).

239 The applicants point out, in regard to repeated infringement, that the case-law has laid down a criterion according to which the companies involved in the various infringements must belong to the same parent company, which actually exercised decisive influence on the infringing conduct of its subsidiaries (*Michelin v Commission*, paragraph 38 above, paragraph 290). An increase in the fine for repeated infringement could therefore be imposed only in the event that the various infringements could have been imputed to the same parent company. Yet, in the present case, SICC, which is wholly owned by SPCo, a holding company separate from SPNV, which owns SNV, was held liable for the two previous infringements. However, the applicants claim, the Commission did not hold the parent companies STT plc (now STT) and KNPM liable for those infringements. The criterion laid down in *Michelin v Commission*, paragraph 38 above, has not therefore been satisfied in the present case.

- 240 Moreover, the contested decision provides no explanation, first, as to how the infringements that were the subject of the Polypropylene and PVC II Decisions could have been imputed to STT (formerly STT plc) and, second, as to how STT actually exercised decisive influence over the unlawful conduct of SICC, the subsidiary which committed the infringements that were the subject of those decisions.
- 241 In the alternative, they submit that the 50% increase for repeated infringement is disproportionate, given the fact that no high-level officials were involved in this cartel, that the SNV employee who participated in this cartel had not participated in the two previous cartels and that the amount of the fine thus imposed is far greater than the annual profits from SNV's bitumen sales in the Netherlands.
- 242 At the hearing of 26 January 2012, the applicants moreover stated that the Commission had infringed their rights of defence by failing to provide them with the opportunity to rebut the presumption that STT plc (now STT) and KNPM in fact exercised decisive influence over their subsidiaries which were punished in respect of the two previous infringements.
- 243 The Commission rejects the applicants' arguments. Moreover, it stated at the hearing of 26 January 2012 that the General Court had upheld, on 13 July 2011, its decision of 29 November 2006 imposing an increase in a fine imposed on SPNV and two other companies in the Shell group for repeated infringement, on the ground that the Shell undertaking had been the subject of the Polypropylene and PVC II Decisions (Case T-38/07 *Shell Petroleum and Others v Commission* [2011] ECR II-4383).

Findings of the Court

- 244 The Commission stated, in recitals 336 to 338 of the contested decision, that it was appropriate to impose on Shell an increase of 50% in the fine for repeated infringement, since it had already been the subject of the Polypropylene and PVC II Decisions.
- 245 It should be borne in mind that the analysis of the gravity of an infringement must take account of any repeated infringements (*Aalborg Portland and Others v Commission*, paragraph 36 above, paragraph 91). In the context of deterrence, repeated infringement justifies a significant increase in the basic amount of the fine, since it is proof that the penalty previously imposed was not sufficiently deterrent (*Michelin v Commission*, paragraph 38 above, paragraph 293).
- 246 In accordance with those principles, Section 2 of the Guidelines on the method of setting fines lays down, under the heading of aggravating circumstances, a non-exhaustive list of circumstances which can result in an increase in the basic amount of the fine, which includes 'repeated infringement of the same type by the same undertaking(s)'.
- 247 The concept of recidivism must be understood as referring to cases where an undertaking has committed fresh infringements after having been penalised for similar infringements (*Michelin v Commission*, paragraph 38 above, paragraph 284).
- 248 According to the case-law, since EU competition law recognises that different companies belonging to the same group form an economic entity and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not decide independently upon their own conduct on the market, with the result that the Commission may impose a fine on the parent company for the practices of group companies, the Commission is entitled to find recidivism where one group company commits an infringement of the same type as that for which another was previously punished (*Michelin v Commission*, paragraph 38 above, paragraph 290).
- 249 The applicants submit, in the first place, that the conditions laid down in the case-law arising from *Michelin v Commission*, paragraph 38 above, have not been fulfilled in the present case, since the parent company to which the infringements that were the subject of the Polypropylene and PVC II

Decisions were imputed is not the same as the one involved in the infringement committed by SNV. They state therefore that, in the two former cases, liability for the infringement was imputed to SICC, which was wholly owned by STT plc and KNPM, whereas this infringement cannot be imputed either to STT (formerly STT plc) or to KNPM, which no longer exists.

- 250 The Court notes that SICC, which was the subject of the Polypropylene and PVC II Decisions, and SNV, which is the subject of the contested decision, are subsidiaries owned indirectly 100% by the same parent companies, namely STT (formerly STT plc) and KNPM.
- 251 As the Court recalled in paragraphs 36 and 37 above, EU competition law refers to the activities of undertakings, and the concept of undertaking within the meaning of Article 81 EC and the Guidelines on the method of setting fines must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (*Akzo Nobel and Others v Commission*, paragraph 37 above, paragraph 55). The anti-competitive conduct of an undertaking can be imputed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (*Akzo Nobel and Others v Commission*, paragraph 37 above, paragraph 58).
- 252 Moreover, the Courts of the European Union consider that, since the Commission is able, but under no obligation, to impute liability for the infringement to a parent company (see, to that effect, 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 82, 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, paragraph 331), the mere fact that the Commission did not impute liability in an earlier decision does not mean that it is required to make the same assessment in a subsequent decision (*PVC II*, paragraph 52 above, paragraph 990; Case T-299/08 *Elf Aquitaine v Commission* [2011] ECR II-2149, paragraph 60; and Case T-343/08 *Arkema France v Commission* [2011] ECR II-2287, paragraph 100).
- 253 Consequently, in the present case, the fact that, in the abovementioned cases, the Commission chose to impute the infringement to SICC, the wholly-owned subsidiary of SPCo, itself wholly-owned by STT plc (now STT) and KNPM, rather than to the latter two companies does not affect the possibility of applying the case-law on repeated infringement.
- 254 Moreover, it is apparent from paragraphs 35 to 52 above that the Commission was right in the present case to impute the infringement to STT (formerly STT plc).
- 255 As regards the argument relating to the disappearance of KNPM, the Court would point out that it is necessary to prevent undertakings being able to escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes, in order not to compromise the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties (Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 173; Case C-289/04 P *Showa Denko v Commission* [2006] ECR I-5859, paragraph 61; Case C-76/06 P *Britannia Alloys & Chemicals v Commission* [2007] ECR I-4405, paragraph 22; and *ETI and Others*, paragraph 44 above, paragraph 41). Accordingly, that disappearance cannot have any consequence regarding the possibility of applying the aggravating circumstance of repeated infringement to the undertaking which continued to exist.
- 256 In the light of the foregoing, it must be concluded that the applicants were wrong to submit that the conditions laid down by the case-law arising from *Michelin v Commission*, paragraph 38 above, were not fulfilled. The Commission did not therefore err in law in finding that the applicants were repeat offenders.

- 257 The applicants submit, in the second place, in the alternative, that it was for the Commission, pursuant to its obligation to state reasons, to adduce evidence in the contested decision establishing that the infringements that were the subject of the Polypropylene and PVC II Decisions could have been imputed to STT (formerly STT plc) and that STT had in fact exercised decisive influence over the unlawful conduct of SICCC, the subsidiary that committed the infringements that were the subject of those decisions.
- 258 In that regard, it has consistently been held that the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review, and that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see the case-law cited in paragraphs 108 to 111 above).
- 259 It should also be borne in mind that the obligation to state reasons regarding the setting of a fine imposed for infringement of the competition rules is particularly important (*Chalkor v Commission*, paragraph 109 above, paragraph 61). Thus, when the Commission seeks to invoke the concept of ‘undertaking’ within the meaning of Article 81 EC, for the purpose of applying the aggravating circumstance of repeated infringement, it must adduce detailed and specific evidence to support its assertion.
- 260 In the present case, in the statement of objections, the Commission stated that it would take into account as an aggravating circumstance previous findings of similar infringements by the same undertakings (recital 336 of the contested decision). In their reply to the statement of objections, the applicants claimed merely that the legal entities to which the previous Commission decisions were addressed had no connection with the road pavement bitumen business in the Netherlands.
- 261 In the contested decision, the Commission found that the Shell undertaking, through its subsidiary SICCC, had already been the subject of the previous prohibition decisions in Polypropylene and PVC II (recitals 336 to 338 of the contested decision). Moreover, the Commission stated expressly that it was a case of examining whether the same undertaking had committed those different infringements, that there was no requirement that the legal entities within the undertaking, products and personnel were the same between all those decisions and that, in the present case, it had established, in the chapter on liability, that the legal entities of Shell that took part in the infringement in question were part of the same undertaking that had participated in the previous infringements (recital 337 of the contested decision).
- 262 The Commission stated inter alia, in recital 213 of the contested decision, that the PVC II Decision and the judgment in *PVC II*, paragraph 52 above (paragraph 312), relating to that decision made it clear that SICCC formed part of the single Shell undertaking which committed the infringement, even if at that time the Commission chose not to address the Decision to the group parent companies. Similarly, the Commission specified that, in the Polypropylene case, the penalty imposed on SICCC applied to the entire Shell group (recital 196 of the contested decision). The Commission moreover stated that, in the present case, unlike in the two previous cases, it had not been able to identify a single legal entity that played a coordinating and strategic planning role within the group for the entire duration of the infringement at a level below that of the two parent companies. The Court would also point out that, in the PVC II Decision (recitals 44 and 46 of the contested decision), the Commission stated that, ‘[i]n the case of a large industrial group it is therefore normal to address any

Decision to the group holding company or headquarters company, although the undertaking itself consists of the unit formed by the parent and all its subsidiaries' but that, given Shell's two-headed structure and the fact that there was no single group headquarters company to which it might be appropriate to address a decision, it had chosen to address its decision to SICC.

263 As regards the applicants' complaint that the Commission failed to adduce any evidence establishing that STT (formerly STT plc) had in fact exercised decisive influence over the unlawful conduct of SICC, the subsidiary that committed the infringements that were the subject of the Polypropylene and PVC II Decisions, the Court would point out, in accordance with the principles set out in paragraphs 36 to 52 above, that it was not for the Commission to adduce such evidence, since when the infringements were committed, SICC was wholly owned jointly by STT plc (now STT) and KNPM and that that was never contested by the applicants.

264 It follows from all the foregoing that the statement of reasons set out by the Commission is sufficiently detailed and specific in the light of the requirements laid down by the case-law, since it enabled the applicants to ascertain the reasons for the measure and is sufficient for the Court to exercise its power of review. The applicants were therefore in a position to understand in an unequivocal fashion the reasoning on which the Commission relied in finding that the same undertaking had committed the three infringements in question.

265 The applicants submit, in the third place, that the rate of increase in the basic amount of the fine for repeated infringement of 50% is disproportionate, given that no high-level Shell officials were involved in this infringement, that the SNV employee involved had not participated in the two previous infringements and that the profits from SNV's sales were negligible in relation to the amount of the fine.

266 As a preliminary point, the Court observes that it is not clear from the applicants' argument whether, by that complaint, they allege infringement of the principle of proportionality by the Commission or whether they are requesting the Court to assess, in the exercise of its unlimited jurisdiction, whether the rate of increase in the basic amount of the fine for repeated infringement applied by the Commission in the contested decision is proportionate.

267 In any event, the Courts of the European Union have already stated that, when determining the amount of the fine the Commission must ensure that its action is deterrent (Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 245) and that repeated infringement justifies a significant increase in the basic amount of the fine, since it is proof that the penalty previously imposed was not sufficiently deterrent (*Michelin v Commission*, paragraph 38 above, paragraph 293). Similarly, the imposition of a fine on an undertaking which was not proportionate to its size on the market in question does not arise from a manifestly unreasonable conception of the context of repeated infringement, but from all of the factors which the Commission rightly takes into account in setting the amount of the fine, since the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up (Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraphs 368 and 369).

268 Furthermore, it should be noted that the Commission may, in determining the amount of the increase for repeated infringement, take account of evidence tending to confirm the propensity of the undertaking concerned to ignore the competition rules, including the time which has elapsed between the infringements in question (Case T-122/04 *Outokumpu and Luvata v Commission* [2009] ECR II-1135, paragraph 62). In the present case, it must be observed, first of all, that the infringement in question was, on the date of adoption of the contested decision, the third infringement of the same type for which the Shell undertaking had been the subject of a Commission decision. In particular, it must be noted that, like the infringement underlying the present case, the infringements at issue in

the Polypropylene and PVC II Decisions concerned the setting of price targets or the allocation of market shares. Furthermore, the Court has already held that an increase of 50% is justified where a period of less than 10 years has elapsed between different infringements, as in the present case, the cartel having begun in 1994 (*Groupe Danone v Commission*, paragraph 267 above, paragraphs 354 and 355). Lastly, the Court notes that, by a decision of 29 November 2006, the Commission found that the Shell undertaking had infringed Article 81 EC by participating with other undertakings, from 20 May 1996 until 31 May 1999, in an infringement by which they agreed on price targets, shared customers by non-aggression agreements and exchanged sensitive information on prices, competitors and customers in the Butadiene Rubber and Emulsion Styrene Butadiene Rubber sectors (Commission Decision C(2006) 5700 final of 29 November 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.638 – Butadiene Rubber and Emulsion Styrene Butadiene Rubber)).

- 269 In those circumstances, none of the factors relied on by the applicants supports the conclusion that the 50% increase in the basic amount of the fine for the purposes of guiding their conduct towards compliance with the competition rules is disproportionate. Accordingly, the Court must reject that complaint in so far as, first, by setting the abovementioned increase, the Commission did not infringe the principle of proportionality and, second, the arguments put forward by the applicants do not warrant a finding by the Court that differs from the Commission's.
- 270 Lastly, in the fourth place, the applicants submitted, for the first time, at the hearing of 26 January 2012, that the Commission had infringed their rights of defence by failing to provide them with the opportunity to rebut the presumption that STT plc (now STT) and KNPM in fact exercised decisive influence over their subsidiaries which were punished in respect of the two previous infringements.
- 271 It should be borne in mind that it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the original application must contain, inter alia, a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a plea which may be regarded as amplifying a submission put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (order in Case C-430/00 P *Dürbeck v Commission* [2001] ECR I-8547, paragraph 17).
- 272 Moreover, in the exercise of its unlimited jurisdiction, the Court may allow new pleas and arguments only on the twofold condition that those pleas and arguments are effective for the purposes of that jurisdiction, and that they are not based on grounds of illegality different from those raised in the application (see, to that effect, Case C-104/97 P *Atlanta v European Community* [1999] ECR I-6983, paragraphs 27 to 29).
- 273 In the present case, it is established that the applicants did not raise, during the written procedure, a plea relating to the infringement of their rights of defence alleging that they were not provided with an opportunity to rebut the presumption that STT plc (now STT) and KNPM in fact exercised decisive influence over their subsidiaries which were punished in respect of the two previous infringements. Moreover, the applicants provided no indication that this plea is based on matters of law or of fact which came to light in the course of the procedure. Lastly, contrary to the applicants' submission at the hearing of 26 January 2012, this plea cannot be regarded as amplifying the plea alleging infringement of the obligation to state reasons raised in the application.
- 274 Accordingly, it follows from the foregoing that this plea must be rejected as inadmissible.
- 275 In any event, it is apparent from the documents before the Court that, in the present case, the applicants had the opportunity, during the administrative procedure, to adduce evidence to establish that the undertaking punished in connection with the first two infringements was not the same as the

one which was the subject of this infringement, since the Commission stated in the statement of objections (paragraphs 93 and 283) that the Shell undertaking had already been held liable for infringements of Article 81 EC in the past, mentioning in this connection the Polypropylene and PVC II Decisions, as well as the judgment in *Shell v Commission*, paragraph 187 above.

276 It follows from all the foregoing, first, that the Commission was justified in increasing the basic amount of the fine by 50% for repeated infringement and, second, that the Court considers that increase to be appropriate.

Conclusion on aggravating circumstances

277 It is clear from paragraphs 140 to 237 above that the Commission has failed to establish to the requisite legal standard that SNV played the role of instigator and leader in the infringement in question. The Court considers that that finding warrants the exercise of its powers of unlimited jurisdiction with respect to the assessment of the role played by SNV in the infringement in question. It should be recalled, in this regard, that the Commission imposed on the applicants a single increase of 50% in the basic amount of the fine in respect of the aggravating circumstance referred to in the third indent of Section 3 of the Guidelines on the method of setting fines.

278 The Court considers that it is appropriate to cancel that increase imposed on the applicants.

279 The Court concludes, as a consequence of that adjustment, that the amount of the fine imposed on the applicants in Article 2(l) of the contested decision is reduced to EUR 81 million.

Costs

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

281 In the present case, as the applicants have been unsuccessful in a significant part of their pleadings, the Court will make an equitable assessment of the case in ruling that each party must be ordered to bear its own costs.

282 Moreover, the Court rejects the request made by the applicants in their application for costs that the Commission be ordered to pay the expenses incurred in paying the fine or providing a bank guarantee. According to settled case-law, such expenses do not constitute costs of the proceedings (see, to that effect, *Cement*, paragraph 77 above, paragraph 5133 and the case-law cited).

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

- 1. Annuls Article 2(l) of Commission Decision C(2006) 4090 final of 13 September 2006 relating to a proceeding under Article 81 [EC] (Case COMP/F/38.456 — Bitumen (Netherlands)) in so far as it sets the fine imposed on Shell Petroleum NV, The Shell Transport and Trading Company Ltd and Shell Nederland Verkoopmaatschappij BV at EUR 108 million;**

- 2. Reduces the fine imposed on Shell Petroleum, The Shell Transport and Trading Company and Shell Nederland Verkoopmaatschappij by Article 2(l) of that decision to EUR 81 million;**
- 3. Dismisses the action as to the remainder;**
- 4. Orders each party to bear its own costs.**

Jaeger

Wahl

Soldevila Fragoso

Delivered in open court in Luxembourg on 27 September 2012.

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