JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

12 October 2011 *

In Case T-38/05,

Agroexpansión, SA, established in Madrid (Spain), represented by J. Folguera Crespo and P. Vidal Martínez, lawyers,

applicant,

v

European Commission, represented by F. Castillo de la Torre, É. Gippini Fournier and J. Bourke, acting as Agents,

defendant,

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

* Language of the case: Spanish.

THE GENERAL COURT (Fourth Chamber),

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

Registrar: J. Palacio González, Principal Administrator,

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

gives the following

Judgment

Background to the case

A — *Applicant and administrative procedure*

1 The applicant, Agroexpansión, SA, is one of the four undertakings established in Spain engaged in the first processing of raw tobacco ('the processors').

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

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

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

5 Dimon is a United States company established in Virginia (United States). It is the parent company of a group of more than 100 companies operating in the tobacco sector ('the Dimon group'). Its main activity is supplying processed tobacco to cigarette manufacturers. For that purpose it obtains supplies of processed tobacco from, inter alia, the applicant.

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

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

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

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

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

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

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

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

14 An oral hearing was held on 29 March 2004.

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

B — *Contested decision*

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

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

minimum price per producer and the average minimum price per producer group (see, in particular, recitals 77 to 83 and 276 to the contested decision).

18 The cartel described at paragraph 17 above will be referred to hereinafter as 'the processors' cartel.

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

20 The cartel described at paragraph 19 above will be referred to hereinafter as 'the cartel of the producers' representatives'.

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

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

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

24 In Article 3 of the contested decision, the Commission imposed fines on those undertakings and on the producers' representatives, and held Dimon jointly and severally liable for payment of the fine imposed on the applicant, and SCC, SCTC and TCLT jointly and severally liable for payment of the fine imposed on WWTE (see paragraphs 67 and 68 below).

C — *Addressees of the contested decision*

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

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

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

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

29 In particular, it stated as follows:

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

— according to settled case-law, where the subsidiary is wholly owned by the parent company, it can legitimately be assumed that the parent company in fact exercises decisive influence over its subsidiary's conduct (Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraph 50; Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 29; and 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* [1999] ECR II-931 ('*PVC II*'), paragraphs 961 and 984);

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

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

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

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

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

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

'[On the other hand], following the issuing of the [s]tatement of [o]bjections and the hearing of the parties, it has become apparent that the evidence in the file could not warrant a similar conclusion in respect of Universal['s] … and Universal Leaf [Tobacco Co. Inc.]'s shareholdings in Taes and Deltafina. In fact, apart from the corporate link between the parents and their subsidiaries, there is no indication in the file of any material involvement of Universal … and Universal Leaf in the facts which are being considered in [the contested] decision. It would therefore not be appropriate to address [to] them a decision in this case. The same conclusion would apply, a fortiori, to Intabex … in so far as its 100 % shareholding in [the applicant] was purely financial.'

32 At recitals 377 to 386 to the contested decision, the Commission considered the applicant's case.

33 The Commission observed, in particular, that, from the second half of 1997, the applicant had been wholly controlled by Dimon through the latter's wholly-owned subsidiary, Intabex (recital 377 to the contested decision). The Commission concluded from this that it could legitimately be assumed that, at least from that time, Dimon had exercised decisive influence over the applicant's conduct (recital 378, first sentence, to the contested decision). The Commission added that other facts in its file — described at recital 379 to the contested decision — confirmed the 'presumption [that Dimon] was in a position to exert decisive influence' (recital 378, second sentence, to the contested decision). At recital 380 to the contested decision, the Commission stated that it could be seen from the above that 'Dimon was informed of its subsidiary's practices that are the subject-matter of this Decision and of the circumstances in which they were carried out and that, since Dimon held all of its subsidiary's capital after 1997, it was in a position to exert influence over its subsidiary's conduct'.

At recital 382 to the contested decision, the Commission stated that '[t]he specific facts which [the applicant] brought to the attention of Dimon in their correspondence should have caused Dimon, either [to react immediately, doing what was necessary to distance itself] from any possible infringement of competition rules or by [requiring] the applicant's management to put an end to any potentially anti-competitive behaviour', before noting that 'no such course of action [had] eventually [been] pursued by Dimon'.

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

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

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

37 At recitals 387 to 400 to the contested decision, the Commission considered the case of WWTE. It found that from 1995 until May 1998 WWTE was jointly controlled by SCC (through SCTC and TCLT) and by the chairman of WWTE and his family, and set out a number of particulars from its file which, it claimed, show that, during the same period, SCC 'and/or its subsidiaries' had exercised effective influence over the conduct of WWTE in Spain (recital 391 to the contested decision). With regard to the period from May 1998 until the date of the contested decision, the Commission relied on a number of factors which, it claimed, demonstrated that, either directly or through SCTC and TCLT, SCC had exclusive control of WWTE and exercised decisive influence over its commercial policy. The Commission added that '[t]he arguments which SCC has deployed in its reply to the [s]tatement of [o]bjections [did] not warrant any different conclusion in this respect' (recital 399 to the contested decision). In the light of those various factors, the Commission found that, at least since 1996, 'SCC and/or its subsidiaries SCTC and TCLT' had exercised decisive influence over WWTE's commercial policy and that they therefore had to be held jointly and severally liable for WWTE's practices and be included among the addressees of the contested decision (recital 400 to the contested decision).

D — *Determination of the amounts of the fines*

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

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

to the contested decision, was applicable at the time of those infringements (recitals 404 and 405 to the contested decision).

40 In fixing the amount of the fine imposed on each of the addressees, the Commission applied the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines'), without expressly referring to them. In the contested decision, the Commission also assessed whether, and to what extent, the addressees met the requirements laid down in the Leniency Notice.

1. *Starting amounts of the fines*

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

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

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

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

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

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

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

48 In the second place, in order to ensure that the fine had sufficient deterrent effect, the Commission considered that it was appropriate to apply a multiplier of 1.5 — an increase of 50 % — to the starting amount determined for WWTE and a multiplier of 2

— an increase of 100 % — to the starting amount determined for the applicant (recital 423 to the contested decision). The Commission considered that it was appropriate to take account of the fact that, in spite of their relatively small market share on the Spanish raw tobacco purchasing market, those two processors belonged to multinational groups of considerable economic and financial strength, and that, '[m]oreover', they had operated 'under the decisive influence of their respective parent companies' (recital 422 to the contested decision).

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

— Deltafina: EUR 8 000 000;

— Cetarsa: EUR 8 000 000;

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

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

— Taes: EUR 200 000.

50 As regards the cartel of the producers' representatives, the Commission considered that it was appropriate to impose on each of them only a symbolic fine of EUR 1 000 (recitals 425 and 430 to the contested decision). It justified its position by reference to the fact that 'the legal framework surrounding the collective negotiation of standard agreements could engender a considerable degree of uncertainty as to the legality

of the producer representatives['] and processors' conduct in the specific context of their collective negotiation of standard agreements' (recital 428 to the contested decision), relying on certain elements mentioned at recital 427 to the contested decision. It also observed that 'the existence and the results of the negotiations on standard contracts were generally well in the public domain and … no authority [had] ever questioned their compatibility with either Community or Spanish law before these proceedings started' (recital 429 to the contested decision).

2. *Basic amounts of the fines*

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

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

— Deltafina: EUR 12 000 000;

— Cetarsa: EUR 12 000 000;

— the applicant: EUR 5 400 000;

— WWTE: EUR 4 050 000;

— Taes: EUR 300 000;

— ASAJA: EUR 1 000;

— UPA: EUR 1 000;

— COAG: EUR 1 000;

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

3. *Aggravating and attenuating circumstances*

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

54 In respect of attenuating circumstances, the Commission observed, at recital 437 to the contested decision, that '[t]he same factors considered under recitals 427 to 429 [to the contested decision could] apply to the processors' conduct only in respect of

their public negotiation and conclusion of standard contracts (including negotiations on price brackets and additional conditions) with producers' representatives'.

55 At recital 438 to the contested decision, the Commission added that, as regards the 'secret' agreements on the (maximum) average delivery price and share-out of quantities of each variety of raw tobacco concluded by the processors, their conduct had '[gone] significantly beyond the scope of the relevant legal framework and the scope of public negotiations and agreements with producer representatives'. However, it acknowledged that 'the public negotiations between producer representatives and processors [had] determined, at least to some extent, the material framework (especially in terms of opportunities to negotiate between themselves and adopt a common position) within which processors [had been able to] develop, aside from the common position they would take in the context of public negotiations, their secret strategy on (maximum) average delivery prices and quantities'.

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

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

57 At recitals 440 to 447 to the contested decision, the Commission considered whether the basic amounts as thus calculated should be adjusted for the different addressees in order to ensure that they did not exceed the limit of 10 % of turnover laid down in Article 23(2) of Regulation No 1/2003.

58 At recital 441 to the contested decision, the Commission stated that, where the companies involved belong to a group and it was established that the parent companies exercised decisive influence over them and that, as a consequence, those parent companies were jointly and severally liable for payment of the fines imposed on the subsidiary, the worldwide turnover of the group must be taken into account in order to determine the maximum limit referred to above.

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

5. *Application of the Leniency Notice*

60 At recitals 448 to 456 to the contested decision, the Commission dealt with the application of the Leniency Notice in the case of the processors and Deltafina.

61 In the first place, it stated, in particular, that Deltafina and the processors had claimed the benefits of the application of that notice before the statement of objections had been notified to them (recital 449 to the contested decision).

62 In the second place, it stated that Section D of the Leniency Notice was applicable to the processors. It pointed out that, even though it had already been in possession of most of the essential evidence proving the existence of the infringement, the information provided by the processors had assisted it in clarifying and establishing the infringement (recitals 450 and 451 to the contested decision).

63 In the third place, the Commission considered that, in consideration of its 'particularly useful' cooperation during the procedure, especially in so far as Deltafina's participation in the infringement was concerned, and of the fact that it had never contested the facts as set out in the statement of objections, Taes should be granted a 40 % reduction of the fine, in accordance with the first and second indents of Section D(2) of the Leniency Notice (recital 452 to the contested decision).

64 In the fourth place, the Commission stated that, while the information provided by Cetarsa and WWTE had been significant, it had not proved to be as useful to its investigations as that provided by Taes (recital 453 to the contested decision). The Commission added that, in their reply to the statement of objections, Cetarsa and WWTE had claimed that 'the processors' cartel on (maximum) average delivery prices, on the one hand, and the various agreements which both producers and processors entered into on an average price per producer group, on the other, [were] identical and that the potentially anti-competitive effects of processors' and producers' behaviour … therefore neutralise[d] each other', and observed that that contention did not correspond to the reality of the facts. In the light of those factors, the Commission decided to grant to each of those processors a 25 % reduction of the fine, in accordance with the first indent of Section D(2) of the Leniency Notice.

65 In the fifth place, the Commission stated that the applicant had also provided useful information but that, in its reply to the statement of objections, it had disputed the facts 'in the same terms as Cetarsa and WWTE' (recital 454 to the contested

decision). The Commission added that the applicant had denied the secret nature of the processors' agreements on (maximum) average delivery prices. In the light of those factors, the Commission granted the applicant a 20 % reduction of the fine.

66 In the sixth place, the Commission reduced the fine imposed on Deltafina by 10 % (recital 456 to the contested decision).

6. *Final amounts of the fines*

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

— Deltafina: EUR 11 880 000;

— Cetarsa: EUR 3 631 500;

— the applicant: EUR 2 592 000;

— WWTE: EUR 1 822 500;

— Taes: EUR 108 000;

— ASAJA: EUR 1 000;

— UPA: EUR 1 000;

— COAG: EUR 1 000;

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

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

Procedure and forms of order sought

69 By application lodged at the Court Registry on 22 January 2005, the applicant brought the present action.

70 On the previous day, SCC, SCTC and TCLT had brought an action for annulment of the contested decision (Case T-24/05) and WWTE had brought an action for a reduction of the fine imposed on it by that decision (Case T-37/05).

71 On 28 January 2005, Dimon brought an action for annulment in part of the contested decision or, alternatively, for a reduction of the fine imposed on it by the contested decision (Case T-41/05).

72 By letter lodged at the Court Registry on 17 August 2005, the applicant requested that the present case be joined with Cases T-24/05, T-37/05 and T-41/05.

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

74 The Court did not grant the request for joinder.

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

76 The parties presented oral argument and answered the questions put by the Court at the hearing, which took place on 9 September 2009.

77 The applicant claims that the Court should:

— annul in part Article 3 of the contested decision;

— reduce the amount of the fine which the Commission imposed on it;

— order the Commission to pay the costs.

78 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

79 In support of its application, the applicant puts forward four pleas in law, alleging:

— first, infringement of Article 23(2) of Regulation No 1/2003, breach of the principles of proportionality and equal treatment and failure to state reasons;

— second, breach of the principle of equal treatment;

— third, breach of the principle of the protection of legitimate expectations;

— fourth, breach of the Leniency Notice and also of the principles of proportionality, the protection of legitimate expectations and equal treatment.

80 The first plea is raised, in essence, in support of the claim for annulment in part of the contested decision. The other three pleas are raised in support of the claim for a variation of that decision.

A — *First plea, alleging infringement of Article 23(2) of Regulation No 1/2003, breach of the principles of proportionality and equal treatment and failure to state reasons*

81 The first plea may be broken down into three parts. The first two parts both allege infringement of Article 23(2) of Regulation No 1/2003 and breach of the principle of proportionality, but the second part is raised in the alternative to the first part. The third part, put forward in the reply, alleges breach of the principle of equal treatment and failure to state reasons. The third part will be examined before the second part.

1. *First part, alleging infringement of Article 23(2) of Regulation No 1/2003 and breach of the principle of proportionality with respect to the existence of joint and several liability for payment of the fine*

(a) Arguments of the parties

82 The applicant claims that the Commission was wrong to hold Dimon jointly and severally liable for the infringement and that, accordingly, it was not entitled to rely on Dimon's consolidated turnover for the purpose of applying the maximum of 10 % of turnover laid down in Article 23(2) of Regulation No 1/2003. The applicant states that its turnover during the tax year preceding the date of adoption of the contested decision was EUR 8 163 815 and maintains that the fine imposed on it therefore greatly exceeds that maximum amount.

83 In support of its assertions, the applicant, in the first place, maintains that the facts on which the Commission relies in order to hold Dimon liable are irrelevant and that it has not been sufficiently established that Dimon exercised decisive influence over the applicant with respect to its participation in the restrictive practices at issue.

84 In that regard, first, the applicant, after observing that it had a 'local management', relies on the following elements, which, in its submission, establish that it enjoyed complete autonomy with respect to its activities in purchasing raw tobacco:

— no company in the Dimon group exercised direct or indirect control over those activities;

— when the applicant was acquired by Intabex, it concluded a 'management contract' ('the management contract') with Mr B., its managing director, under which the powers relating to the management of the company and, more specifically, those relating to the planning and management of purchases (including preparing the annual budget and entering into agreements with producer groups) were fully and exclusively delegated to him;

— its board of directors never put in place internal procedures or systems with which Mr B. was required to comply and there is nothing in the management contract to support the assertion that Mr B.'s activities were subject to prior approval or subsequent ratification by the board of directors;

— no member of its board of directors or its staff, other than Mr B., had the power to participate in the management, negotiation or conclusion of contracts for the purchase of raw tobacco or to interfere in the contractual relationships with the producers;

— when the applicant was acquired by Intabex, Intabex maintained Mr B. in his post as chairman of the applicant's board of directors and designated three other members within the board of directors, two of whom (Mr T. and Mr G.) were from the Intabex group of companies, while the third was an 'independent professional';

— Mr B.'s former purchasing team remained in place after the applicant's acquisition by Intabex;

— no member of the applicant's board of directors was at the same time a member of the board of directors or management bodies of Intabex or Dimon or employed by those companies;

— the applicant did not consult Dimon or any other company in the Dimon group concerning its purchasing policy or the restrictive practices in issue;

— it did not receive instructions from either Dimon or any other company in the Dimon group with respect to its participation in those practices;

— the Commission's file contains no evidence that Dimon or any other company in the Dimon group participated directly in the infringement.

85 Second, the applicant denies having sent Dimon the 'activity reports' and 'field reports' referred to at recital 379 to the contested decision. It maintains that the Commission has no evidence that those reports were sent to individuals outside its board of directors or its management bodies. It explains that if those reports were systematically translated into English, that was to facilitate the work of Mr T., who did not speak Spanish and who in 1998 had worked for Dimon International Services Ltd, a company in the Dimon group established in the United Kingdom and providing operational services. The applicant adds that if the reports at issue were sent to Mr T. at the headquarters of that company, they were not sent to him in his capacity as a member of its board of directors but only because he worked there and received there all correspondence from the applicant.

86 Third, the applicant claims that none of the letters referred to at recital 379 to the contested decision was addressed to Dimon either. The applicant exchanged those letters with Mr T., in his capacity as a member of the applicant's board of directors, and with Mr S., who since 2000 had held a post as coordinator of operations in Europe with Dimon International Services. The applicant further claims that most of those letters had no connection with the applicant's raw tobacco purchasing policy or with the practices complained of. It explains that in the emails which he sent to Mr S. on

30 October 2000 and 9 May 2001 Mr B. merely informed Mr S. in vague and general terms of certain facts that were in the public domain and well known, namely the existence of collective price negotiations between, on the one hand, the processors and, on the other, the producer groups and agricultural unions. As regards the fax of 14 December 1998 from Mr B., it was sent to Dimon International Inc., not to Dimon, and concerned only questions relating to the contract for the sale of processed tobacco which the applicant had entered into with Deltafina before it became part of the Dimon group.

87 In the reply, the applicant disputes the role and functions which the Commission ascribes to Mr T. and Mr S., relying on the following factors:

— there is nothing in the file to indicate that Mr T. sent Dimon the information which he obtained in his capacity as a member of the applicant's board of directors or that he supervised the applicant's purchasing policy in order to provide Dimon with information about it;

— Mr T. had no important functions within the Dimon group and was not responsible for integrating the applicant's activities in that group;

— in August 1998, following a dispute between Dimon and Mr T.'s family, Mr T. ceased to be a member of the board of directors of Dimon International Services;

— Mr T. was a member of the boards of directors of other — 'very insignificant' — companies in the Dimon group only on a transitional basis;

— when Mr S. received the only two letters relating to the restrictive practices in issue, he was an employee of Dimon International Services and was not on the board of directors of any of the companies in the Dimon group;

— Mr S. never carried out any activities connected with the applicant's raw tobacco purchasing policy and was never employed by Dimon or a member of its board of directors.

88 In the second place, the applicant maintains that it is clear from the case-law on which the Commission relies at recitals 371 to 374 to the contested decision, and in particular from paragraphs 28 and 29 of *Stora Kopparbergs Bergslags* v *Commission*, paragraph 29 above, that the fact that a parent company holds the entire capital of its subsidiary does not in itself suffice to support the presumption that it exercises decisive influence over the subsidiary. In order for the unlawful conduct of the subsidiary to be imputed to the parent company, other elements in addition to the degree of ownership remain necessary, in particular where, as in the present case, the companies concerned objected to the application of that presumption during the administrative procedure.

89 The applicant claims that such elements are lacking in the present case. More specifically, it emphasises that Dimon did not exercise control of the applicant's raw tobacco purchasing policy and that it has not been shown that Dimon participated directly in the infringement or instructed the applicant to commit it. The applicant asserts that the fact that a parent company has received ad hoc and imprecise information about certain of the restrictive practices committed by its subsidiary has never been considered 'in itself and in isolation' to be sufficient to hold the parent company liable for the unlawful conduct of the subsidiary. According to the case-law, it is essential that the parent company was kept constantly informed of the actions of the cartel and that it was therefore in a position to know in great detail about the restrictive practices committed by its subsidiary. The applicant never communicated to Dimon information about its purchasing policy, still less about the impugned practices.

90 The Commission contends that the first part of the first plea must be rejected as unfounded.

91 In the first place, the Commission sets out a series of considerations concerning the concept of 'undertaking' in competition law and the conditions on which a parent company may be held liable for the unlawful conduct of its subsidiary. As regards the latter point, the Commission submits, with reference to *AEG-Telefunken* v *Commission*, paragraph 29 above, that it is necessary not only that the parent company be in a position to exercise decisive influence on the conduct of its subsidiary, but also that it did in fact make use of that influence.

92 As regards, more specifically, the second of the conditions referred to at paragraph 91 above, the Commission denies that it requires that the parent company has instructed its subsidiary to infringe Article 81 EC. It asserts that, in defining this condition, the case-law consistently refers to the subsidiary's lack of independence in determining its general conduct on the market, and it does so without establishing a specific connection with the infringement concerned.

93 The Commission contends that the evidence which may establish effective exercise of control over the subsidiary's policy includes the fact that the parent company is represented on its subsidiary's board. It adds that a subsidiary is less likely to be autonomous where it is active on the same market as the parent company or on a closely related market. Apart from those general factors, certain specific circumstances may help to demonstrate that the parent company is involved in its subsidiary's commercial policy or that it has set up mechanisms enabling it to supervise the subsidiary's activities.

94 The Commission adds that the case-law has recognised that, where a subsidiary is wholly owned by its parent company, the parent is presumed to have exercised its power to influence the conduct of its subsidiary. The parent company can rebut that presumption by adducing evidence showing that its subsidiary does in fact act autonomously on that market.

95 In the second place, the Commission sets out its reasons for taking the view in the contested decision that Dimon should be held liable for the infringement committed by the applicant.

96 First, the Commission states that since the second half of 1997 Dimon, through Intabex, held the applicant's entire capital, and that it could therefore be presumed to have actually exercised decisive influence over the applicant's conduct.

97 Second, the Commission claims that that presumption is confirmed by other evidence in its file. In that regard, first of all, the Commission observes that the purchase and sale of tobacco constitute the essential part of the activities of the Dimon group, that Dimon has since 1999 purchased a large part of the applicant's processed tobacco and that Dimon entered into a number of contracts with Cetarsa and Deltafina concerning, respectively, the subcontracting and sale of the applicant's tobacco. Next, the Commission explains that the applicant drew up 'activity reports' and 'field reports' which described its activities in detail, notably the agreements entered into between the processors and the collective negotiations with the producers. It emphasises that Mr T., in his capacity as a member of the applicant's board of directors and those of other companies in the Dimon group and, accordingly, as an intermediary acting on behalf of Dimon, received copies of those reports. Last, the Commission refers to the letters mentioned at recital 379 to the contested decision, observing, in particular, that certain of them related to the restrictive practices in issue and were addressed to Mr T. or Mr S., who both acted on behalf of Dimon, and others concerned the contracts for the processing or sale of tobacco concluded by Dimon with Cetarsa and Deltafina.

98 Third, the Commission claims that, in their replies to the statement of objections, neither the applicant nor Dimon succeeded in rebutting the presumption referred to at paragraph 94 above. It contends that the fact that the applicant has its own local management is not in itself sufficient to establish that it acted autonomously and

observes that the management contract provides that Mr B. is subject to the 'systems' and 'procedures' imposed by the applicant's board of directors.

(b) Findings of the Court

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

100 The case-law has also made clear that, in the same context, the concept of an undertaking must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 40, and Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 85).

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

102 As regards the question whether, in those circumstances, a legal person who is not the perpetrator of the infringement may none the less be penalised, it is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where that subsidiary, despite having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (*Imperial Chemical Industries* v *Commission*, paragraph 29 above, paragraphs 132 and 133; Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 44; and Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 15), regard being had in particular to the economic, organisational and legal links between those two legal entities (see, by analogy, *Dansk Rørindustri and Others* v *Commission*, paragraph 99 above, paragraph 117, and *ETI and Others*, paragraph 101 above, paragraph 49).

103 In such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law referred to at paragraphs 99 and 100 above. As a consequence, it is not because of a relationship between the parent company and its subsidiary in instigating the infringement or, a fortiori, because the parent company is involved in the infringement, but because they constitute a single undertaking for the purposes of Article 81 EC that the Commission is able to address a decision imposing fines to the parent company (Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraph 58).

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

105 In the specific case where a parent company has a 100 % shareholding in a subsidiary which has infringed the competition rules, the parent company is able to exercise decisive influence over the conduct of the subsidiary (see, to that effect, *Imperial*

Chemical Industries v *Commission*, paragraph 29 above, paragraphs 136 and 137) and there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary (see, to that effect, *AEG-Telefunken* v *Commission*, paragraph 29 above, paragraph 50, and *PVC II*, paragraph 29 above, paragraphs 961 and 984).

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

107 While it is true that at paragraphs 28 and 29 of *Stora Kopparbergs Bergslags* v *Commission*, paragraph 29 above, the Court of Justice referred not only to the fact that the parent company owned 100 % of the capital of the subsidiary but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the General Court had based its reasoning, and not to make the application of the presumption referred to at paragraph 105 above subject to the production of additional indicia relating to the actual exercise of influence by the parent company (Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 57).

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

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

110 According to settled case-law relating to Article 15(2) of Regulation No 17, the turnover referred to in those provisions concerns the overall turnover of the undertaking concerned (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 119; Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 367; and Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 533). That undertaking is the undertaking to which the infringement was attributed and which was therefore declared liable (Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 181, and Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 116).

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

112 It follows that the question which arises in this part of the plea is whether the Commission was justified in finding that, in the present case, the undertaking concerned consisted of the applicant and the company at the head of the group to which it belonged,

namely Dimon. If the answer to that question is in the affirmative, it leads to the conclusion, in the light of the principles recalled at paragraphs 109 to 111 above, that the Commission was correct, at recitals 442 and 446 to the contested decision, to take account of Dimon's consolidated turnover in 2003 when applying the limit of 10 % of turnover referred to above.

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

The tests applied by the Commission in the contested decision in order to impute to a parent company liability for the infringement committed by its subsidiary

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

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

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

117 In that regard, the Commission considered that it was not sufficient merely to find that the parent company was able to exercise decisive influence over the conduct of its subsidiary: it also had to show that that influence had in fact been exercised (see, in particular, recitals 18, 376, 384, 391, 392, 397, 399 and 400 to the contested decision).

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

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

120 The Commission sought to apply those same principles in the case of WWTE's parent companies in respect of the period before May 1998. Thus, initially, the Commission sought to show that those parent companies, together with WWTE's chairman and

two members of his family, had joint control of WWTE, thereby suggesting that those parent companies were in a position to exercise decisive influence over the conduct of that company (see recitals 388 to 391 to the contested decision). Relying on a number of factors set out at recital 391 to the contested decision, the Commission then endeavoured to establish that those parent companies did in fact exercise such influence over WWTE's conduct (see recitals 391, 392 and 400 to the contested decision).

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

122 However, in the case in point, in order to attribute liability for the infringement committed by subsidiaries to the parent companies in such a position, the Commission chose not to rely on that presumption alone, but to base its findings also on evidence designed to establish that those parent companies did in fact exercise decisive influence over their subsidiaries and, accordingly, to support that presumption (see, in particular, recitals 372, 375, 376 and 378 to the contested decision).

123 Thus, it is made expressly clear at recital 18 to the contested decision that, although the Commission did not hold Deltafina's ultimate and intermediate parent companies — Universal and Universal Leaf — liable for the unlawful conduct of their subsidiary, in spite of the fact that they wholly controlled Deltafina, it did not do so because it did not have enough evidence that those companies did in fact exercise decisive influence over that subsidiary. Recital 376 to the contested decision should also be understood in this way, even if it is drafted somewhat ambiguously. More specifically, while it is true that the Commission states at that recital that there is 'no indication' in its file 'of any material involvement of Universal … and Universal Leaf in the facts which are being considered in [the contested decision]', when read together with recital 18 to

the decision and in the context of that decision, that statement cannot be interpreted as meaning that the reason that the Commission did not hold those two parent companies — or any other parent company — liable was their lack of involvement in the infringement.

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

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

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

127 That can be inferred, in particular, from the second sentence of recital 378 to the contested decision, although it is stated therein that those additional elements confirm that Dimon was 'in a position' to exercise such influence (see paragraph 33 above). It is true that, as the Commission itself acknowledges in its reply to a written question put by the Court, that sentence might have been 'phrased in a clearer manner'. However, when read together with recitals 372 and 377 to the contested decision, and with the first sentence of recital 378 to that decision, it can be understood only in the sense described at paragraph 126 above.

128 Last, the Commission examined whether the arguments submitted by the subsidiaries concerned (and/or by their parent companies) in their replies to the statement of objections with the aim of establishing that they acted independently on the market could succeed (see, in particular, recitals 381 and 399 to the contested decision). Thus, the Commission rejected the arguments put forward by Dimon as inconclusive and observed, in particular, that 'the existence of a dedicated local management running its Spanish subsidiary [did] not rule out the possibility for Dimon to exercise decisive influence over the same subsidiary' (recital 381).

129 It should be pointed out that the Commission applied the method set out at paragraphs 115 to 117, 121 and 122 above not only with regard to the ultimate parent companies, but also with regard to the intermediate parent companies, as is demonstrated — in respect of those intermediaries — by the cases of Universal Leaf, Intabex, SCTC and TCLT.

130 It should be added that that method — without prejudice to the question as to whether it was correctly applied in the case of the applicant (which will be considered below) — is entirely consistent with the principles laid down in this area by the case-law and restated at paragraphs 99 to 108 above.

131 It is true that, this being the specific case where a parent company has a 100 % shareholding in a subsidiary which has infringed the competition rules, the Commission did not rely solely on the presumption affirmed in the case-law (see paragraphs 105 and 106 above) in order to show that the parent company did in fact exercise decisive influence over the commercial policy of the subsidiary, but also took into account other factual elements tending to confirm that such influence was actually exercised. At the hearing, the Commission stated, in that context, that, in the light of the state of the relevant case-law at the time when the contested decision was adopted, it had chosen to show prudence.

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

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

breach of the principle of non-discrimination, as long as the principles of liability are consistently applied'.

The existence of a single economic entity between the applicant and Dimon

134 It is appropriate to examine whether the Commission correctly applied the tests set out at paragraphs 115 to 117, 121 and 122 above in order to conclude that the applicant and Dimon constituted a single economic unit from the second half of 1997 and, accordingly, to hold Dimon jointly and severally liable for the infringement and for payment of the fine, and also to include it among the addressees of the contested decision.

135 It is common ground that, during the period from 18 November 1997 until the date of adoption of the contested decision, Dimon held a 100 % shareholding in the applicant through Intabex. It cannot therefore be contested that, throughout that period, Dimon was in a position to exercise decisive influence over the applicant's conduct (see paragraph 105 above).

136 It is therefore necessary to ascertain whether, as regards that period, the condition relating to the actual exercise of decisive influence by Dimon was also satisfied, as the Commission contends.

137 In that regard, it must be recalled that, in the contested decision, in the case of the subsidiaries wholly owned by their parent companies, the Commission chose not merely to rely on the presumption referred to at paragraphs 105, 106 and 121 above in order to attribute to them liability for the infringement committed by those subsidiaries, but also to take account of additional evidence demonstrating that decisive influence was in fact exercised (see paragraphs 122 to 127 above).

138 It is therefore appropriate to examine whether the factors relied on by the Commission in the contested decision, together with the fact that Dimon owned all the applicant's capital, establish to the requisite legal standard that, during the relevant period, Dimon did in fact exercise decisive influence over the applicant's conduct. Those factors are set out at recital 379 and footnotes 303 to 305 to the contested decision. They essentially concern various reports and letters from the applicant which, according to the Commission, were intended for Dimon.

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

— The 'activity reports' and 'field reports'

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

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

142 Next, it should be noted that it is clear from the file that the reports in question were drawn up by Mr B. and that, as the applicant itself observes, they were addressed to the members of the applicant's board of directors.

143 On this last point, it must be pointed out that, on the same day that it acquired a 100 % shareholding in the applicant, Dimon — acting through its wholly-owned subsidiary, Intabex, whose involvement in the applicant was purely financial — replaced three of the four members of the applicant's board, in particular appointing to that board two persons (Mr G. and Mr T.) who were then already carrying out functions within other companies in the Dimon group. Thus, at that time, Mr G. was also executive director of Compañia de Filipinas, SA, a subsidiary of Intabex whose headquarters were in Spain and which was active in the production of black tobacco, and Mr T. was also employed by Dimon International Services and was a member of the board of that company (until August 1998).

144 In that context, the importance of Mr T.'s functions within the Dimon group should be particularly stressed. Not only was he a member of the applicant's board throughout the period of the infringement and a member of the board of Dimon International Services until August 1998, but he also sat on the board of two other companies in the Dimon group, namely Intabex Holding Worldwide, SA (from 1998 to 1999) and LRH Travel Ltd (until November 2000). Moreover, as the applicant stated in its reply to the

statement of objections, Mr T. was responsible for 'contribut[ing] to the integration of the Intabex group into the Dimon group'. Additionally, as will be explained in greater detail at paragraph 160 below, it is apparent from several letters in the file that the applicant consulted Mr T. on questions relating to its commercial activities, or sought his agreement before adopting certain important decisions. In the light of those factors, the Commission was justified in taking the view that Mr T. acted on behalf of the company at the head of the Dimon group, namely Dimon, and played the role of an intermediary between Dimon and the applicant. Mr T.'s alleged dispute with Dimon, which purportedly led Dimon to relieve him of his duties as a member of the board of Dimon International Services in August 1998, is not such as to call that conclusion into question. Indeed, after August 1998, Mr T. continued not only to be employed by that company, but also to be a member of the boards of the applicant, Intabex Holding Worldwide and LRH Travel.

145 The elements set out at paragraphs 142 to 144 above show that, through the members that it had appointed to the applicant's board and, in particular, Mr T., Dimon intended to supervise the applicant's activities and ensure that they would develop in accordance with the commercial policy of the Dimon group. Accordingly, even if, formally, the 'activity reports' and 'field reports' in question were sent to those members and not directly to Dimon itself, the Commission was justified in finding, at recital 380 to the contested decision, that Dimon was informed of the content of those reports and, in particular, of the unlawful practices in question. That finding is supported by the fact, noted at recital 379 to the contested decision, that those reports were systematically translated from Spanish into English, which is Dimon's working language.

146 Last, it must be observed that it is common ground that Dimon, which was indisputably in a position to exercise decisive influence over the applicant's conduct (see paragraphs 105 and 135 above), never raised any objections to the unlawful practices of

which it was aware or took any measures aimed at preventing its subsidiary's continuing involvement in the infringement, notwithstanding the risk of legal proceedings or claims for damages from third parties to which it was exposing itself by conducting itself in that manner (see also recital 382 to the contested decision). The Commission could properly infer from this that Dimon tacitly approved of that involvement and find that such conduct constituted further evidence that Dimon exercised decisive influence over the conduct of its subsidiary.

— The letters exchanged between the applicant and Dimon

147 The Commission also relies on a number of letters alleged to have been exchanged between the applicant and Dimon, and notes that some of them referred to the unlawful practices in question, others related to contracts for the processing of tobacco or the sale of processed tobacco that Dimon had concluded with Cetarsa and Deltafina, while others related in more general terms to the buying conditions for raw tobacco and the regulatory framework in Spain.

148 As regards the letters in the first category mentioned at paragraph 147 above, the Commission refers, at recital 379 to the contested decision, by way of example, to recitals 168 and 179 and footnotes 217 and 229 to that decision.

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

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

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

151 Recital 179 to the contested decision refers to a report by Mr B. of 5 May 1998, which was addressed to Mr T., and a copy of which Mr B. had sent the previous day by fax to the other two members of the applicant's board. It should be noted that, in that report, which describes the progress of the 1998 campaign for the purchase of tobacco, it is stated in particular that '[the applicant] has made a major contribution to the firms' reaching a number of agreements on avoiding the price war that characterised [the previous] year'; that 'the prices have been negotiated with the unions and the [groups of tobacco producers]'; that, 'for the first time … war between the firms [has been avoided] and each of them has been able to buy the quantities it wished'; and that 'the negotiations with [those groups] have been difficult but all the firms maintained their points of view in a serious manner and in a spirit of cooperation'. It is also explained in that report that the applicant and WWTE agreed to buy the same quantities of tobacco as in the previous year and that the processors agreed to pay advances to the producer groups of ESP 35 per kg for the Virginia and ESP 45 per kg for the Burley varieties. Last, reference is made to the 'desirability of other agreements between the

processors in the future'. In the light of those elements, it cannot be disputed that the report of 5 May 1998 was referring to the unlawful practices in question.

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

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

154 Next, as in the case of the 'activity reports' and 'field reports' referred to above, the Court considers that the Commission was justified in taking the view, at recital 380 to the contested decision, that Dimon was informed of the content of the documents mentioned at paragraphs 150 to 153 above and, therefore, of the unlawful practices in question, even if, formally, they were not addressed to it.

155 Thus, as regards the report dated 5 May 1998 that Mr B. had sent to Mr T. (see paragraph 151 above), it has already been explained at paragraph 144 above that Mr T. acted on behalf of Dimon and played the role of intermediary between Dimon and the applicant. As regards the fax of 14 December 1998 (see paragraph 150 above), which had been sent to Dimon International, it is sufficient to observe that, in the reply, the applicant itself stated that, by that fax, it meant to communicate certain

information to 'its new shareholder'. That new shareholder was in fact Dimon, not Dimon International.

156 The emails of 30 October 2000 and 9 May 2001 (see paragraphs 152 and 153 above) had been sent to Mr S. Contrary to the applicant's contention, Mr S. was not simply an employee of Dimon International Services, but held a high-level position within the Dimon group, so that, as in the case of Mr T., the Commission was entitled to consider that he acted on behalf of the company at the head of that group, namely Dimon. Thus, in its reply of 18 March 2002 to a request for information from the Commission, the applicant stated that Mr S. carried out the duties of 'regional director of the Dimon group in Europe'. In its reply to the statement of objections and in its written pleadings, the applicant also stated that since 2000 Mr S. had 'held a post in the coordination of operations in Europe'. Certain information in the email of 9 May 2001 and in Mr S.'s reply further confirm the importance of Mr S.'s role within the Dimon group. Thus, in that email, Mr B. also informed Mr S. of a meeting that he had had with the chairman of Deltafina, on the fringes of the meeting held at Anetab's headquarters, in order to discuss two issues which Mr B. described as 'very important' and indicated to Mr S. that the chairman of Deltafina would telephone Mr S. as soon as possible in order to secure agreement on that issue. By email of the same date, Mr S. replied to Mr B. that he had just spoken to the chairman of Deltafina and that they had agreed to meet very soon. Mr S. also advised Mr B. that he agreed to Mr B.'s proposals concerning the abovementioned issues.

157 Last, the Commission could reasonably infer from the lack of any reaction by Dimon to the applicant's involvement in the infringement, in spite of having thus been informed of it, that it tacitly approved of its subsidiary's unlawful conduct, and was entitled to consider that such conduct constituted further evidence that Dimon exercised decisive influence over the conduct of its subsidiary (see paragraph 146 above).

158 The correspondence in the second of the categories mentioned at paragraph 147 above is identified at footnote 304 to the contested decision. It essentially consists of faxes or emails between Mr B., on the one hand, and Mr T. or Mr S., on the other hand. For the reasons already set out at paragraphs 144 and 156 above, Mr T. and Mr S. must be regarded as having acted on behalf of Dimon.

159 Some of the correspondence concerns a contract dating from September 1998 and renegotiated in 2001, under the terms of which some of the applicant's tobacco processing operations were subcontracted to Cetarsa. It is clear from that correspondence that that contract was concluded by Mr B. in the name and on behalf of Dimon, and that Dimon, through Mr T. and Mr S., in fact exercised decisive influence over the negotiation of that contract.

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

161 Similarly, the Court observes that, in an email of 3 April 2001, Mr B. informed Mr S. of the progress made in the renegotiation of the contract referred to at paragraph 160 above, expressing the fear that Cetarsa would require the same conditions from Dimon as it had agreed with Mr M., the chairman of Deltafina, in the context of a contract concluded in parallel with Deltafina on behalf of Universal and therefore requesting Mr S. to contact Mr M. It is apparent from an email of the following day from Mr S. to Mr B. that Mr S. did in fact attempt to contact Mr M.

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

163 Other correspondence in the second of the categories mentioned at paragraph 147 above concerns a contract by which Deltafina was to purchase a large quantity of processed tobacco from the applicant. Thus, in a fax of 14 September 1998, Mr T. asked Mr B. to clarify certain prices and other terms agreed in that contract. By fax of the same date, Mr B. provided those clarifications to Mr T. Likewise, in the fax of 14 December 1998 referred to at paragraph 150 above, Mr B., as well as referring to the unlawful practices in question, replied to a question that Mr D. — who was a member of Dimon's board of directors — had put to him regarding the implementation of that contract. Last, the email of 9 May 2001 referred to at paragraphs 153 and 156 above establishes not only that Dimon was informed of those practices, but also that it exercised influence over the commercial relations between the applicant and Deltafina.

164 The applicant's argument that the correspondence examined at paragraphs 158 to 163 above has no connection with purchases of raw tobacco is irrelevant. The independence of a subsidiary in relation to its parent company must not be assessed solely by reference to the subsidiary's activity in the area of the products concerned by the

infringement. As has already been pointed out at paragraph 102 above, in order to determine whether a subsidiary decides independently upon its own conduct on the market, account must be taken of all the relevant factors relating to the economic, organisational and legal links between the subsidiary and the parent company, which may vary from case to case and cannot therefore be exhaustively listed.

165 Last, as regards the third type of correspondence mentioned at paragraph 147 above, that correspondence is listed at footnote 305 to the contested decision.

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

— The arguments put forward by the applicant in order to show that it acted autonomously on the market

167 First of all, the Court points out that the applicant bases a large part of its reasoning on the argument that the decisive influence that a parent company must exercise in order to have liability attributed to it for the infringement committed by its subsidiary must relate to activities which are directly linked to that infringement, in this instance the purchase of raw tobacco. However, for the reasons set out at paragraphs 102 and 164 above, that argument cannot be accepted.

168 Thus, the applicant's assertion that no company in the Dimon group exercised control over its raw tobacco purchasing activities, apart from the fact that — as is apparent from the following developments — it is not true, cannot suffice to establish that it acted autonomously on the market during the period following its acquisition by Dimon. The same applies to its assertion that it did not consult either Dimon or any other company in the Dimon group about its raw tobacco purchasing policy. Those assertions are even less conclusive since, as is apparent from the documents examined at paragraphs 158 to 163 above, Dimon, through Mr T. or Mr S., actively intervened in other aspects of the applicant's commercial policy, namely the subcontracting of certain raw tobacco processing operations and the sale of processed tobacco.

169 The Court must also reject at the outset the applicant's argument that the Commission has not sufficiently demonstrated that Dimon — or any other company in the Dimon group — instructed the applicant to commit the infringement or was directly involved in the infringement. As has already been stated at paragraph 103 above, it is not because of a relationship between the parent company and its subsidiary in instigating the infringement or, a fortiori, because the parent company is involved in the infringement, but because they constitute a single undertaking for the purposes of Article 81 EC that the Commission is able to address a decision imposing fines to the parent company.

170 Next, as regards the argument based on the fact that when Intabex acquired the applicant it decided to replace three of the four members of the applicant's board, far from undermining the Commission's theory, that argument tends rather to show, as already explained at paragraph 145 above, that Dimon had no intention of granting the applicant full autonomy, but intended to supervise its activities and ensure that they developed in accordance with the Dimon group's commercial policy. In that regard, it must be borne in mind, first, that Intabex was wholly controlled by Dimon and held only a purely financial shareholding in the applicant and, second, that at the time of their appointment by Intabex two of the new members of the applicant's

board already carried out functions within other companies in the Dimon group (see paragraph 143 above).

171 As for the fact that when the applicant was acquired by Intabex Mr B. was retained in his post as chairman of the board and its former purchasing team remained in place, it does not in itself demonstrate that the applicant acted autonomously on the market, even with respect only to its raw tobacco purchasing activities. On the one hand, as the applicant stated in its reply to the statement of objections, that situation was the result of a choice made by Dimon and not by the applicant; on the other hand, it is quite normal that where an international group acquires the entire share capital of a company active on a particular national market on which the group has never before been present — as was the case for the Dimon group — it should retain in place some of the former management of that company and also the team that was previously responsible for purchasing.

172 Last, while it is true that the management contract confers extensive powers on Mr B. with respect to the management of the applicant and, in particular, to purchases of raw tobacco, the fact remains that it provides expressly in Article 1(1) that Mr B. is required to comply, inter alia, with 'the methods and procedures imposed on him by the board of directors [of the applicant]'. Moreover, Article 1(2) of the management contract obliges Mr B. to 'inform [the board of directors] regularly and in detail about the development of the company's activities and [to] prepare and submit on the dates and in the format indicated to him such reports as the board of directors might request'. It is therefore clear that, in carrying out his duties, including those relating to purchases of raw tobacco, Mr B. remained subject to the control of the applicant's board and to the instructions that that board might issue to him. When questioned on that matter by the Court at the hearing, moreover, the applicant expressly acknowledged that, as was the case for any other company in Spain, its board had the power to reject, amend or annul decisions of its managing director. The fact, on the assumption that it is established, that, in practice, the board never did so and never

laid down 'methods' or 'procedures' such as those referred to above does not alter the fact that, contrary to the applicant's contention, Mr B. did not enjoy complete freedom of action in the management of the company or even in respect of the company's raw tobacco purchasing policy. It should be added that the conferring of powers on Mr B. in the management contract was by no means exceptional and did not make the applicant different from other companies incorporated under Spanish law, contrary to the applicant's suggestion. Indeed, it is quite common for the board of a company not to concern itself with the day-to-day management activities of the company.

173 In the light of the finding at paragraph 145 above that Dimon supervised the applicant's activities through the members that it had appointed to the applicant's board and, in particular, Mr T., the arguments based on the management contract and the powers conferred on Mr B. are unconvincing. Likewise, as regards, more generally, the fact that the applicant has its own local management, the Court shares the Commission's view that it does not prove, in itself, that the applicant decides upon its conduct on the market independently of its parent company. Thus, although, admittedly, the applicant was in such a situation in the present case, the fact remains that it acted under Dimon's supervision and that Dimon even had an active role in certain aspects of the applicant's commercial policy (see, in particular, paragraphs 158 to 163 above).

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

175 In the light of the principles recalled at paragraphs 109 to 111 above, the Court concludes that the Commission was also correct to rely on Dimon's consolidated turnover in 2003, the year preceding that of the adoption of the contested decision, in order to calculate the upper limit of 10 % laid down in Article 23(2) of Regulation No 1/2003.

176 The first part of the first plea must therefore be rejected as unfounded.

2. *Third part, alleging breach of the principle of equal treatment and failure to state reasons*

(a) Arguments of the parties

177 In the first place, the applicant claims that it was only at the stage of the defence that the Commission, in breach of the obligation to state reasons, set out for the first time the reasons why Dimon should be held jointly and severally liable for the unlawful conduct in question. The applicant observes, more specifically, that the Commission did not rely in that regard either in the statement of objections or in the contested decision on the fact that Mr T. was one of the members of the applicant's board of directors and a 'senior manager' of Dimon, that he sent Dimon a copy of the reports which he received from Mr B. and that he ensured that Dimon effectively exercised decisive influence over the applicant.

178 In the second place, the applicant maintains that the Commission assessed on the basis of 'radically different' criteria the possible liability of the parent companies of Taes and Cetarsa and that of the applicant's parent company, thus failing to observe the principle of equal treatment.

179 The Commission contends that the third part of the first plea must be rejected as inadmissible on the ground that the two complaints of which it consists are new complaints.

180 In any event, the Commission maintains that the two complaints are unfounded.

(b) Findings of the Court

181 In the first place, as regards the complaint alleging breach of the principle of equal treatment, it is sufficient to state that this is a new plea, formulated for the first time at the stage of the reply, which is not based on matters of law or of fact which came to light in the course of the procedure. Consequently, it must be rejected as inadmissible, in accordance with Article 48(2) of the Rules of Procedure.

182 In the second place, as regards the complaint alleging failure to state reasons, it must be stated that this too was raised for the first time in the reply. However, that does not mean that the Court cannot examine it in the present case. In an action for annulment, a plea alleging failure to state or failure sufficiently to state the reasons on which a measure is based is a matter of public policy which may, and indeed must, be raised by the Union Court of its own motion and which, in consequence, may be invoked by the parties at any stage of the proceedings (see, to that effect, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 125).

183 According to settled case-law, the statement of reasons required under Article 253 EC must be appropriate to the measure in question and disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that 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 carry out its review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited, and *Hoek Loos* v *Commission*, paragraph 110 above, paragraph 58).

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

185 In the present case, it is apparent from the summary of the part of the contested decision relating to the addressees thereof, as set out at paragraphs 27 to 37 above, and from the findings made at paragraphs 114 to 129 above that, in that decision, the Commission provided an adequate statement of reasons as to why it had decided to attribute liability for the applicant's infringement to Dimon. The Commission thus set out, by reference to the case-law of the Court of Justice and of this Court, the principles that it intended to apply in order to define those addressees. More specifically, as regards Dimon, first of all, the Commission observed that, from the second half of 1997, that undertaking had held all the applicant's capital. The Commission then found that it was established that Dimon in fact exercised decisive influence over the applicant's conduct, relying in that regard not only on the presumption arising from ownership of all of the subsidiary's capital, but also on certain additional elements

supporting that presumption. Last, the Commission found that none of the arguments put forward by Dimon in its reply to the statement of objections supported a conclusion to the contrary.

186 Nor can the applicant seriously claim that it could not understand before perusing the Commission's defence that the Commission was of the view that Mr T. should be regarded as acting as an intermediary for Dimon. First, most of the documents expressly identified at footnotes 303 and 304 to the contested decision were addressed to Mr T. Second, both in its reply to the statement of objections and in the application, the applicant submitted detailed observations on Mr T.'s role and functions within the Dimon group, emphasising that he was not in a position to exercise decisive influence, on behalf of Dimon, on its subsidiary's conduct.

187 Therefore, the third part of the first plea must be rejected as inadmissible in part and unfounded in part.

3. *Second part, alleging infringement of Article 23(2) of Regulation No 1/2003 and breach of the principle of proportionality, with respect to the consequences of the extent of joint and several liability for payment of the fine*

(a) Arguments of the parties

188 In the second part of the first plea, which is put forward in the alternative, the applicant takes issue with the fact that when the Commission calculated the amount of its fine it drew no conclusions from its finding, set out at recital 386 to the contested

decision, that Dimon could not be held jointly and severally liable with the applicant for the infringement for the period before the second half of 1997. The applicant claims that that calculation ought to have drawn a distinction between the period preceding 18 November 1997, the date of its acquisition by Intabex, and the period after that date.

189 Thus, as regards, first, the first period, the applicant maintains that the Commission was not justified in applying a multiplier of 2 for the purposes of deterrence to the starting amount of its fine, since at that time it did not belong to a multinational and was not subject to Dimon's decisive influence. Furthermore, once the amount of the fine corresponding to the infringement committed in 1996 and 1997 has been calculated, it will still be necessary to ascertain that 'the maximum amount of the fine that can be imposed [on the applicant] … individually, under Article 23(2) of Regulation No 1/2003 (EUR 816 381, or 10 % of [its] turnover … for the business year 2003/2004) is not exceeded'.

190 Second, the applicant maintains that the amount of the fine corresponding to the second period ought to have been calculated after deduction of the amount of the fine imposed on the applicant and payable by the applicant alone for the first two years of the infringement. Furthermore, for the reasons set out in the context of the second plea, there was no need to apply a multiplier for deterrence.

191 The Commission contends that the second part of the plea must be rejected as unfounded.

(b) Findings of the Court

192 Even on the assumption that Dimon could not be held jointly and severally liable with the applicant for the infringement in question for the period before 18 November 1997, it must be held that that has no effect on the amount of the fine imposed on the applicant.

193 In that regard, it should be observed that, even though the applicant was actually acquired by Dimon, through the intermediary of Intabex, only on 18 November 1997, the fact none the less remains that the applicant is guilty of having participated in the processors' cartel — which constitutes a single and continuous infringement (see paragraph 21 above) — throughout the infringement period, namely from 13 March 1996. There was thus no reason to calculate a separate amount of its fine for the period before 18 November 1997 and for the period after that date and, accordingly, to impose on the applicant a fine made up of two separate amounts, one relating to each of those periods.

194 Nor does the circumstance on which the applicant relies have any impact on the application of the multiplier of 2 for the purposes of deterrence to the starting amount of the applicant's fine. As will be explained in greater detail below when the Court examines the second plea, the Commission relied — correctly — on the size and global resources of the undertaking concerned — namely, as demonstrated above when the Court examined the first part of the first plea, the economic entity consisting of the applicant and Dimon, the company at the head of the Dimon group — in 2003, the year preceding the year of adoption of the contested decision, when it decided to apply that coefficient. Therefore, the fact that before 18 November 1997 Dimon did not form one and the same economic entity with the applicant and could not therefore be held jointly and severally liable with the applicant for the infringement is wholly irrelevant.

195 The same applies to the maximum amount of 10 % laid down in Article 23(2) of Regulation No 1/2003, which was calculated on the basis of the global turnover achieved by the undertaking concerned during the business year preceding the adoption of the Commission's decision (see paragraphs 109 to 111 above). In the present case, since, as was demonstrated when the Court examined the first part of the first plea, the Commission was correct to take account of the consolidated turnover achieved by Dimon in 2003 for the purpose of calculating that maximum amount, it is wholly irrelevant that Dimon cannot be held jointly and severally liable for the infringement for the period before 18 November 1997.

196 The second part of the first plea must therefore be rejected as unfounded.

197 In the light of the foregoing considerations, the first plea cannot be upheld. Consequently, the claim seeking annulment in part of the contested decision must be rejected.

B — *Second plea, alleging breach of the principle of equal treatment*

1. *Arguments of the parties*

198 The applicant claims that the Commission breached the principle of equal treatment by applying a multiplier for deterrence to the starting amount of its fine but not to the starting amounts of the fines imposed on Taes and Deltafina.

199 The applicant maintains that the Commission relied on the fact that the applicant belongs to a multinational with considerable economic and financial strength in order to apply such a multiplier in its case. The use of the adverb '[m]oreover' in the final sentence of recital 422 to the contested decision (see paragraph 48 above) shows that the fact that the applicant supposedly acted under the decisive influence of its parent company is justification which was formulated in a purely ancillary manner.

200 The applicant observes that Taes and Deltafina belong to a group of companies whose economic and financial strength is far greater than that of the Dimon group. The starting amount of the fine imposed on each of those two companies therefore ought to have been increased for deterrence.

201 The applicant adds that, even if it should be accepted that the Commission could set a multiplier only by taking into consideration the turnovers of the undertakings held liable for the infringement, there would be a breach of the principle of equal treatment. It observes that the Commission did not take account of Deltafina's turnover in order to apply a multiplier to the starting amount of Taes's fine, even though Deltafina had also taken part in the infringement.

202 In the alternative, the applicant requests the Court to reduce the multiplier applied to the starting amount of its fine, on the ground that it is disproportionate by reference to that applied in WWTE's case.

203 In the light of the foregoing considerations, the applicant requests the Court to review the calculation of the amount of the fine imposed on it by annulling the multiplier or, in the alternative, reducing the rate of that multiplier.

204 The Commission denies having breached the principle of equal treatment by applying a multiplier to the starting amount of the fine determined for the applicant and not to the starting amount of the fine determined for Taes and for Deltafina.

2. *Findings of the Court*

205 It should be borne in mind that deterrence is one of the factors to be taken into account in calculating the amount of the fine. It is settled case-law that the fines imposed for infringements of Article 81 EC, as laid down in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003, are designed to penalise the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other economic operators from infringing, in future, the rules of competition law (Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 16).

206 The objective of deterrence is referred to, in particular, in the fourth paragraph of Section 1.A of the Guidelines, according to which it 'will … be necessary … to set the fine at a level which ensures that it has a sufficiently deterrent effect'.

207 It should also be borne in mind that the size and economic power of the undertaking concerned are factors that can be taken into account for the purposes of calculating the fine and, accordingly, of setting the multiplier designed to ensure that it has a deterrent effect (see *Showa Denko* v *Commission*, paragraph 205 above, paragraphs 16 and 29 and the case-law cited).

208 The fact that the size and global resources of the undertaking concerned are taken into consideration in order to ensure that the fine has sufficient deterrent effect is explained by the impact sought on that undertaking, and the sanction must not be negligible in the light, especially, of its financial capacity.

209 The Court of Justice has thus held that this Court was justified in taking the view that an undertaking, owing to its 'enormous' worldwide turnover by comparison with the turnovers of the other members of the cartel, could more readily raise the necessary funds to pay its fine, which, if the fine was to have a sufficiently deterrent effect, justified the application of a multiplier (*Showa Denko* v *Commission*, paragraph 205 above, paragraph 18). The Court of Justice reached that conclusion after observing that it had already emphasised the relevance of taking into account the global turnover of each undertaking forming part of a cartel in order to set the amount of the fine (see *Showa Denko* v *Commission*, paragraph 205 above, paragraph 17 and the case-law cited).

210 In the present case, the Commission applied a multiplier of 2 (an increase of 100 %) to the starting amount of the fine determined for the applicant and a multiplier of 1.5 (an increase of 50 %) to the starting amount of the fine determined for WWTE, relying on the size of the groups to which those two processors belonged and also on their 'comparative size vis-à-vis the other … processors' (recital 423 to the contested decision). In order to assess the size of those groups, the Commission took into consideration the consolidated turnover achieved in 2003 by the company at the head of each of those groups (same recital).

211 Those increases were, according to recital 422 to the contested decision, designed to ensure that the fine would have a sufficiently deterrent effect. The Commission considered that a starting amount of a fine merely reflecting the market position would not be sufficiently deterrent in the case of the applicant and WWTE. In that regard, it observed that, while those companies had relatively small market shares on the Spanish market for the purchase of raw tobacco, they none the less belonged to multinational groups 'of considerable economic and financial strength' and, '[m]

oreover, [they had] operated under the decisive influence of their respective parent companies' (same recital, second and third sentences).

212 The argument put forward by the applicant is both factually and legally flawed.

213 In the first place, contrary to the applicant's assertion, it was not merely the fact that it belongs to a group of companies with considerable economic and financial strength that led the Commission to increase the starting amount of its fine in order to ensure that it would have a sufficiently deterrent effect. While that increase was indeed intended to take account of the size and global resources of the Dimon group, the fact none the less remains that the Commission applied that increase solely because the applicant, in addition to belonging to that group, formed a single economic entity with the company at the head of that group or, in other words, one and the same undertaking for the purposes of Article 81 EC. It must be held that, in the light of the case-law referred to at paragraphs 99 to 103 above and recitals 377 to 386 to the contested decision, where the Commission sought to establish that the applicant and Dimon together constituted one and the same undertaking, the final two sentences of recital 422 to that decision (see paragraph 211 above) must be read together and can be understood only in that sense.

214 In the second place, where, as in the present case, the Commission uses, as criteria for the purpose of deciding to apply a multiplier for deterrent, the size and global resources of the undertaking concerned, the latter undertaking can encompass the parent company of the company that committed the infringement of the competition

rules only where it actually exercised decisive influence over the conduct of the company that committed the infringement.

215 The undertaking whose size and global resources are thus taken into account is necessarily the same as the undertaking within the meaning of Article 81 EC as defined in the case-law. As already stated at paragraph 208 above, the fact that those elements are taken into consideration in order to ensure that the fine has a sufficiently deterrent effect is to be explained by the impact sought on the undertaking on which the fine is imposed. The objective pursued is to ensure the effectiveness of the fine by adjusting the amount of the fine according to the global resources of that undertaking and its capacity to raise the funds necessary to pay it. Where the company that committed the infringement behaves autonomously on the market and therefore constitutes an undertaking on its own, that objective can logically, in the light of that autonomy, relate only to that company and not also to other companies in the group to which it belongs. If, in such a situation, the Commission were to take account of the size and economic strength of the group when deciding to apply a multiplier for deterrence, not only would the deterrent effect sought be applied in fact to an entity other than the undertaking responsible for the infringement, but, in addition, the fine might be rendered excessive, notably in the light of the financial capacity of that undertaking, which would result in a breach of the principle of proportionality.

216 In the third place, it should be borne in mind that, in accordance with settled case-law, the principle of equal treatment is breached only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (*Sermide*, paragraph 133 above, paragraph 28, and *BPB de Eendracht* v *Commission*, paragraph 133 above, paragraph 309).

217 In the present case, the applicant, on the one hand, and Taes and Deltafina, on the other, were not in comparable situations, since, unlike the parent companies of Taes and Deltafina, the applicant's parent company was held jointly and severally liable for the infringement committed by its subsidiary, as it effectively exercised decisive influence over the subsidiary's commercial policy (see recitals 18 and 375 to 386 to the contested decision and also paragraphs 32 to 36 above). In application of the principles set out at paragraphs 99 to 103 above, the applicant and Dimon were therefore regarded as forming together one and the same undertaking for the purposes of Article 81 EC whose size and global resources determined the application of a multiplier for deterrence.

218 For the same reasons, the applicant cannot take issue with the Commission for not having taken Deltafina's turnover into account when applying a multiplier to the starting amount of Taes's fine. The Commission did not at any time take the view that Deltafina was in a position to exercise decisive influence over its sister company Taes or, a fortiori, that it did in fact exercise such influence. As those two companies were not regarded as forming together a single economic entity, Deltafina's size and resources could not be taken into account for the purpose of deciding to apply a multiplier for deterrence to the starting amount of Taes's fine.

219 In the fourth place, it may be concluded from a mere comparison between the turnover achieved by Dimon in 2003, namely USD 1 271 700 000, and that achieved by SCC, WWTE's ultimate parent company, namely USD 993 716 000, that the multiplier of 2 applied in Dimon's case is not manifestly disproportionate by comparison with the multiplier of 1.5 applied in WWTE's case.

220 It follows from the foregoing considerations that the second plea must be rejected as unfounded and that, accordingly, it is not appropriate to cancel or reduce the multiplier applied for deterrence to the starting amount of the applicant's fine.

C — Third plea, alleging breach of the principle of the protection of legitimate expectations

1. *Arguments of the parties*

221 The applicant claims that it ceased to take part in the infringement as soon as the Commission intervened and takes issue with the Commission for having infringed its legitimate expectations by omitting to apply, in accordance with Section 3 of the Guidelines and the Commission's past decisions, that attenuating circumstance when determining the amount of the fine to be imposed on the applicant.

222 In the reply, the applicant claims that, while it is true that under Regulation No 1/2003 the Commission has a wide discretion in setting fines, that does not mean that it may depart from the rules which it has imposed on itself, in this instance the rules laid down in the Guidelines. The applicant acknowledges that the Commission is not required to grant an automatic reduction of the fine or to accept an attenuating circumstance, but submits that, on the contrary, when faced with indicia of such a circumstance it must take it into consideration and indicate in its decision the reasons why it considers that that circumstance does or does not justify a reduction of the fine.

223 The applicant maintains, moreover, that the Commission cannot claim that it is inappropriate to take the termination of an infringement as soon as the Commission intervenes into account where there has been a serious and deliberate infringement of the competition rules or where such termination of the infringement had a positive effect on the duration of the infringement.

224 In the light of the foregoing considerations, the applicant requests the Court to reduce the amount of the fine imposed on it.

225 The Commission disputes the applicant's arguments.

2. *Findings of the Court*

226 In the application, the applicant takes issue with the Commission for not having accepted as an attenuating circumstance in its case the fact, put forward in its reply to the statement of objections, that it had ceased the infringement as soon as the Commission intervened.

227 In that regard, it should be borne in mind that the Commission must, in principle, comply with its own Guidelines when setting fines. However, the Guidelines do not state that the Commission must always take account separately of each of the attenuating circumstances listed at Section 3 of the Guidelines and it is not obliged to grant an additional reduction on such grounds automatically; the appropriateness of any reduction of the fine to take account of attenuating circumstances must be assessed globally in the light of all the relevant circumstances. The adoption of the Guidelines has not rendered irrelevant the previous case-law under which the Commission has a

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

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

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

230 In the present case, the infringement had ceased on 10 August 2001, namely before the Commission's initial investigations on 3 October 2001. As is apparent from recital 432 to the contested decision, although the processors stated that their cartel had ceased to exist on 3 October 2001, the Commission took 10 August 2001 to be the date on which the infringement ended on the ground that the 'latest evidence' in its possession was a meeting held on 10 August 2001, mentioned at recital 260 to the

contested decision. The termination of the infringement cannot therefore constitute an attenuating circumstance for the purpose of determining the amount of the fine.

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

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

233 In the reply, the applicant puts forward a new complaint alleging that the Commission did not provide any explanation in the contested decision of its reasons for taking the view that it was not required to apply the alleged attenuating circumstance in question.

234 For the same reasons as those set out at paragraph 182 above, it must be held that the fact that this complaint was first raised by the applicant only at the stage of the reply does not have the consequence that the Court cannot examine it in the present case.

235 However, this complaint cannot succeed.

236 It has been held that although Article 253 EC requires the Commission to state the reasons for its decisions and to mention the facts forming the basis of the decision and the considerations which led it to adopt the decision, it does not require the Commission to discuss all the points of fact and of law dealt with during the administrative procedure (Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraphs 14 and 15, and Case T-319/94 *Fiskeby Board* v *Commission* [1998] ECR II-1331, paragraph 127). It has thus already been held that the Commission was not required to define its position on matters which were manifestly irrelevant or insignificant or plainly of secondary importance (Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraph 64). The same solution is applied where, as in the present case, the reason why a circumstance claimed by an applicant during the administrative procedure cannot be characterised as an attenuating circumstance can be readily understood (see, in that regard, paragraphs 229 to 232 above).

237 It follows from all the foregoing considerations that the third plea must be rejected as unfounded and that, accordingly, it is not appropriate to grant the applicant a further reduction in respect of the attenuating circumstance.

D — *Fourth plea, alleging breach of the Leniency Notice and also of the principles of proportionality, the protection of legitimate expectations and equal treatment*

1. *Arguments of the parties*

238 The applicant maintains that the Commission breached the Leniency Notice and also the principles of proportionality, the protection of legitimate expectations and equal treatment by granting it, in application of Section D(2) of that notice, a smaller reduction of its fine than that granted to WWTE, Cetarsa and Taes.

239 In the first place, the applicant submits that the Commission cannot justify that difference in treatment by claiming that the applicant contested certain facts described in the statement of objections and also the secret nature of the processors' agreements on prices.

240 In that regard, first, the applicant claims that in its reply to the statement of objections it merely shed light on certain facts presented imprecisely or incorrectly in the statement of objections. In particular, it did not at any time state that the agreements on maximum average prices concluded by the processors and the agreements on minimum average prices concluded by the producers' representatives neutralised each other. The applicant adds that the Hearing Officer himself stated in his final report that the statement of objections contained certain ambiguities and that the explanations given by the processors in their replies to the statement of objections and at the hearing had enabled the Commission to 'clarify the direction' taken by its draft decision on a number of points.

241 Second, the applicant claims that in its reply to the statement of objections it did not contest the secret nature of the agreements on maximum average prices 'in themselves'. It merely stated that the 'result' of the negotiations between the processors, that is to say, the maximum average price on which they agreed at the beginning of each campaign and which they proposed during the collective negotiations with the agricultural unions and producer groups, was necessarily known to the production sector. The applicant states that, in other words, 'it was referring to the public knowledge of the maximum average purchase price agreed between the processors at the beginning of the year, which, once proposed at the price negotiations with the [agricultural unions and producer groups] as the maximum amount at which the processors were prepared to purchase the tobacco, was necessarily bound to become a price known to the public'.

242 In the second place, the applicant claims that the Commission misapplied the Leniency Notice and breached the principle of proportionality.

243 In that regard, first, the applicant explains that the Commission incorrectly failed to apply in the applicant's case the second indent of Section D(2) of the Leniency Notice, claiming, at recital 454 to the contested decision, that the applicant had substantially contested certain facts mentioned in the statement of objections and refusing for that reason to grant the applicant a reduction of its fine on the basis of that provision.

244 Second, the applicant claims that it cooperated actively with the Commission immediately the latter carried out its inspections. It explains that the information and clarifications which it provided to the Commission enabled the Commission to understand the operation of the market and the particular conduct of the parties more readily and also to clarify certain essential aspects of the infringement. The applicant submits that the Commission therefore ought to have granted it, under the first indent of Section D(2) of the Leniency Notice, a percentage of reduction of the fine greater than 20 %.

245 In the third place, the applicant maintains that it was entitled to benefit from the same reduction of the fine as that granted to Taes, namely 40 %, as Taes did not communicate to the Commission any information having a higher value than that of the information which the applicant itself provided.

246 In the alternative, the applicant claims that it ought at least to have benefited from the same percentage reduction of its fine as Cetarsa and WWTE, namely 25 %, as the Commission did not properly understand the light which it had shed on the secret nature of the agreements on average prices.

247 The Commission contends that the fourth plea should be rejected as unfounded.

248 In the first place, the Commission disputes the applicant's assertion that in its reply to the statement of objections it merely explained some of the finer points of the facts set out in that statement. In reality, the applicant called into question certain important aspects of those facts. More specifically, it denied that the agreements relating to the (maximum) average delivery price concluded by the processors were secret and maintained that those agreements did not go further than the agreements concluded by the producers' representatives.

249 In the second place, the Commission claims that it properly applied Section D(2) of the Leniency Notice and did not breach the principle of proportionality.

250 In the third place, the Commission denies having breached the principle of equal treatment by granting Taes, Cetarsa and WWTE a higher percentage of reduction of the amount of the fine than that granted to the applicant. It observes that the information communicated to it by Taes enabled it, in particular, to establish that Deltafina had participated in the restrictive practices in question and that the applicant did not

provide any relevant new elements, but at most 'details relating to elements that were already known'. The Commission adds that Taes, Cetarsa and WWTE, unlike the applicant, did not deny the secret nature of the agreements relating to the (maximum) average delivery price concluded by the processors. Last, Taes, unlike the applicant, did not call into question certain other facts set out in the statement of objections.

2. *Findings of the Court*

251 Before examining the various arguments put forward by the applicant, it is appropriate to set out some general considerations.

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

253 In order to justify the reduction of a fine for cooperation, the conduct of an undertaking must facilitate the Commission's task of finding and bringing to an end infringements of the competition rules (see *JFE Engineering and Others* v *Commission*, paragraph 110 above, paragraph 499 and the case-law cited) and reveal a true spirit of cooperation (*Dansk Rørindustri and Others* v *Commission*, paragraph 99 above, paragraphs 395 and 396).

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

255 Section D of the Leniency Notice, headed 'Significant reduction in a fine', provides as follows:

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

2. Such cases may include the following:

— before a statement of objections is sent, it provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement,

— after receiving a statement of objections, it informs the Commission that it does not substantially contest the facts on which the Commission bases its objections.'

256 In the present case, it should be observed that it is common ground that, in accordance with the terms of recital 450 to the contested decision, the applicant did not satisfy the conditions for the application of Sections B and C of the Leniency Notice, so that its conduct had to be assessed by reference to Section D of that notice.

257 The various arguments which the applicant raises in the context of the present plea may be divided into two parts. The first part concerns the non-application to the applicant of the second indent of Section D(2) of the Leniency Notice, while the second part deals with the quality of the cooperation provided by the applicant by comparison with that provided by Taes, Cetarsa and WWTE.

(a) The non-application to the applicant of the second indent of Section D(2) of the Leniency Notice

258 At recital 454 to the contested decision, the Commission granted the applicant a reduction of 20% of its fine on the sole basis of the first indent of Section D(2) of the Leniency Notice. It is clear upon reading that recital together with recital 453 to the contested decision that for two reasons the Commission refused to grant the applicant the benefit of the second indent of that section, in spite of the fact that the applicant had stated generally that it did not substantially contest the facts on which the charges against it were based.

259 First, one of the applicant's assertions did not correspond with the reality of the facts, namely the assertion that the processors' agreements on (maximum) average delivery prices and the agreements entered into at the same time by the producers and processors on the minimum average prices by producer group were identical and that, consequently, the potential anti-competitive effects of the processors' and producers' conduct neutralised each other. The Commission referred, in that regard, to pages 18 to 45 of the applicant's reply to the statement of objections.

260 It must be pointed out that the abovementioned pages of the applicant's reply to the statement of objections contain no such assertion. Furthermore, when requested, in the context of the measures of organisation of procedure, to identify the passages in that reply in which that assertion appears, the Commission admitted that the assertion was not expressly made, but that it emerged implicitly from certain arguments put forward by the applicant in that reply. At the hearing, in answer to a question put by the Court on that point, the Commission reiterated that explanation.

261 Even on the assumption that the Commission could rely on a mere implicit assertion to establish that an undertaking had substantially contested the facts within the meaning of the second indent of Section D(2) of the Leniency Notice, in the present case it cannot be inferred from the arguments to which the Commission refers that the applicant claimed that the two categories of agreements referred to at paragraph 259 above were identical and that the potential anti-competitive effects of the processors' and producers' conduct neutralised each other. By those arguments, the applicant merely intended to express the opinion that, even if the processors' agreements on (maximum) average delivery prices had not existed, competition would not have been perfect on the market, since, for their part, the agricultural unions and producer groups agreed between themselves average selling prices for raw tobacco, which they then negotiated collectively with the processors. In any event, such an opinion relating to the effects of a cartel on the market cannot reasonably be assimilated to 'substantially contest[ing] the facts' within the meaning of the abovementioned provision (see, to that effect, Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 366). It should be noted, in particular, that by its arguments the applicant did not call into question the actual existence of the agreements concerned. It is appropriate to add that a number of the explanations provided by the applicant at pages 18 to 45 of its reply to the statement of objections were expressly taken into account in the contested decision (see, in particular, recitals 75, 82 and 201).

262 Second, the applicant is alleged to have denied the secret nature of the agreements on the (maximum) average delivery price entered into by the processors.

263 In that regard, it should be stated that in its reply to the statement of objections the applicant unambiguously defended such a point of view. Thus, at page 8 of its reply, it stated, inter alia, that 'the [processors] [had] not at any time adopted secret agreements on average prices outside the collective negotiations organised with the negotiation platform of the production sector'. The explanation which the applicant attempts to give of that statement in its written pleadings (see paragraph 241 above) is based on a purely artificial distinction and is unconvincing.

264 As that statement does not correspond in any way with reality and as the fact that the processors' cartel had a secret aspect assumed great importance in the structure of the contested decision, the Commission did not make a manifest error of assessment when it considered that, in making that statement, the applicant had substantially contested the facts within the meaning of the second indent of Section D(2) of the Leniency Notice.

(b) The quality of the cooperation provided by the applicant by comparison with that provided by Taes, Cetarsa and WWTE

265 In the first place, the applicant cannot claim that it ought to have been granted, on the basis of Section D(2) of the Leniency Notice, the same rate of reduction of its fine as that granted to Taes.

266 First, as regards the application of the second indent of Section D(2), Taes, unlike the applicant, had not in any way substantially contested the facts.

267 Second, as regards the application of the first indent of Section D(2), it is clear from the file that the cooperation provided by Taes was of higher quality and greater use than that provided by the applicant. Thus, although the information provided by the applicant was useful, to a large degree it merely confirmed or clarified elements which the Commission already had in its possession and therefore had little added value, whereas Taes had also provided new and decisive elements which enabled the Commission to establish Deltafina's liability for the commission of the infringement.

268 In that context, the applicant cannot validly rely — as it did in the application — on the answers which it provided to the requests for information which the Commission had sent it on the basis of Article 11 of Regulation No 17. In fact, documents supplied to the Commission in response to a request for information are supplied under a legal obligation and cannot be taken into account under the Leniency Notice even if they may serve to establish, as against the undertaking which supplies them or as against a different undertaking, the existence of anti-competitive conduct (Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraph 111).

269 Nor, in the second place, can the applicant claim the same rate of reduction of the fine as that granted to Cetarsa and WWTE. Unlike the applicant, the latter undertakings had not denied the secret nature of the agreements on the (maximum) average delivery price concluded by the processors. It should also be observed that although the Commission, in the contested decision, had taken issue with Cetarsa and WWTE for having put forward in their replies to the statement of objections the same assertion as that set out at paragraph 259 above, none the less, as in the present case, the Court considered, in its judgments of 3 February 2011 in Case T-33/05 *Cetarsa* v

Commission, not published in the ECR, paragraph 271, and of 8 March 2011 in Case T-37/05 *World Wide Tobacco España* v *Commission*, not published in the ECR, paragraph 197, that in doing so the Commission had made a manifest error of assessment.

270 It follows from the foregoing that the fourth plea must be rejected as unfounded, save in so far as it concerns the assertion, referred to at paragraph 259 above, which the Commission incorrectly ascribed to the applicant.

E — *Determination of the final amount of the fine*

271 In those circumstances, it is for the Court to set an appropriate rate of reduction. In the exercise of its unlimited jurisdiction, the Court considers it appropriate to grant the applicant, for its cooperation, an additional reduction of 5 %, over and above the reduction of 20 % already granted. Thus, it is appropriate to apply a reduction of 25 % to the amount of the fine after application of the maximum amount of 10 % of turnover, namely EUR 3 240 000, which results in the final amount of the fine imposed being set at EUR 2 430 000.

Costs

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

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

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Sets the fine imposed on Agroexpansión, SA, in Article 3 of Commission Decision C(2004) 4030 final of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2 — Raw tobacco — Spain) at EUR 2 430 000;**

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

3. **Orders Agroexpansión to bear nine tenths of its own costs and to pay nine tenths of the costs incurred by the Commission and the Commission to bear one tenth of its own costs and to pay one tenth of the costs incurred by the applicant.**

Czúcz Labucka O'Higgins

Delivered in open court in Luxembourg on 12 October 2011.

[Signatures]

Table of contents

Background to the case ..... II - 7013

A — Applicant and administrative procedure ..... II - 7013

B — Contested decision ..... II - 7016

C — Addressees of the contested decision ..... II - 7018

D — Determination of the amounts of the fines ..... II - 7023

1. Starting amounts of the fines ..... II - 7024

2. Basic amounts of the fines ..... II - 7027

3. Aggravating and attenuating circumstances ..... II - 7028

4. The maximum limit of the fine laid down in Article 23(2) of Regulation No 1/2003 ..... II - 7029

5. Application of the Leniency Notice ..... II - 7030

6. Final amounts of the fines ..... II - 7032

Procedure and forms of order sought ..... II - 7033

Law ..... II - 7035

A — First plea, alleging infringement of Article 23(2) of Regulation No 1/2003, breach of the principles of proportionality and equal treatment and failure to state reasons ..... II - 7036

1. First part, alleging infringement of Article 23(2) of Regulation No 1/2003 and breach of the principle of proportionality with respect to the existence of joint and several liability for payment of the fine ..... II - 7037

(a) Arguments of the parties ..... II - 7037

(b) Findings of the Court ..... II - 7044

The tests applied by the Commission in the contested decision in order to impute to a parent company liability for the infringement committed by its subsidiary ..... II - 7048

The existence of a single economic entity between the applicant and Dimon ..... II - 7054

— The 'activity reports' and 'field reports' ..... II - 7055

— The letters exchanged between the applicant and Dimon .. II - 7058

— The arguments put forward by the applicant in order to show that it acted autonomously on the market ..... II - 7058

2. Third part, alleging breach of the principle of equal treatment and failure to state reasons ..... II - 7068

a) Arguments of the parties ..... II - 7068

b) Findings of the Court ..... II - 7069

3. Second part, alleging infringement of Article 23(2) of Regulation No 1/2003 and breach of the principle of proportionality, with respect to the consequences of the extent of joint and several liability for payment of the fine ..... II - 7071

(a) Arguments of the parties ..... II - 7071

(b) Findings of the Court ..... II - 7073

B — Second plea, alleging breach of the principle of equal treatment ..... II - 7074

1. Arguments of the parties ..... II - 7074

2. Findings of the Court ..... II - 7076

C — Third plea, alleging breach of the principle of the protection of legitimate expectations ..... II - 7081

1. Arguments of the parties ..... II - 7081

2. Findings of the Court ..... II - 7082

D — Fourth plea, alleging breach of the Leniency Notice and also of the principles of proportionality, the protection of legitimate expectations and equal treatment II - 7086

1. Arguments of the parties ..... II - 7086

2. Findings of the Court ..... II - 7089

(a) The non-application to the applicant of the second indent of Section D(2) of the Leniency Notice ..... II - 7091

(b) The quality of the cooperation provided by the applicant by comparison with that provided by Taes, Cetarsa and WWTE ..... II - 7093

E — Determination of the final amount of the fine ..... II - 7095

Costs ..... II - 7095