JUDGMENT OF THE GENERAL COURT (Third Chamber)

9 September 2011 *

In Case T-25/06,

Alliance One International, Inc., established in Danville, Virginia (United States), represented by C. Osti and A. Prastaro, lawyers,

applicant,

v

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

defendant,

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

* Language of the case: English.

THE GENERAL COURT (Third Chamber),

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

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 28 September 2010,

gives the following

Judgment

Background to the dispute

1 The applicant, Alliance One International, Inc. ('Alliance One'), is an American company, established in the United States, and is the head of a group resulting from the merger of Dimon Inc. ('Dimon Inc.') group and Standard Commercial Corp. ('SCC') completed on 13 May 2005, after the infringement had come to an end.

2 During the infringement period, Dimon Italia Srl and Transcatab SpA, two of the four main raw tobacco processors established in Italy ('the processors'), were wholly-owned subsidiaries of, respectively, Dimon Inc. and SCC, to which Alliance One is the legal successor.

A — *Administrative procedure*

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

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

5 On 4 April 2002 the Commission received an application from Dimon Italia for immunity from fines under point 8 of the Leniency Notice and, in the alternative, an application for a reduction in any fine, under points 20 to 27 of the Leniency Notice, and also an application on the same basis from Transcatab for a reduction in any fine.

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

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

8 On 25 February 2004, the Commission adopted a statement of objections, which it addressed to ten undertakings or associations, including the processors and the parent companies of certain of them. The addressees of the statement of objections had access to the administrative file, a CD-ROM copy of which was sent to them by the Commission. They submitted written observations in response to the Commission's objections. An administrative hearing was then held on 22 June 2004.

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

10 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 Decision C (2005) 4012 final of 20 October 2005 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.281/B.2 — Raw tobacco — Italy) ('the contested decision'), a summary of which was published in the *Official Journal of the European Union* of 13 February 2006 (OJ 2006 L 353, p. 45).

B — *Contested decision*

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

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

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

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

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

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

16 In Article 2 of the contested decision, the Commission imposed fines on the undertakings referred to in paragraph 15 above and on APTI and Unitab (see paragraph 54 below).

1. *Addressees of the contested decision*

17 Section 2.4 of the contested decision deals with the determination of the addressees of that decision.

18 The Commission referred, by way of a preliminary point, to the settled case-law that the term 'undertaking' must be understood in competition law as designating an economic unit for the purpose of the subject-matter of the agreement in question even if, in law, that economic unit consists of several persons, natural or legal (recital 325 of the contested decision).

19 Next, the Commission stated that it was established that Deltafina, Dimon Italia (subsequently renamed Mindo), Transcatab and Romana Tabacchi, as well as APTI and Unitab, had participated, during the respective periods of the infringements, directly in the infringements found and that, consequently, each of those undertakings and associations was an addressee of the contested decision (recital 327 of the contested decision).

20 The Commission continued its analysis by examining the question of the attributability of the unlawful conduct of certain subsidiaries (Deltafina, Dimon Italia and Transcatab) to their respective parent companies. In that regard, the Commission observed that, during the infringement period, Deltafina was a wholly-owned subsidiary of Universal, Dimon Italia, a wholly-owned subsidiary of Dimon Inc. and Transcatab a wholly-owned subsidiary of SCC (recital 328 of the contested decision).

21 The Commission stated inter alia that, according to case-law, a parent company could be held liable for the unlawful conduct of its subsidiary where the subsidiary is not capable of determining its conduct on the market independently. In this respect, the Commission recalled that it could be presumed that where a parent company holds the entire share capital of a subsidiary it exercises decisive influence over the conduct of that subsidiary when the subsidiary infringes Article 81(1) EC (recitals 329 and 330 of the contested decision).

22 In recital 331 of the contested decision, the Commission concluded that, in the case of Deltafina, Dimon Italia and Transcatab, it could be legitimately presumed that they '[lacked] autonomy' given that they were or, in the case of Dimon Italia, had been wholly owned by their respective parent companies.

23 Rejecting the argument, put forward by those companies in their replies to the statement of objections, that further elements are necessary, other than that of 100% ownership, in order to indicate the exercise of a decisive influence, the Commission stated that any presumption of such influence in the case of a wholly-owned subsidiary remained rebuttable. Proof to the contrary must be adduced by the party wishing to rebut such a presumption in the form of 'solid evidence', which cannot be merely general assertions unsupported by convincing evidence (recital 334 of the contested decision).

24 In that regard, it examined, in turn, the arguments submitted by the parent companies to which the contested decision was addressed.

25 The Commission rejected, first of all, the general argument put forward by the parent companies concerned that the local management was wholly responsible for the activities of their respective subsidiaries. The Commission maintains that the fact that Dimon Inc. and SCC left the existing management in place when they wholly acquired their respective subsidiaries cannot preclude their having exercised decisive influence over their respective Italian subsidiaries, since it is common practice to entrust the day-to-day business to the local management of a wholly-owned subsidiary (recital 338 of the contested decision).

26 In the Commission's submission, none of those undertakings demonstrated, in general, any specific feature within its group which would have rendered the activities of its subsidiary significantly independent of the parent company's influence (recital 339 of the contested decision).

27 In that regard, the Commission examined the solidity of the economic links between Deltafina, Dimon Italia and Transcatab and their respective parent companies, which, it found, show that the Italian subsidiaries constituted an economic unit with the rest of their group. The Commission noted in that regard that the groups in question were the largest tobacco leaf merchants in the world and that they often acquired and marketed the tobacco bought by their Italian subsidiaries (recital 340 of the contested decision).

28 With respect to Dimon Inc. and SCC, the Commission noted that, before they acquired the entire capital of Dimon Italia and Transcatab, those two undertakings already controlled the latter companies jointly with their respective Italian partners. The fact that they had 'not change[d] the management' of the subsidiaries after acquiring them could not therefore be regarded as evidence that they had not exercised any influence over the management after becoming sole owners. The Commission further stated that, in the case of Dimon Italia, the board of directors consisted solely of representatives of the Dimon group and that one of them was fully involved in the day-to-day management of the undertaking. As concerns the delegation of executive

powers to the chief executive officer of Transcatab, the Commission stated that it had no information enabling it to find that he was not appointed by SCC, like the other members of the board (recitals 341 and 342 of the contested decision).

29 The Commission then rejected Dimon Inc.'s and SCC's argument that there were no lines of communication between them and their subsidiaries (recitals 343 to 346 of the contested decision).

30 First, the Commission examined possible lines of communication between Transcatab and SCC. It observed in that regard that Transcatab's activities had been regarded as being the activities of Standard Commercial Tobacco Co., Inc. (SCTC), a holding company within the SCC group and wholly owned by SCC, and that they had been analysed within the scope of the group's activities, including the SCC group's sales to cigarette manufacturers. The Commission inferred that the results of Transcatab's activities had been reported to higher levels within the group and had then been consolidated (recital 344 of the contested decision).

31 Second, the Commission examined the situation of Dimon Italia and Dimon Inc. It observed that the subsidiary drafted periodic reports containing confidential information on its strategy and results, reports which were addressed to companies within the group which bought from Dimon Italia. The Commission also observed that other documents indicated direct intervention by the management of Dimon International Inc. and other companies in the Dimon group in the activities of Dimon Italia. The Commission added that Dimon Inc. was often referred to as 'Dimon International Inc', which signifies that it actually operated at the highest level in the group on behalf of the parent company. The Commission concluded that there could be no doubt that there were lines of communication between Dimon Italia and Dimon Inc., even though they communicated through Dimon International (recital 345 of the contested decision).

32 The Commission rejected the argument that Dimon Inc. was not the direct parent company of Dimon Italia, on the ground that no evidence had been provided about the role of Intabex Netherlands BV ('Intabex'), or about any lines of communication between that undertaking and Dimon Italia and between Intabex and Dimon Inc. Moreover, it appeared that Intabex acted solely as a financial intermediate holding and maintained no link with the operational aspects of Dimon Italia's activities (recital 346 of the contested decision).

33 The Commission stated that, since the groups to which Transcatab and Dimon Italia belonged during the infringement period had ceased to exist following their merger in the new entity Alliance One, that entity, as the legal successor of those two groups, was the addressee of the contested decision. The same applied to Dimon Italia, which had been sold by Intabex to certain individuals who renamed it Mindo (recitals 349 and 350 of the contested decision).

34 In the light of those various elements, the Commission concluded, in recital 351 of the contested decision, that Deltafina, Universal, Mindo (formerly Dimon Italia), Transcatab, Alliance One, Romana Tabacchi, APTI and Unitab had to be held liable for the infringements and had to be the addressees of the contested decision.

2. *Determination of the amount of the fines*

35 In recitals 356 to 404 of the contested decision the Commission determined the fines to be imposed on the addressees of the decision.

36 First, the Commission examined the gravity of the infringement. After observing that, in order to evaluate that factor, it had to take into consideration the nature of the infringement, its actual impact on the market, where this can be measured, and the size of the relevant geographic market, it concluded, in recital 369 of the contested decision, that the processors' infringement had to be qualified as very serious.

37 Second, in recitals 370 to 376 of the contested decision, the Commission examined the question of 'specific weight' and 'deterrence'. In this respect, it stated that it was necessary to take account of the 'specific weight of each of the undertakings involved and the likely effect of its unlawful behaviour'.

38 First of all, the Commission maintained that the fines had to be set according to the market position occupied by each of the parties involved (recital 371 of the contested decision).

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

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

41 The Commission considered however that a starting amount merely reflecting the market position would not be a sufficient deterrent in respect of Deltafina, Dimon Italia (Mindo) and Transcatab because, despite their relatively small turnovers, these three companies belonged — or, in the case of Mindo, had belonged — to multinational groups of considerable economic and financial strength, representing the biggest

tobacco merchants in the world and operating at different levels of business in the tobacco industry and in different geographic markets (recital 374 of the contested decision).

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

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

— Deltafina: EUR 37.5 million;

— Transcatab: EUR 12.5 million;

— Dimon Italia (Mindo): EUR 12.5 million;

— Romana Tabacchi: EUR 10 million.

44 Third, the Commission examined the question of the duration of the infringement.

45 It is apparent inter alia from recitals 377 to 379 of the contested decision that the Commission increased the starting amounts of the fines by 10% per full year of infringement and by 5% for any additional period of six months or more. Thus, the starting amount of the fine was increased by 60%, corresponding to an infringement period of six years and four months, for Deltafina, Dimon Italia (Mindo) and Transcatab, and by 25%, corresponding to an infringement period of two years and eight months, for Romana Tabacchi.

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

— Deltafina: EUR 60 million;

— Transcatab: EUR 20 million;

— Dimon Italia (Mindo): EUR 20 million;

— Romana Tabacchi: EUR12.5 million.

47 Fourth, the Commission considered, in recitals 380 to 398 of the contested decision, whether any attenuating circumstances should be taken into consideration. As regards, in particular, the situation of Dimon Italia and of Transcatab, the Commission rejected all their arguments alleging attenuating circumstances in their case.

48 Fifth, the Commission determined the amount of the fines resulting from the application of attenuating circumstances, by reducing, by 50 % and 30 % respectively, the basic amounts of the fines imposed on Deltafina and on Romana Tabacchi, and examined whether it was necessary to adjust the basic amounts for the various addressees so that those amounts did not exceed the limit of 10 % of turnover laid down in Article 23(2) 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) (recitals 399 to 404 of the contested decision).

49 In this respect, the Commission stated that, in cases where the undertakings in question belong to a group, where it is established that those undertakings are under the decisive influence of their parent companies and where, consequently, the latter are jointly and severally liable for the fines imposed on the subsidiary, it is the worldwide group turnover that must be taken into account for the purpose of determining the limit of 10 % referred to above (recital 401 of the contested decision).

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

51 The Commission concluded its analysis of the upper limit of the fine by limiting Mindo's joint and several liability to 10 % of its turnover for the most recent business year, that is to say, EUR 3.99 million, because at the time of adoption of the contested decision that undertaking maintained no links with the former Dimon group, now Alliance One (recital 404 of the contested decision).

52 Sixth, the Commission dealt with the application of the Leniency Notice (recitals 405 to 500 of the contested decision).

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

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

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

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

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

— Romana Tabacchi: EUR 2.05 million;

— APTI: EUR 1 000;

— Unitab: EUR 1 000.

Procedure and forms of order sought by the parties

55 By application lodged at the Court Registry on 24 January 2006, Alliance One brought the present action.

56 In the application, Alliance One requested that the present case be joined with those relating to the applications lodged by Mindo and Transcatab (see paragraphs 57 and 58 below).

57 On 20 January 2006, Mindo brought an action for partial annulment of the contested decision and, in the alternative, a reduction in the fine imposed on it by the contested decision (Case T-19/06).

58 On 3 February 2006, Transcatab also brought an action for partial annulment of the contested decision and, in the alternative, a reduction in the fine imposed on it by the contested decision (Case T-39/06), requesting that that case be joined with the present case.

59 By separate document lodged at the Court Registry on 27 July 2006, Mindo requested that Case T-19/06 be joined with the present case. On 21 August 2006 Alliance One presented its observations on that application for joinder and stated that it was in favour of the cases being joined.

60 By letter lodged at the Court Registry on 21 August 2006, the Commission stated that it considered that the joinder of those cases would not enable the procedure to be significantly more effective and was leaving the issue to the wisdom of the Court.

61 The Court did not grant the application for joinder.

62 On 24 November 2009, the Court, in the context of the measures of organisation of procedure provided for in Article 64 of its Rules of Procedure, put a written question to Alliance One, which replied within the prescribed period. On 2 February 2010, the Commission submitted its observations on the reply of Alliance One.

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

64 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 28 September 2010.

65 Alliance One claims that the Court should:

— annul Article 1(1) of the contested decision, in so far as it relates to SCC, Dimon Inc. and Alliance One;

— accordingly reduce the fines imposed on Transcatab and on Dimon Italia (Mindo) so that the fines do not exceed 10 % of their turnover in the latest financial year;

— in the alternative, reduce the fine imposed on Transcatab and Dimon Italia (Mindo) as the multiplying factor is not applicable;

— order the Commission to pay the costs.

66 The Commission contends that the Court should:

— dismiss the application;

— order Alliance One to pay the costs.

Law

67 In support of its application, Alliance One puts forward, in substance, three pleas, which may be further broken down into a number of parts. The first plea, relied on principally, alleges breach of the rules governing the imputability to a parent company of the infringements committed by its subsidiary and also breach of the rights of the defence. The second plea alleges breach of Article 23(2) of Regulation No 1/2003, in that the amount of the fine imposed exceeds 10 % of the turnover achieved in 2005 by Transcatab and Dimon Italia respectively, and also breach of the principle of proportionality in setting the final amount of the fine. Alliance One also puts forward, in the alternative, a third plea alleging an error of law and of fact, and also breach of the principle of proportionality and failure to state reasons in determining the multiplier.

A — *First plea: breach of the rules governing the imputability to a parent company of the infringements committed by its subsidiary, and also breach of the rights of the defence*

68 This plea can be broken down into four parts. In the first part, Alliance One claims that the Commission breached the rules governing the imputability to the parent company of the practices of its subsidiary. In the second part, Alliance One claims that SCC and Dimon Inc. provided the Commission with evidence that they did not exercise decisive influence over their subsidiaries, which the Commission essentially disregarded. In the third part, Alliance One alleges that the Commission breached SCC's and Dimon Inc.'s rights of defence by using, in order to contest evidence adduced by them, documents not mentioned in the statement of objections and non-accessible documents. In the fourth part, Alliance One claims that the Commission breached the rules on the burden of proof.

1. *First part: the Commission breached the rules governing the imputability to the parent company of the practices of its subsidiary*

(a) Arguments of the parties

69 Alliance One claims that the Commission erred by finding that SCC and Dimon Inc. exercised decisive influence over Transcatab and Dimon Italia respectively during the infringement period and thereby holding the applicant jointly and severally liable for the infringement committed by those subsidiaries.

70 According to Alliance One, the contested decision is based on a misinterpretation of the relevant case-law, inasmuch as that decision finds that a parent company holding all the shares in a subsidiary may be presumed to exercise decisive influence over the subsidiary's commercial conduct. In support of its proposition, Alliance One relies on a number of judgments of the Court of Justice, the Opinions of the Advocates General in certain of the cases which gave rise to those judgments, and also certain judgments of this Court. It submits that it is apparent, in particular, from Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, which has been confirmed by other judgments, that it is always necessary to adduce evidence in addition to the mere possession by the parent company of all the shares in a subsidiary at the time when the subsidiary infringed Article 81(1) EC in order to presume that the parent company exercised decisive influence over the conduct of its subsidiary and thus to hold the parent company jointly and severally liable for the infringement committed by the subsidiary.

71 In addition, the applicant submits that it has been the Commission's practice when adopting decisions to assert on many occasions that the mere fact that an undertaking owns 100 % of the shares in a subsidiary directly involved in the infringement of competition law is not in itself sufficient to establish the liability of the parent company and that, consequently, additional evidence is necessary in order to establish with certainty that a group is liable for the conduct of one of its subsidiaries where the parent company did not participate directly in the infringement.

72 In particular, Alliance One refers to cases in which the Commission did not declare the parent company liable for the conduct of its subsidiary (in particular, to the approach taken by the Commission in the case leading to the Decision of 20 October 2004 in the Raw Tobacco Spain case (COMP/38.238/B.2)), declared the parent company liable on account of its direct participation in the cartel or relied on other elements in order to establish the parent company's liability.

73 It is apparent, in particular from examination of the Commission's practice when taking decisions that the Commission also requires 'other factors' in addition to the mere fact that a company owns 100 % of the shares in its subsidiary, such as:

— the direct involvement of the parent company in the infringements;

— the parent company's responsibility for the implementation of the infringement;

— the parent company's participation in meetings during which anti-competitive practices were discussed;

— the parent company's failure to assert or give an indication of its subsidiary's independence;

— the fact that the parent company has presented itself as the sole interlocutor during the procedure;

— elements indicating that the parent company was 'aware' of the agreements or the fact that it did not expressly deny that it was aware of the unlawful conduct.

74 All in all, it follows from the analysis of the case-law and of the Commission's practice when taking decisions that:

— the Commission has the burden of proving that the parent company exercised decisive influence over its subsidiary;

— the burden of proof is not reversed but merely eased when the subsidiary is 100 % controlled, provided that other elements or indicia have been found to support that conclusion;

— it is only where the parent company holds 100 % of the subsidiary and where there are other indicia of its involvement that the liability of the parent company can be presumed and the burden of proving that it was not involved is transferred to the parent company;

— that presumption may always be rebutted if Alliance One is able to adduce sufficient evidence to prove that, although it could have exercised decisive influence, it did not do so in the particular case.

75 Alliance One thus disputes the way in which the Commission interpreted the case-law in the contested decision and emphasises that during the procedure the Commission claimed only that SCC and Dimon Inc. had held all the shares in their Italian subsidiaries, which the Commission considered sufficient for the burden of proof to be transferred to the parties.

76 By unduly transferring the burden of proof to SCC and Dimon Inc., the Commission therefore transformed a presumption *iuris tantum* into a presumption *iuris et de iure*, namely a presumption that cannot be rebutted by adducing evidence to the contrary.

77 Thus, the burden of proving that a parent company exercised decisive influence over its subsidiary is not reversed where the subsidiary is wholly owned. In the present case, that burden could have been transferred to Alliance One only if the Commission had provided convincing indicia that Transcatab and Dimon Italia were under the decisive influence of their respective parent companies during the infringement period.

78 According to the applicant, the Commission therefore erred in law when it presumed the liability of Dimon Inc. and SCC for the conduct of their respective subsidiaries.

79 The Commission contends that this part of the first plea should be rejected.

(b) Findings of the Court

80 It should be observed that competition law refers to the activities of 'undertakings' (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 59) and that the concept of an undertaking refers to 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, and Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 54).

81 According to the case-law, in the same context, the concept of an undertaking must be understood as denoting 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 *Akzo Nobel and Others* v *Commission*, paragraph 80 above, paragraph 55; Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 85).

82 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-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 39, and *Akzo Nobel and Others* v *Commission*, paragraph 80 above, paragraph 56).

83 The infringement of Community competition law must be attributed unequivocally to a legal person on whom fines may be imposed. For the purposes of applying and enforcing Commission competition law decisions, it is necessary to identify, as addressee, an entity having legal personality (see, to that effect, 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, paragraph 978).

84 It is clear from settled case-law that the conduct of a subsidiary may be attributed to the parent company in particular where that subsidiary, despite having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between those two legal entities (see *Akzo Nobel and Others* v *Commission*, paragraph 80 above, paragraph 58 and the case-law cited).

85 In such a situation, since the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of Article 81 EC, the Commission may address a decision imposing fines on the parent company, without having to establish the personal involvement of the latter in the infringement (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 80 above, paragraph 59).

86 It is also apparent from the case-law that, 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 and there is a rebuttable presumption that the parent company does in fact exercise such influence (see A*kzo Nobel and Others* v *Commission*, paragraph 80 above, paragraph 60 and the case-law cited).

87 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to avail itself of the presumption that the parent exercises decisive influence over the commercial policy of the subsidiary. The Commission will then be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see, to that effect, *Stora Kopparbergs Bergslags* v *Commission*, paragraph 70 above, paragraph 29, and *Akzo Nobel and Others* v *Commission*, paragraph 80 above, paragraph 61).

88 While it is true that at paragraphs 28 and 29 of *Stora Kopparbergs Bergslags* v *Commission*, paragraph 70 above, the Court of Justice referred, not only to the fact that the parent company owned 100 % of the capital of the subsidiary, but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the General Court had based its reasoning, and not to make the application of the presumption referred to in paragraph 86 above subject to the production of additional indicia relating to the actual exercise of influence by the parent company (see *Akzo Nobel and Others* v *Commission*, paragraph 80 above, paragraph 62 and the case-law cited; Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 57).

89 It is apparent from the contested decision that, in order to attribute liability to a parent company for the infringement on the part of its subsidiary, 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 (recital 325 of the contested decision).

90 The central feature on which the Commission relied in order to establish that the parent company could be held liable for the unlawful conduct of its subsidiary is the subsidiary's lack of independence in deciding upon its own conduct on the market. That lack of independence is the corollary of the exercise by the parent company of 'decisive influence' over the conduct of the subsidiary, and the actual exercise of such an influence can be presumed, according to the case-law, where a parent company holds the entire share capital of its subsidiary (see recitals 329 and 330 of the contested decision).

91 In recital 331 of the contested decision, the Commission thus considered that, in the present case, Deltafina, Dimon Italia and Transcatab '[lacked] autonomy' given that they were wholly owned by their respective parent companies.

92 Contrary to Alliance One's submission, namely that, in the present case, the Commission transformed a presumption *iuris tantum* into a presumption *iuris et de iure*, the Commission's reasoning does not depart from the logic of a rebuttable presumption. Thus, as in the case of other rebuttable presumptions in competition law, if a fact can be lawfully presumed by the Commission, it is considered to be established, provided that the undertaking concerned does not rebut the presumption by adducing conclusive evidence to the contrary (see *Commission* v *Anic Partecipazioni*, paragraph 82 above, paragraphs 121 and 126, and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 162 and 167). Moreover, given its rebuttable nature, that presumption, which may be rebutted in an individual case, does not lead to the

automatic attribution of liability to a parent company holding 100 % of the capital of its subsidiary, which would be contrary to the principle of personal liability on which competition law is based.

93 The Commission did not therefore breach the rules governing the imputability to a parent company of the conduct of its subsidiary by essentially holding SCC and Dimon Inc., to which Alliance One is the legal successor as the company resulting from their merger, liable for the infringement committed by their subsidiaries Transcatab and Dimon Italia.

94 That conclusion cannot be called in question by the arguments put forward by Alliance One in reply to the Court's written question regarding the consequences to be inferred from *Akzo Nobel and Others* v *Commission*, paragraph 80 above. According to Alliance One, first, in that judgment, the Court of Justice misinterpreted the earlier case-law, in particular the judgment in *Stora Kopparbergs Bergslags* v *Commission*, paragraph 70 above, and, in any event, the case-law is not unequivocal in this respect. Second, according to Alliance One, the facts of *Akzo Nobel and Others* v *Commission*, paragraph 80 above, can be distinguished from the facts of the present case, since in the Akzo Nobel case a number of subsidiaries were involved in the cartel and, consequently, it was more difficult to show that the parent company was not aware of the anti-competitive activities. With respect to the first argument, it is sufficient to note that it is apparent from *Akzo Nobel and Others* v *Commission*, paragraph 80 above (see also, to that effect, the Opinion of Advocate General Kokott in *Akzo Nobel and Others* v *Commission*, paragraph 80 above, ECR I-8241, points 60 and 61) that the Court of Justice not only took into consideration the case-law on which Alliance One bases a large part of its reasoning, and, in particular, *Stora Kopparbergs Bergslags* v *Commission*, paragraph 70 above, but also gave an unequivocal interpretation of the earlier case-law (*Akzo Nobel and Others* v *Commission*, paragraph 80 above, paragraphs 58 to 62). As regards the second argument, it is sufficient to note that the alleged difference between *Akzo Nobel and Others* v *Commission*, paragraph 80 above, and the present case is irrelevant, since the criterion used to attribute liability in the former case was definitely not that of direct or indirect knowledge on the part of the

parent company of the activities implemented by the subsidiary or subsidiaries. In any event, as the Commission correctly observes, such a factor was not taken into consideration at all in that judgment.

95 In the light of all the foregoing considerations, the Court rejects the first part of the first plea as unfounded.

2. *Second part: the Commission ignored the evidence supplied by SCC and Dimon Inc. for the purposes of rebutting the presumption*

(a) Arguments of the parties

96 Alliance One maintains that, although they were under no obligation to do so, SCC and Dimon Inc. adduced wide and complete evidence showing that they had neither participated in the cartel nor exercised any influence over the conduct of their subsidiaries, and clearly established that none of the situations in which penalties had been imposed by the case-law existed in the present case. That evidence therefore proves that SCC and Dimon Inc. did not exercise decisive influence over their Italian subsidiaries and were not in a position to do so.

97 In addition, Alliance One takes issue with the Commission for having misinterpreted the evidence adduced by SCC and Dimon Inc. It refers in that respect not only to the various passages of the contested decision in which the Commission examines and rejects that evidence, but also to the Commission's use of supporting documents.

98 According to the applicant, SCC's and Dimon Inc.'s replies to the statement of objections made it quite clear that the two groups were structured in a very decentralised manner, especially in the light of the specific features of the Italian raw tobacco market. Thus, the exercise of decisive influence by the parent company would be incompatible with the needs of the market. Furthermore, the fact that those two groups have subsidiaries on the national tobacco market of several countries, each with its specific features, makes it impossible for them to exercise commercial influence on the subsidiaries in any form whatsoever.

99 Transcatab and Dimon Italia, for their part, explained that they had always been autonomous companies in the market in question and that they determined their own commercial policies in that field. As regards sales of processed tobacco, Alliance One observes that the subsidiaries operated as independent companies vis-à-vis their customers. On that point, the applicant observes that sales of processed tobacco within the group between September 1995 and June 2001 represented only a minimum part of Dimon Italia's total sales (between 20 and 30 %), as most of its tobacco was sold directly to other customers.

100 In the reply, Alliance One also submits that, contrary to the Commission's contention, there is no precedent in case-law that requires the parties to proceedings to demonstrate a specific feature of their group as justification for the autonomy of a subsidiary. Moreover, SCC and Dimon Inc. clearly demonstrated that none of those elements required by the case-law was present in their case.

101 As regards, more specifically, the evidence which SCC provided in order to demonstrate the absence of any decisive influence over its Italian subsidiary Transcatab, Alliance One recalls that:

— Transcatab's board of directors was composed mainly of Italian accountants and none of them had any previous or subsequent, direct or indirect, link with SCC. Furthermore, SCC's role in selecting the members of the board was limited to

formally appointing individuals designated by Transcatab's chief executive officer, who was himself completely independent of SCC;

— in accordance with Article 19 of Transcatab's by-laws, its board of directors enjoyed the widest possible powers to run the company;

— from 4 August 1994, that is to say, before SCC acquired sole control of Transcatab, Transcatab's conduct was determined solely by its Chief Executive Officer (CEO), on whom, as shown in the transcript of the meeting of Transcatab's board of directors held on the same date, the board conferred all the powers set out in Article 19 of the by-laws relating to the management of the ordinary and extraordinary business of the company; that situation was never altered by SCC and the CEO has always been the same person;

— Transcatab's business policy was therefore determined exclusively by its CEO, as the transcripts of the meetings of the board of directors confirm, at which, as a general rule, the CEO merely informed the other board members of the company's commercial situation and those board members gave their formal approval *ex post facto* to the acts of the CEO.

102 Those elements are sufficient to rebut the Commission's presumption.

103 Alliance One disputes, next, the Commission's argument that: (i) SCC has not been able to prove that Transcatab's CEO was not an emanation of SCC; (ii) in any event, the other members of Transcatab's board of directors had executive powers; and (iii) SCC has not proved that those members were chosen by the CEO and not appointed by SCC.

104 As regards, first, the independence of the CEO, Alliance One reiterates that it has shown that there was no link between that officer, who had been appointed well before the acquisition of the subsidiary by SCC, and SCC. In any event, it was for the Commission to prove that Transcatab's management had been appointed by SCC before the latter acquired full control of Transcatab.

105 As regards, second, the executive powers of the other members of the board of directors, Alliance One observes, in the first place, that the delegation to the CEO of ordinary and extraordinary powers to run the company was not disputed by the Commission. In the second place, Alliance One rejects the alleged detailed evidence showing that other members of the board of directors, for example Mr. S.M., held executive posts, and does not regard them as significant, since (i) they do not indicate that there was shared power to run Transcatab's business and (ii) do not show any intervention by the members of the board of directors in the definition of Transcatab's purchasing policy. In any event, those documents cannot assist the Commission, since they predate the beginning of the cartel in issue.

106 It follows, moreover, from an example of the transcript of meetings of the board of directors, placed on the file by Alliance One, that the CEO informed the other board members of the company's commercial situation and that the board members automatically approved *ex post facto* all the acts of the CEO. Conversely, there is no evidence that the other members of the board of directors were involved in the company's commercial policy.

107 Third, Alliance One maintains that the question as to whether the members of Transcatab's board of directors were appointed by SCC is irrelevant since, even if other members of the board had been appointed by SCC, they would have had no powers to run Transcatab's business.

108 It follows, moreover, from certain documents on the file that the shareholders merely approved the annual reports. Nor is there any evidence that the CEO discussed Transcatab's purchasing policy with the other board members, still less with the parent company. The existence of certain contacts, which were necessary but wholly unconnected with management of local activities, cannot constitute a criterion of proof that influence was exercised by the parent company over its subsidiary.

109 As regards, on the other hand, the evidence which Dimon Inc. provided in order to prove that it had no decisive influence over its subsidiary Dimon Italia, Alliance One observes that:

— Dimon Italia's board of directors was composed of experts on the Italian raw tobacco market and Dimon Inc. did not appoint any members of that board after acquiring control of Dimon Italia, with the exception of two persons who performed tasks linked to financial aspects and Mr V.R. (appointed in 1998), who was senior executive of Reditab Srl., a company owned as to 50 % by his family, the other 50 % being owned by Dibrell Brothers Inc., which had been acquired by Dimon Inc. at the end of 1995; Dimon Inc. therefore delegated control of Dimon Italia to persons with great knowledge of the local market;

— the managers responsible for purchases, namely Mr V.R. and Mr F.R. (members of the R. family) and Mr B. (former manager of Dibrell Italia) enjoyed complete autonomy in determining Dimon Italia's purchasing strategy, even after Dimon Inc. had acquired control;

— there was no overlap between, on the one hand, Dimon Italia's management and purchasing team and, on the other, the managers of Dimon Inc. or any other company in the Dimon group and none of the members of the board of directors was ever a member of the board of directors of any other company in the group or held any managerial or executive post in those companies.

110 In the reply, Alliance One rejects as unfounded the Commission's argument that Alliance One does not deny that Dimon Inc appointed the members of the board after it acquired sole control of Dimon Italia.

111 In that regard, first, Alliance One takes issue with the Commission for having failed to mention that when Dimon Inc. acquired Dimon Italia (at that time Reditab), the three members of Reditab's board of directors were retained in their posts and that no new member was appointed to Dimon Italia's board of directors before 1 January 1996. It was on that date that the number of board members was increased from three to five and Dimon Inc. appointed Mr V.R., the previous senior executive of Reditab and a member of the family that founded the company, and Mr N., a purchasing expert who had never previously had any contact with the Dimon group.

112 Following the full acquisition of Dimon Italia, Dimon Inc. appointed only two financial experts (Mr W.M., subsequently replaced by Mr C.), who were not involved in the subsidiary's purchasing policy and were not on the board of directors of any other companies in the Dimon group, and, in 1998, Mr F.R., who had been connected with the company before it was acquired by Dimon Inc.

113 Contrary to the Commission's assertion, Mr W.M. was an employee of Dimon International Services Ltd, a sister company of Dimon Italia, and had no connection with Dimon Inc. and had never exercised executive powers within Dimon Italia. Consequently, the appointment of Mr W.M. cannot prove that Dimon Inc. 'exercised' control over Dimon Italia's commercial policy.

114 Second, Alliance One disputes the Commission's argument that it is sufficient to demonstrate that the parent company appointed a single member of the board of directors to prove that it exercised actual control over its subsidiary's conduct. According to the case-law, the only relevant elements are whether the person appointed had the power to direct the subsidiary's business and whether at the same time he was also a member of the board of directors of other companies in the group. That is not true of the persons appointed by Dimon Inc.

115 Third, Alliance One draws attention to the role played by the R family. Contrary to the Commission's assertion, Mr V.R., as a member of that family that previously owned Reditab, was running that company's business at the time of its acquisition by Dimon Inc. and continued to do so afterwards, first as purchasing manager and then as a member of the board of directors.

116 Fourth, Alliance One observes that Mr B. was a member of the board of directors before the company was acquired by Dimon Inc. and that there is no evidence of other links between him and Dimon Inc. The fact that Mr B., as the Commission asserts, was involved in the cartel says nothing about any links with the parent company and does not prove that the parent company was involved in or aware of the anti-competitive practices.

117 Fifth, the applicant takes issue with the Commission for having disregarded the fact that there was no overlap between the management and purchasing team of Dimon Italia and the management of Dimon Inc. or that of any other company in the Dimon group.

118 As regards, last, the documents mentioned in the contested decision relating to the alleged existence of lines of communication between Dimon Italia and the rest of the Dimon group, Alliance One claims, first of all, that those documents are insufficient to impute to Dimon Inc. liability for the conduct of its subsidiary, since those lines of communication do not concern Dimon Italia's commercial policy.

119 In particular, Alliance One claims that the documents connected with the APTI meeting are of a very general nature and do not reflect Dimon Italia's commercial policy. The email from Mr C. to Mr S. of 12 February 2002 indicates solely that Dimon Italia acted as an autonomous entity on the national raw tobacco market. As regards the email from Mr B. to Mr S. of 10 May 2001, Alliance One disputes the Commission's interpretation of that document in its defence, namely that the document shows that Dimon Inc. was aware of the cartel, since this is a new objection and is therefore inadmissible. Nor does the document explain or prove the Commission's assertion that Mr S. was aware of the cartel. That assertion is also wholly unfounded, since it is clear from the document that it refers to sales of processed tobacco (and not to purchases of raw tobacco) and since the main objective of the meeting proposed in the document was to discuss a tobacco manufacturer customer. As regards the documents which are intended to substantiate the Commission's assertion that Dimon Italia drafted periodic crop reports for other companies in the Dimon group, Alliance One disputes the conclusion which the Commission draws from them, since the Commission relies on a wholly unfounded presumption. Nor do those documents support the conclusion that Dimon Italia was under Dimon Inc.'s influence in determining its purchasing policy, since they relate to a different market (the market for sales of processed tobacco) and provide only information on sales and on the general economic situation in Italy, without making any reference to suppliers, prices or agreements with competitors. In particular, the documents make no mention of Dimon Italia's raw tobacco purchasing policy. Alliance One observes that, whereas in the contested decision the Commission mentions documents 2892 and 2893 as further proof of communications between the parent company and its subsidiary, in its defence it also mentions, for the first time, documents 2894 to 2902. As those documents were produced within the context of a possible merger between Dimon Italia and Transcatab, they cannot show that Dimon Inc. intervened in the 'management' of Dimon Italia and that the latter's commercial policy was defined at group level. As regards the email containing an evaluation by Dimon Inc. of Dimon Italia's

business and the report drawn up by Mr N. attached thereto, it is in actual fact only a 'last will' of an outgoing chairman describing the general situation of Dimon Italia. As regards, lastly, the email from Mr B. to Mr S., relating to the annual meeting of the board of directors, Alliance One claims that it provides an overview of the company's situation, as established during an annual meeting of the board of directors, and that it does not in any way prove that Dimon Inc. usually received 'detailed information' from Dimon Italia.

120 Alliance One disputes, last, the conclusion which the Commission draws from the two new documents annexed to its defence, namely that Mr S. was 'a very highly placed executive at the very top of the Dimon Group' and that Alliance One attempted to minimise his role. In Alliance One's submission, those documents merely confirm that Mr S. was responsible for the co-ordination of sales of processed tobacco in Europe.

121 All in all, it follows from those documents that Dimon Italia was autonomous with respect to the definition of its commercial policy and that the only information exchanged between it and the group was general in nature or related, at most, to specific issues unconnected with its commercial policy.

122 Alliance One maintains, in conclusion, that it has shown that the documents on which the Commission relied in order to assert that SCC and Dimon Inc. were responsible fail to show that the two companies were in a position to influence, or did in fact influence, the conduct of Transcatab and Dimon Italia, respectively. Those documents do not even support the conclusion that there were direct lines of communication between those companies.

123 In Alliance One's submission, the documents to which the Commission refers are general documents which do not prove that the parent companies were aware of the cartel at issue. The Commission has found no document showing that SCC or Dimon Inc. gave instructions to their Italian subsidiaries or requested, or even received, information about their purchasing policies.

124 The Commission contends that this part of the first plea should be rejected.

(b) Findings of the Court

125 As a preliminary point, the Court observes that, as was recalled in paragraphs 86 and 87 above, where a subsidiary is wholly owned by the parent company, the Commission is entitled to presume that the parent exercises decisive influence over the conduct of that subsidiary, and is not required to adduce additional evidence establishing that the parent company actually exercised such influence or was aware of the infringement or of that subsidiary's involvement in the infringement. It is a rebuttable presumption, which can be set aside in the face of evidence to the contrary. It is therefore for the parent company, regarded by the Commission as jointly and severally liable for payment of the fine imposed on its subsidiary, to rebut that presumption by adducing evidence capable of establishing that its subsidiary decides independently upon its course of action in the market and that those two companies do not therefore constitute a single economic entity. If the parent company fails to do so, the exercise of control is demonstrated by the fact that the presumption arising from 100 % ownership of a subsidiary has not been rebutted (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 80 above, paragraphs 60 to 62, and the case-law cited; judgment of 30 September 2009 in Case T-175/05 *Akzo Nobel and Others* v *Commission*, not published in the ECR, paragraph 93).

126 In order to assess 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 according to the specific features of each case (see, to that effect, Case C-97/08 P *Akzo Nobel and Others* v *Commission*, paragraph 80 above, paragraph 74, and Case C-407/08 P *Knauf Gips* v *Commission* [2010] ECR I-6375, paragraph 100).

127 In the present case, it is therefore necessary to ascertain whether the Commission committed an error of assessment in so far as it considered that the arguments and evidence put forward for the purposes of showing that Transcatab and Dimon Italia were independent in the implementation of their commercial policy, were not capable of showing that those subsidiaries conducted themselves independently of their parent companies and that they did not constitute a single economic entity with those parent companies.

128 The Commission devotes recitals 335 to 346 of the contested decision to an examination of the arguments and evidence put forward by SCC and Dimon Inc., in their replies to the statement of objections, in order to prove that they did not exercise decisive influence over the commercial policy of their subsidiaries. In particular, in recitals 335 to 340, the Commission examines and rejects the arguments of a general nature that SCC and Dimon Inc. derive from the fact that their subsidiaries had a totally independent local management. Next, in recitals 341 to 346 of the contested decision, the Commission examines and rejects the more specific arguments put forward by SCC and Dimon Inc. in order to rebut that presumption.

The factors of a general nature relied on for the purposes of rebutting the presumption

129 First of all, Alliance One claims that the SCC and Dimon Inc. groups were structured in a very decentralised manner, had their own totally independent local management,

to which all functions were delegated, in the light of the specific features of the raw tobacco markets of each Member State. Alliance One submits that producers of tobacco need, inter alia, to create a personal relationship with their customers, namely the processors, which, *de facto*, makes the exercise of decisive influence by the parent company incompatible with the needs of the market.

130 However, as the Commission rightly stated in recital 338 of the contested decision, the fact that a subsidiary has its own local management and its own resources does not prove, in itself, that that company decides upon its conduct on the market independently of its parent company. The entrustment of day-to-day business to the local management of a wholly-owned subsidiary is a common practice and is not therefore capable of proving that subsidiaries have real independence. The same is true of the argument that SCC and Dimon Inc. are active in dozens of countries.

131 Moreover, it should be noted that, as the Commission observed, SCC and Dimon Inc. were at the head of vertically integrated groups, the subsidiaries concentrating on the purchase of raw tobacco and the parent companies taking responsibility for the marketing of the processed tobacco, which tends rather to prove that Dimon Italia and Transcatab constituted a single economic entity with their respective parent companies (see, to that effect and by analogy, Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 312). In this respect, no conclusion can be drawn from the fact that the parent companies operated on separate markets and had no links in terms of customer-supplier relationships. Indeed, the division of tasks between subsidiaries and their parent companies is a normal practice in vertically-integrated groups which is not capable of rebutting the presumption that SCC and Dimon Inc. in fact exercised decisive influence over the conduct of Transcatab and Dimon Italia respectively. As regards, moreover, the argument that Dimon Italia did not sell all its production to other companies in the Dimon group, suffice it to note that, to the extent that the table set out in the reply confirms that, between 1995 and 2000, its sales within the group represented between 20 and 30 % of its total sales, that data does not contradict the Commission's finding in recital 340 of the contested decision, namely

that the groups in question 'often acquire and trade the tobacco bought by their Italian subsidiaries'.

132 As regards the argument that there is no precedent that requires parties to demonstrate a specific feature of their group as justification for the autonomy of a subsidiary, it is sufficient to note, first, that the precedents cited by Alliance One all concern cases in which the parent company was held liable and not cases in which the presumption was rebutted. Second, although it is true that, in recital 339 of the contested decision, the Commission stated that SCC and Dimon Inc. had not adduced evidence of any specific feature within their group, the fact remains that the Commission did not require at all that such evidence be adduced. The Commission merely found, after examining the general arguments put forward by SCC and Dimon Inc., that they had put forward evidence which was not capable of showing that their groups were in a specific situation, namely a special situation which was out of the ordinary — the presumption being a rule based on general experience — which would have enabled it to be inferred that the activities of the Italian subsidiaries were independent of the influence of their parent companies. From that perspective, the characteristics of the Italian raw tobacco market do not, in themselves, warrant the conclusion that such a specific feature existed.

The specific factors relied on for the purposes of rebutting the presumption

133 Alliance One also relies on specific arguments concerning the relationship between SCC and Transcatab, and the relationship between Dimon Inc. and Dimon Italia, which prove, in its submission, that neither SCC nor Dimon Inc. exercised decisive influence over their Italian subsidiaries.

— The relationship between SCC and Transcatab

134 First, Alliance One observes that Transcatab's board of directors was composed mainly of Italian accountants, who had no direct or indirect link with SCC and that SCC limited itself to formally appointing individuals designated by Transcatab's chief executive officer, who was also completely independent of SCC.

135 Second, it submits that, from 4 August 1994, that is to say, even before SCC acquired sole control of Transcatab, the commercial policy and, in general, the 'conduct' of Transcatab were determined by its CEO (presidente del consiglio di amministrazione e amministratore delegato), on whom Transcatab's board of directors conferred all the powers which it was authorised to do under Article 19 of its by-laws. Essentially, according to Alliance One, the fact that the chief executive officer at the time of the infringement was appointed before the acquisition of Transcatab by SCC demonstrates, in the light primarily of the wide powers at the disposal of the CEO, that SCC never influenced the conduct of its Italian subsidiary.

136 It must be stated that that argument, which corresponds almost verbatim with what SCC submitted in its reply to the statement of objections, was examined by the Commission, in particular in recitals 341 and 342 of the contested decision. The Commission states in those recitals that, before it acquired the entire capital of Transcatab, SCC already controlled that company with its Italian partner and that the fact that it had not changed the management of that company after taking control of it could not therefore be regarded as evidence that it did not exercise any influence over its subsidiary after becoming sole owner of it. Moreover, the Commission maintained that the delegation of executive powers to Transcatab's chief executive officer, who, in the absence of evidence to the contrary, could be reasonably presumed to be an appointee

of SCC, had not prevented other members of the board from holding executive positions and exercising executive functions.

137 The Court observes that the Commission was correct, in the absence of any explanation by SCC, to attribute significance to the fact that SCC, which, when it became sole shareholder, had all the powers necessary to renew partially or totally the board of directors, took no steps to that effect. It follows that the fact that the members of the board and, in particular, Mr J., remained in office can be attributed only to a decision by SCC, as sole shareholder of Transcatab. Moreover, the nationality or identity of the members of the board is of no relevance whatsoever to the assessment of whether or not there was an economic unit between SCC and Transcatab.

138 Furthermore, the fact that one person alone, namely the CEO, has considerable powers which were delegated to him by the board might, on the contrary, demonstrate that the parent company wished to simplify the exercise of its control over its subsidiary, specifically by confining the role of the board to marginal activities and by concentrating all the powers in the hands of a man they trust. It is not credible that a multinational company would delegate all the powers of a subsidiary operating on a national market, as is the case with Transcatab — or would accept, as Alliance One seems to suggest, a delegation of powers predating the acquisition of sole control — to a natural person who, operating with complete independence and without allegedly having been appointed by the sole shareholder, in turn chooses the members of the board, thereby depriving any other person of any influence whatsoever over the management of the company, and who, if Alliance One's proposition were to be accepted, would not, *de facto*, be accountable for his actions to anyone.

139 Thus, and given also that a delegation of powers to the CEO of a subsidiary is not at all uncommon, that argument is not capable of rebutting the presumption of control exercised by the parent company over Transcatab.

140 Moreover, the Commission, when assessing certain evidence adduced by SCC in reply to the statement of objections, was right to take into consideration, in order to verify the credibility of SCC's assertions, documents, such as those referred to in recital 342 of the contested decision, indicating that, at the very least, another member of the board, Mr S.M., Executive Vice President of the company, organised weekly meetings with the heads of all the departments of the company in order to discuss company policy and gave instructions on a large number of issues whilst Mr J. was the CEO of the company. Alliance One's claim that those documents predate the infringement period cannot succeed. The Court notes that they were used by the Commission in order to assess the credibility of the argument, submitted by SCC in its reply to the statement of objections and reproduced by Alliance One in its written pleadings, that the delegation of powers to the CEO had the effect of depriving any other person of any influence whatsoever over the management of the company. In so far as those documents show that, at a point in time when the delegation of the powers to Mr J. had already been effected, another member of the Transcatab board, in this instance Mr S.M., played a significant role in the management of Transcatab's commercial policy, the fact that they relate to a period preceding the infringement is of no account.

— The relationship between Dimon Inc. and Dimon Italia

141 As regards the relationship between Dimon Inc. and Dimon Italia, Alliance One submits, first, that, when Dimon Inc. acquired control of its Italian subsidiary, it did not appoint any of its subsidiary's board members, with the exception of two individuals, who performed tasks primarily related to financial aspects and had nothing to do with the purchasing policy of the company. It asserts, second, that there was no overlapping of staff between the two companies, in particular between the managers, the purchase team or the board members of Dimon Italia and the managers or board members of Dimon Inc. or of any other company of the Dimon Group. It submits, lastly, that no central team of Dimon Inc. directed the purchasing strategy of its

subsidiaries. All those considerations indicate that it did not exercise decisive influence over its Italian subsidiary.

142 However, the Commission was also right to raise as an objection to Dimon Inc., in recital 341 of the contested decision, that Dimon Inc. already had control of Dimon Italia before acquiring the entire capital of the latter. The fact that Dimon Inc. did not change the management of Dimon Italia after taking control of it cannot therefore be regarded as evidence that Dimon Inc. did not exercise any influence over the management of Dimon Italia after becoming sole owner of it.

143 Also in recital 341, *in fine*, of the contested decision, the Commission observes, moreover, that 'it also appears from [Dimon Inc.'s] reply to the [statement of objections] that after 1995 the board only comprised appointees of the Dimon group and that one of them [Mr B.] was fully involved in the daily management of the company'. Furthermore, it is apparent from the documents in the file that, even after the appointment of Mr F.R. to the board of Dimon Italia, Mr B. was associated with all aspects of the management of the company, including the performance of contracts for the purchase of raw tobacco.

144 As the Commission states in the defence, that finding is sufficient in itself to prove, even without recourse to the presumption in question, that Dimon Inc. exercised its power of control over Dimon Italia. Moreover, like Dimon Inc. in its reply to the statement of objections, Alliance One does not appear to dispute that the board members of Dimon Italia were appointed by Dimon Inc. after the latter acquired sole control of it.

145 As regards the argument based on the origin and the local market expertise of the board members, reference is made to the considerations set out in paragraph 130 above. In particular, the claim that '[a]ll functions and responsibilities regarding the

purchase of raw tobacco in Italy were delegated to the local management of Dimon Italia' is irrelevant. Even if it were correct, the circumstance referred to by Alliance One does not mean that Dimon Inc. was not in a position to exercise, or did not in fact exercise, decisive influence over Dimon Italia's commercial conduct, in particular as regards Dimon Italia's activities other than purchases of raw tobacco on the Italian market. The same is true of the argument that there was no overlap between Dimon Italia's management and purchasing team and the managers of Dimon Inc. or any other company in the Dimon group.

The material allegedly used by the Commission to confirm Transcatab's and Dimon Italia's lack of independence

146 Alliance One examines recitals 343 to 346 of the contested decision and submits that the documents on which the Commission relied in the present case are irrelevant.

147 It concludes that those documents do not prove that the parent companies were able to influence or did influence the conduct of Transcatab and of Dimon Italia and also that they are general documents that do not prove the parent companies were aware of the cartel in question.

148 However, as was stated in paragraph 125 above, the Commission is entitled to presume that a parent company in fact exercises decisive influence over the conduct of a wholly-owned subsidiary, and is not required to adduce additional evidence establishing that the parent company actually exercised such influence or was aware of the infringement or of that subsidiary's involvement in the infringement.

149 Contrary to Alliance One's claim, the documents mentioned in those recitals of the contested decision were not intended to prove that the parent companies were able to influence or did in practice influence the conduct of their Italian subsidiaries, nor, still less, to prove that the parent companies were aware of the cartel in question. On the contrary, the Commission limited itself to using certain documents which were part of the administrative file in order to establish the degree of credibility of the evidence and arguments put forward by SCC and Dimon Inc. in their replies to the statement of objections for the purposes of rebutting the presumption of decisive influence over their respective subsidiaries.

150 In this respect, the Court would point out that the Commission did not err in referring, in those recitals, to evidence aimed at establishing the existence of 'lines of communication' between parent companies and subsidiaries.

151 It is apparent from the documents in the file that several factors demonstrate the existence of such lines of communication.

152 As regards, in the first place, the existence of lines of communication between Transcatab and SCC, the Commission is right to make reference, in recital 344 and in footnote 281 of the contested decision, to documents which were found in Mr J.'s office indicating that Transcatab's activities were regarded as being the activities of SCTC, Transcatab being referred to either as part of the SCC group or as an SCTC company, and that they were analysed within the scope of the group's activities, including the SCC group's sales to cigarette manufacturers. In this respect, the fact

that those documents were not mentioned in the statement of objections is of no importance, since those documents are intended merely to contradict the argument that there were no lines of communication between subsidiary and parent company. As regards Alliance One's argument that the information in those documents was to be used by SCC to consolidate Transcatab's results, it is sufficient to state, as the Commission does, that the documents in question are not accounting documents intended for the preparation of the group's annual reports, but documents on commercial activities whose purpose was certainly not to enable SCC to consolidate the results of Transcatab.

153 As regards, in the second place, the existence of lines of communication between Dimon Italia and Dimon Inc., the Commission is also right to make reference, in recital 345 and in footnotes 282 and 283 of the contested decision, to periodic crop reports, providing information on the results obtained by Dimon Italia in Italy, addressed to companies within the Dimon group which bought from Dimon Italia, and to other documents indicating direct intervention by the management of Dimon International and other companies in the Dimon group in the activities of Dimon Italia.

154 As regards, first, the 'crop reports', and the 'Dimon Country Profile — Italy' of January 2000 (see footnote 282 of the contested decision), the Court observes that the Commission was right to consider that, given that purchases are principally made within the group (recital 340 of the contested decision), those documents were compiled for the benefit of the companies in the Dimon group responsible for purchases. Even if it is accepted that Alliance One's assertion that those documents were sent to customers outside the Dimon group is correct, the fact remains that Alliance One does not state to whom they were sent, especially as those reports contained detailed information on the purchase of raw tabacco and confidential information on the strategy and results of Dimon Italia.

155 As regards, second, the document prepared by Dimon International comparing Dimon Italia's and Transcatab's facilities (see footnote 283 of the contested decision), the Court observes that, irrespective of its content, namely the planned joint venture in Italy between Transcatab and Dimon, it indicates that strategic questions impacting on the commercial policy of Dimon Italia were dealt with at group level. Accordingly, that document was correctly taken into consideration in order to establish, for the purposes of contradicting the argument advanced by Dimon Inc., the existence of lines of communication between Dimon Italia and Dimon Inc. and not, as Alliance One claims, in order to establish that Dimon Inc. exercised decisive influence over the commercial policy of Dimon Italia.

156 As regards, third, the report entitled 'The Present and Future of Dimon Italia', by the former president of the company, Mr N., the Court observes that it concerns, inter alia, the cost and quality of purchases from producers, the weaknesses of the company, its facilities, the need to recruit a new factory manager and to train him in 'Dimon's best run factory in S. America or Africa', the professional abilities of the members of its purchasing team and its management structure. As is stated in footnote 283 of the contested decision, that report, which was sent to Dimon International and was brought to the attention of the highest-placed managers in the Dimon group, shows that detailed information concerning the Italian subsidiary and its commercial policy circulated at group level. In this respect, the Court would also point out that, at page 4 of that report, Mr N. complains about the 'new and, to [his] mind, exaggerated reporting requirements of DIMON International on every aspect of [the subsidiary's] activities'. On the same page, Mr N. states that, although Mr B. is one of the best men in Europe for customer relations, that advantage of the company 'has become of less and less importance as DIMON UK organisation increases its grip on the sales of all DIMON affiliates'. Moreover, in the email accompanying the report it is stated that the issues arising currently at the level of Dimon Italia can be resolved by its management 'with authority from DIMON International' and it is proposed to 'empower DIMON Italia Management to further reorganize the Company'. The fact, mentioned by Alliance One, that that report was prepared by the president of Dimon Italia in order to take stock of his time in office does not detract from the finding that, even in the light of its content, it demonstrates the existence of 'lines of communication' between Dimon Italia and its parent company.

157 As regards, fourth, exchanges between Dimon Italia and Mr S., it should be noted that, as the Commission correctly states in footnote 283 of the contested decision, it is apparent from the documents in the file that those communications included detailed information on the activities of Dimon Italia and instructions received by the latter on certain commercial activities.

158 In this respect, the Court would point out, first of all, that, as regards Mr S.'s role within the Dimon group, the contested decision does not go beyond what Alliance One itself admits, when it states that Mr S. was responsible for the co-ordination of sales of processed tobacco in Europe. It is also apparent from the documents in the file that Mr S.'s role within the group was that of 'Regional Executive — Europe' (see, for example, the 'Dimon Country Profile — Italy' of January 2000) and that, as such, he was one of the executive officers running the Dimon group. It is also apparent from an email sent to him by Mr B., chairman of Dimon Italia, that Mr S. would meet with the chairman of Deltafina and discuss with him 'future opportunities'.

159 Although, admittedly, Mr S. was formally only an employee in one of the companies of the Dimon group, as Alliance One claims, the fact remains that the duties and responsibilities that he exercised within the Dimon group were at a very high level, in particular since they concerned one of the main sectors of activity of that group and the whole of Europe.

160 The fact that Mr S., given his role within the group, was kept directly and personally informed of the activities of Dimon Italia can therefore only confirm that there were significant lines of communication between Dimon Italia and its parent company.

161 In this respect, as regards, first, the email sent by Mr B. to Mr S., referring to an annual board meeting, it should be pointed out that, contrary to Alliance One's submission, that document is obviously not related to the preparation or consolidation of Dimon Italia's accounts, and contains strategic information about the business of the latter and its position compared to competitors.

162 As regards, second, the document containing a power point presentation prepared for a meeting at APTI, also from Mr B. to Mr S., it is sufficient to note that, contrary to Alliance One's claim, it is apparent from that document that discussions on prices took place at that meeting (see, in this respect, recital 213 of the contested decision). Moreover, in the accompanying email Mr B. informs Mr S. of the purpose of that meeting and also mentions a meeting between Mr M., of Deltafina, and Mr S. in this respect.

163 As regards, third, the email from Mr C. to Mr S. and Mr B., the Court notes that it states, establishing a link between purchases and sales, as follows:

'[Dimon Italia's] new purchasing strategy will require the support and involvement of Dimon's [E]uropean executive management as it could have a big impact on our sales'.

164 As regards, lastly, the email from Mr B. to Mr S. on 10 May 2001 (see also recital 209 of the contested decision), the Court would point out that it shows that Mr S. received detailed information on Dimon Italia's commercial policy, relating, inter alia, to purchasing activities, including relevant aspects for the purposes of the cartel.

Interpretation of the evidence capable of rebutting the presumption in the light of the case-law

165 According to Alliance One, Case C-97/08 P *Akzo Nobel and Others* v *Commission*, paragraph 80 above, brought clarification to 'what kind of evidence/arguments a parent company must submit to rebut the presumption'. In this respect, it identifies two groups of factors, the first group relating to the conduct of the subsidiary on the market and the second to the economic, organisational and legal links between the subsidiary and the parent company, and submits that, with respect to the first group of factors, it is not disputed that SCC and Dimon Inc. demonstrated that their respective subsidiaries had acted independently on the market.

166 In this respect, it is sufficient to note that the only relevant factors mentioned in Case C-97/08 P *Akzo Nobel and Others v Commission*, paragraph 80 above, are the 'the economic, organisational and legal links' between the parent company and its subsidiary (see paragraph 126 above).

167 The suggestion by Alliance One that the factors inherent in those links should be read in the light of Joined Cases T-339/94 to T-342/94 *Metsä-Serla and Others* v *Commission* [1998] ECR II-1727) and Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, and *Dansk Rørindustri and Others* v *Commission*, paragraph 80 above, must be rejected. In Alliance One's submission, it follows from those judgments that it is not the case that any economic, organisational or legal link is sufficient for a finding that the parent company is liable for the conduct of its subsidiary, but that only links of that kind that are capable of tying the subsidiary's conduct to the parent company's instructions are sufficient.

168 As regards, first, the passages from *Metsä-Serla and Others* v *Commission*, paragraph 167 above, it should be recalled that that case concerned an association, Finnboard, which, by definition, was not a subsidiary and could not form part of an

undertaking or even have a commercial policy (see, with respect to the precise nature of the legal relationship between that association and its members, Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraphs 271 to 281). As regards, second, the passages from *Dansk Rørindustri* v *Commission*, paragraph 80 above, and *Aristrain* v *Commission*, paragraph 167 above, the Court observes that they do not relate to the issue of the attribution of liability to a parent company. *Dansk Rørindustri*, paragraph 80 above, concerns the liability of companies, Henss and Isoplus, which did not have a common parent company (see, in this respect, Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraphs 55 to 61). Similarly, in *Aristrain* v *Commission*, paragraph 167 above, the Court of Justice refused to attribute liability for the conduct of a subsidiary to a 'sister' company which had not been identified as the legal person at the head of that group (see, inter alia, to that effect, *Aristrain* v *Commission*, paragraph 167 above, paragraph 98).

169 In the final analysis, as the Commission correctly states, the cases which gave rise to the three judgments relied on by Alliance One do not relate at all to the issue of attributability of liability for the unlawful conduct of a subsidiary to its parent company. Those three judgments merely bring clarification in the context of other situations in which joint and several liability may be incurred, even in the absence of any relationship of control between the companies. They cannot therefore be relied on by Alliance One.

170 In the light of all the foregoing considerations, the Court holds that the presumption that SCC and Dimon Inc. in fact exercised decisive influence over the conduct of their subsidiaries has not been rebutted by sufficient evidence. The second part of this plea must therefore be rejected.

3. *Third part: breach of the rights of the defence*

171 The third part of the first plea can essentially be broken down into two complaints. The first complaint alleges that the Commission based the contested decision, as regards the liability of the parent companies, on documents which it had not even mentioned in the statement of objections. The second complaint alleges that the Commission also breached SCC's and Dimon Inc.'s rights of defence by using non-accessible documents to demonstrate that they were liable.

172 In reply to a question put by the General Court at the hearing, Alliance One however stated that it was withdrawing the second complaint, formal note of which was taken in the minutes of the hearing. There is therefore no longer any need to examine that complaint.

(a) Arguments of the parties

173 Alliance One disputes the arguments which the Commission put forward in the contested decision to refute the evidence provided by SCC and Dimon Inc. It maintains that the Commission breached the rights of defence of those undertakings and thus of Alliance One itself. In particular, Alliance One claims that the Commission based its decision that the parent companies were liable on documents which had not even been mentioned in the statement of objections.

174 In that regard, the applicant observes, first, that neither SCC nor Dimon Inc. was able to express its opinion on those documents, since the Commission never informed them of the significance it might attach to them. SCC and Dimon Inc. therefore considered that those documents were irrelevant in the present case and did not comment on them in their replies to the statement of objections. It follows, in accordance

with the case-law of the Court of Justice, that such documents are not admissible evidence as against Alliance One, since it was never given the opportunity to express its views on them, the fact that the parties were familiar with those documents not being sufficient to support the conclusion that they could have commented on them in their replies to the statement of objections.

175 In the reply, Alliance One disputes the Commission's argument that the nature of the objections remains unaltered. Comparing the statement of objections and the contested decision, Alliance One emphasises that, especially in recitals 339 to 343 of the contested decision, the Commission added several elements and referred to documents which had not been mentioned previously. The 'nature of the objections' thus changed from a general presumption of decisive influence to a finding, based on those new documents, that such influence had actually been exercised; yet, according to the case-law, however, the Commission cannot rely on evidence which is not in the statement of objections without giving the undertakings in question the opportunity to comment on those new documents. Since those documents are, in Alliance One's submission, the only evidence on which the Commission relies, the liability of the parent companies is not proved and the contested decision should be annulled on that point.

176 In the reply, Alliance One further asserts (i) that documents 2894 to 2902, on which the Commission relies for the first time in the defence, are new documents and therefore inadmissible and (ii) that by freely reinterpreting in the defence the email sent by Mr B. to Mr S. on 10 May 2001, in the sense that it contains evidence that Dimon Inc. was informed of the cartel's activities, the Commission is introducing an objection which is completely new and therefore inadmissible.

177 The Commission contends that this part of the first plea should be rejected.

(b) Findings of the Court

178 The Court would recall that respect for the rights of the defence in the conduct of administrative procedures relating to competition policy constitutes a general principle of European Union law whose observance the European Union Courts ensure (see Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 26 and the case-law cited).

179 According to settled case-law, respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 10; Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 21).

180 Article 27(1) of Regulation No 1/2003 reflects that principle in so far as it provides that the parties are to be sent a statement of objections which must clearly set out all the essential matters on which the Commission relies at that stage of the procedure (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 80 above, paragraph 67), to enable the parties concerned properly to identify the conduct complained of by the Commission and to defend themselves properly before the Commission adopts a final decision. That obligation is satisfied if the final decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and takes into consideration only facts on which the persons concerned have had the opportunity of stating their views (see, to that effect, Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 109 and the case-law cited).

181 However, that may be done summarily and the decision is not necessarily required to be a replica of the statement of objections (*Musique Diffusion française and Others* v *Commission*, paragraph 179 above, paragraph 14), since the statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature (see, to that effect, Joined Cases 142/84 and 156/84 *British American Tobacco and Reynolds Industries* v *Commission* [1987] ECR 4487, paragraph 70). Thus, it is permissible for the Commission to supplement the statement of objections in the light of the parties' replies, whose arguments show that they have actually been able to exercise their rights of defence. The Commission may also, in the light of the administrative procedure, revise or supplement its arguments of fact or law in support of its objections (see, to that effect, Case T-86/95 *Compagnie Générale Maritime and Others* v *Commission* [2002] ECR II-1011, paragraph 448, and Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071, paragraph 438).

182 Moreover, the Court of Justice has stated that the taking into account of an argument put forward by an undertaking during the administrative procedure, without it having been given the opportunity to express an opinion in that respect before the adoption of the final decision, cannot as such constitute an infringement of its rights of defence (order in Case C-497/99 P *Irish Sugar* v *Commission* [2001] ECR I-5333, paragraph 24).

183 Lastly, it should be recalled that, according to the case-law, the rights of the defence are infringed where it is possible that the outcome of the administrative procedure conducted by the Commission might have been different as a result of an error committed by it. An applicant undertaking establishes that there has been such an infringement where it adequately demonstrates, not that the Commission's decision would have been different in content, but rather that it would have been better able to ensure its defence had there been no error, for example because it would have been able to use for its defence documents to which it was denied access during the administrative procedure (see, to that effect, Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 31 and the case-law cited, and *Knauf Gips* v *Commission*, paragraph 126 above, paragraph 28).

184 In the present case, Alliance One alleges that the Commission relied, in the contested decision, on documents which were not mentioned in the statement of objections. In the reply, it adds that the Commission relied in the defence on new documents, which are therefore inadmissible, and that the Commission also freely reinterpreted a document, which Alliance One submits is a new objection and therefore inadmissible.

185 The Court observes that, in the statement of objections, the Commission, in order to justify attributing to SCC and Dimon Inc. liability for the cartel offences of their wholly-owned Italian subsidiaries, was entitled, in principle, in the light of the case-law set out in paragraphs 86 to 88 above, to limit itself to establishing the distribution of the capital between subsidiaries and parent companies (see points 336 to 338 of the statement of objections). Pursuant to that case-law, in its final decision, the Commission was required to adopt a position on the arguments relied on by the parties in reply to that statement of objections (see recitals 335 et seq. of the contested decision), by which they sought to rebut the presumption in question.

186 Moreover, it must be stated that, contrary to Alliance One's submission, the Commission did not change in any way at all in the contested decision, either in terms of the law or the facts, the objections, the criterion used to attribute liability to SCC and Dimon Inc. or the evidence on which it relies. In this respect, it is apparent from recitals 328 to 334 of the contested decision, read together, that the Commission maintained its conclusion, clearly set out in points 336 to 338 of the statement of objections, that SCC and Dimon Inc.'s liability resulted, in principle, from the fact they had 100 % control of their subsidiaries, which, moreover, is not disputed by Alliance One. It is only in the context of the assessment of the arguments and evidence put forward by the parties during the administrative procedure, in the exercise of their rights of defence, that the Commission deals, in recitals 335 to 346 of the contested decision, with certain specific aspects and documents concerning the relationships between SCC and Transcatab, and Dimon Inc. and Dimon Italia, respectively and, in doing so, refers to the documents in the administrative file. The assessment of those aspects and documents was thus not capable of affecting the efficacy of the exercise of SCC's

and Dimon Inc.'s rights of defence, especially as they had access to those documents — which were in any event already in their possession — during the administrative procedure.

187 Moreover, it is apparent from the documents in the file that SCC and Dimon Inc., to which Alliance One is the legal successor, were able to respond to the objection expressly set out in the statement of objections addressed to them and to set out their defence at the administrative hearing before the Hearing Officer. The rule that the parties should be heard was therefore observed during the administrative procedure.

188 In any event, it should also be recalled that, as the Court of Justice has held, since the Commission is not required, as regards the imputability of the infringement, to submit, at the stage of the statement of objections, evidence other than proof of the shareholding of the parent company in its subsidiaries, the argument relating to the infringement of the rights of defence cannot be accepted (see, to that effect, Case C-97/08 P *Akzo Nobel and Others* v *Commission*, paragraph 80 above, paragraph 64).

189 Lastly, the argument, raised in the reply, alleging that certain documents placed in the file by the Commission were inadmissible, and that the Commission freely re-interpreted one of those documents, cannot succeed. That argument is based on the incorrect premiss that the Commission is using those documents as another means of substantiating its finding that the parent companies were liable. Moreover, the Court notes that, contrary to what Alliance One submits, the documents prepared by Dimon International comparing Dimon Italia's and Transcatab's facilities were cited in footnote 283 of the contested decision.

190 The third part of this plea must therefore be rejected.

4. *Fourth part: breach of the rules relating to allocation of the burden of proof*

(a) Arguments of the parties

191 Alliance One observes, first of all, that since the Commission has been unable to prove that the parent companies were involved in the cartel, the burden of proof remains with the Commission.

192 Even if one were to accept that the presumption is applicable in the present case, the fact none the less remains that, in the light of the evidence which SCC and Dimon Inc. submitted in their replies to the statement of objections, it was still for the Commission to prove their liability.

193 In effect, that evidence rebutted the Commission's presumptions. The Commission, on the other hand, instead of adducing sufficient evidence to refute SCC's and Dimon Inc.'s allegations and thereby establish their liability, relied in substance on other presumptions to refute their arguments or to deny that the evidence which they had adduced had any value.

194 By rejecting all the evidence and all the arguments put forward by SCC and Dimon Inc. on the sole basis of general statements about their inability to convince it, the Commission failed to develop adequate reasoning with respect to that evidence and those arguments. It is therefore not easy to know what elements, other than those already submitted, should be presented by an undertaking in order to convince the Commission that it did not exercise any influence over its wholly-owned subsidiary.

195 What the Commission therefore requires is in reality a *probatio diabolica*, in other words proof that it is in practice impossible to provide in so far as it should be 'negative' proof that the undertakings in question did not intervene in the decisions taken by their subsidiaries.

196 The Commission contends that this part of the first plea should be rejected.

(b) Findings of the Court

197 Alliance One essentially submits that it is not possible for a parent company to adduce direct, 'positive' and irrefutable evidence that it did not exercise any influence over the conduct of its subsidiary on the market, since that would amount to requiring a *probatio diabolica*.

198 In this respect, it is sufficient to point out that, contrary to Alliance One's claim, the parties concerned are not required to adduce direct and irrefutable evidence of the independence of the subsidiary's conduct on the market but only to submit evidence capable of demonstrating that independence (see paragraph 125 above).

199 The fact that, in the present case, for the purposes of rebutting the presumption of liability, Alliance One did not succeed in demonstrating that the subsidiaries of the parent companies, to which it is the legal successor, decided independently upon their conduct on the market does not mean, contrary to Alliance One's claim, that that presumption cannot under any circumstances be rebutted.

200 Furthermore, the Court would also point out that, given the nature of the presumption, which makes it possible to infer from a known fact proof of an unknown fact, it is entirely logical that the person against whom the presumption applies should have, in principle, to prove that the fact presumed is incorrect. However, that does not mean that the presumption becomes irrebuttable, since, in the case in point, that proof has to be sought within the sphere of the person against whom the presumption applies.

201 It follows that Alliance One's argument is not well founded and must be rejected.

202 It is also necessary to reject the claim, made by Alliance One in reply to a written question put by the Court that, according to Case C-97/08 P *Akzo Nobel and Others* v *Commission*, paragraph 80 above, the only consequence deriving from the presumption in question is the reversal of the burden of proof, and not, as the Commission allegedly contends, that such burden is more onerous for the other party than the burden resting on the Commission.

203 In the present case, the Commission did not indicate what 'level' of proof was required, but merely found that the evidence adduced by SCC and Dimon Inc. was not capable of rebutting the presumption.

204 The fourth part of this plea must therefore also be rejected.

205 In the light of the foregoing considerations, the first plea must be rejected in its entirety.

B — *Second plea: breach of Article 23(2) of Regulation No 1/2003 and also breach of the principle of proportionality in the fixing of the final amount of the fine*

1. *Arguments of the parties*

206 According to Alliance One, the amount of the fine imposed jointly and severally on Transcatab, Dimon Italia and itself, as the legal successor of SCC and Dimon Inc., breaches Article 23(2) of Regulation No 1/2003, in so far as the fine exceeds the threshold of 10 % of the turnover of each subsidiary. In view of their respective turnovers, the maximum amount of the fines that the Commission was entitled to impose was EUR 3.23 million in Transcatab's case and EUR 3.99 million in Dimon Italia's case, instead of EUR 14 million and EUR 10 million, respectively.

207 Alliance One further claims that by imposing a total fine of EUR 24 million on it, the Commission breached the principle of proportionality. In particular, the Commission disregarded, when fixing the starting amount, the fact that SCC and Dimon Inc. had already merged at the time of the adoption of the contested decision and that, therefore, only Transcatab was still part of the new group whereas Dimon Italia (with its 10 % market share) had been sold to third parties. Since it was left with only a 10 % market share, Alliance One criticises the Commission for having breached the principle of proportionality by setting the starting amount of its fine at an amount similar to that imposed on Deltafina (Universal), notwithstanding that the latter held 25 % of the market.

208 The Commission contends that this plea should be rejected.

2. *Findings of the Court*

209 There are two parts to this plea. Alliance One complains that the Commission exceeded the threshold of 10 % of the turnover of Transcatab and Dimon Italia. Moreover, it complains that the Commission breached the principle of proportionality, in so far as the starting amount of its fine approaches that of Deltafina (Universal), notwithstanding the significant difference between the two groups in terms of market share.

210 The Court observes that the first part of this plea is closely connected with the first plea, in so far as the rejection of the first plea necessarily has an effect on the merits of this part. Consequently, in the light of the considerations which gave rise to the rejection of the first plea, the Court concludes that the Commission did not err in taking the consolidated turnover of Dimon Inc. (parent company of Dimon Italia during the infringement) and of SCC (parent company of Transcatab during the infringement), which merged on 13 May 2005 into the new entity Alliance One, as reference points for the calculation of the upper limit of 10 % of turnover laid down in Article 23(2) of Regulation No 1/2003 (see, to that effect, Case T-175/05 *Akzo Nobel and Others* v *Commission*, paragraph 125 above, paragraph 114).

211 That maximum amount must be calculated on the basis of the total turnover of all the companies constituting the economic entity acting as an undertaking for the purposes of Article 81 EC, since only the total turnover of the component companies can constitute an indication of the size and economic power of the undertaking in question (see, to that effect, *HFB and Others* v *Commission*, paragraph 168 above, paragraphs 528 and 529, and Case T-175/05 *Akzo Nobel and Others* v *Commission*, paragraph 125 above, paragraph 114).

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

213 As regards the second part of this plea, alleging breach of the principle of proportionality, the Court observes, as the Commission rightly states, that, under the guise of breach of the principle of proportionality, Alliance One is in reality raising a question of the succession of undertakings. Alliance One is suggesting, in substance, that it should be held liable only for the fine imposed on Transcatab (SCC) and not for the fine imposed on Dimon Italia, since the latter — which held 10 % of market share during the infringement period — does not belong to the new group, having been sold to third parties before the adoption of the contested decision.

214 In this respect, it is not disputed that Alliance One was held liable for the infringement in its capacity as legal successor of the parent companies SCC and Dimon Inc. Moreover, that is also apparent from recital 349 of the contested decision, according to which, since Alliance One is the legal successor of the (SCC and Dimon Inc.) groups to which Transcatab and Dimon Italia belonged during the infringement period, it is on that basis that it is considered an addressee of the contested decision.

215 According to settled case-law, it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking (*Stora Kopparbergs Bergslags* v *Commission*, paragraph 70 above, paragraph 37; *HFB and Others* v *Commission*, paragraph 168 above, paragraph 103, and Case T-161/05 *Hoechst* v *Commission* [2009] ECR II-3555, paragraph 50).

216 The Court of Justice has also stated that when an entity that committed an infringement of the competition rules is subject to a legal or organisational change, that change does not necessarily create a new undertaking free of liability for its predecessor's infringements of the competition rules, when, from an economic point of view, the two are identical (see *ETI and Others*, paragraph 82 above, paragraph 42 and the case-law cited).

217 For the effective enforcement of competition law it may become necessary, by way of exception, to attribute a cartel to the new operator of the entity which participated in the cartel, in a situation where that new entity may, in economic terms, be regarded as the successor to the original operator (see, to that effect, the Opinion of Advocate General Kokott in *ETI and Others*, paragraph 82 above, points 75 to 78).

218 That 'economic continuity' test applies in specific circumstances, such as where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed (*Commission* v *Anic Partecipazioni*, paragraph 82 above, paragraph 145).

219 In the present case, it is undisputed that the infringement in question was committed by the entities managed, at the material time, by SCC and Dimon Inc. Those two entities ceased to exist in law after the infringement was committed, inasmuch as they produced, following their merger in 2005, the new entity Alliance One.

220 When an undertaking ceases to exist upon being merged with a purchaser, the latter takes on its assets and liabilities for infringements of competition law. In such cases, the liability for the infringement committed by the undertaking taken over may be attributed to the purchaser (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 326 and the case-law cited).

221 It is on the basis of those principles that Alliance One remains liable for the infringement committed by Dimon Italia, notwithstanding the fact that Dimon Italia was transferred to third parties. The situation of Mindo is different in this respect, since, as the case-law has made clear, the principle of personal liability is not called into question by the principle of economic continuity in cases where, as in the present case, an undertaking involved in the cartel has been transferred to an independent third party and there is no structural link between the initial operator and the new

operator (see, to that effect and by analogy, *Hoechst* v *Commission*, paragraph 215 above, paragraph 61).

222 It follows that, in the present case, the Commission was entitled to attribute liability for the infringement committed by Transcatab (SCC) and Dimon Italia (Dimon Inc.) to Alliance One.

223 Moreover, it should be added that, as the Commission maintains, it is not relevant to refer to Alliance One's market share at the time when the contested decision was adopted, as Alliance One submits, since the market shares used to determine the starting amount of the fines were, as is apparent from recitals 372 and 373 of the contested decision, those of the undertakings involved at the end of the infringement, namely in 2001.

224 The second part of this plea must therefore also be rejected.

225 In the light of the foregoing considerations, the second plea must be rejected in its entirety.

C — *The third plea: error of law and of fact and also breach of the principle of proportionality and failure to state reasons in determining the multiplier*

226 The third plea may be broken down into three parts. The first part is based, in substance, on the 'sufficient deterrent effect' of the fine and also to the Commission's practice in taking decisions. The second part alleges breach of the principle of

proportionality and also failure to state reasons in that the multiplier applied to Alliance One International is higher than that applied to Deltafina. The third part alleges inconsistency in the Commission's reasoning when applying the multiplier to Mindo.

227 In reply to a question put by the Court at the hearing, Alliance One stated however that the second part of this plea was the result of a clerical error and that it was withdrawing it, formal note of which was taken in the minutes of the hearing. Accordingly, there is no longer any need to examine it.

1. *First part: the sufficient deterrent effect and the Commission's practice in adopting decisions imposing fines*

(a) Arguments of the parties

228 Alliance One disputes the application of a multiplier of 1.25 to the starting amount of the fines imposed on Transcatab and Dimon Italia, which were set at EUR 10 million.

229 In particular, the applicant maintains that the turnovers of their parent companies did not justify the application of a multiplier and that, in view of the size of SCC and Dimon Inc. and the fact that they were not aware of their Italian subsidiaries' practices on the raw tobacco market, a fine of EUR 10 million was sufficiently deterrent in the present case. In addition, the Commission should also have taken into account the small size of the geographic market concerned by the infringement.

230 Alliance One refers, next, to the Commission's practice in taking decisions and compares the turnovers of SCC and Dimon Inc. and the level of the fines imposed on their subsidiaries with those of the undertakings on which sanctions were imposed by the Commission in the cases to which it refers, in order to demonstrate that the application of a multiplier was not justified in the present case by the need to achieve a sufficient deterrent effect.

231 In the reply, Alliance One further submits that by applying a multiplier separately to Transcatab and to Dimon Italia, the Commission exceeded the limits of its discretion and also departed from 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'), which state that an adjustment of the basic amount of the fine should not be applied automatically in the case of multinational companies but should be applied only if the need to ensure a sufficient deterrent effect so requires.

232 Alliance One thus concludes that the application of a multiplier of 1.25 to Transcatab and Dimon Italia is not justified and it requests the Court to reduce the amount of the fines accordingly.

233 The Commission disputes Alliance One's arguments.

(b) Findings of the Court

234 It must be borne in mind that the purpose of the penalties laid down in Article 23 of Regulation No 1/2003 is to suppress illegal activities and to prevent any recurrence. Deterrence is therefore one objective of the fine (see, to that effect, Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraphs 218 and 219 and the case-law

cited, and Case T-175/05 *Akzo Nobel and Others* v *Commission*, paragraph 125 above, paragraph 150).

235 The need to ensure that the fine has a sufficient deterrent effect requires that the amount of the fine be adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible, or on the other hand excessive, notably by reference to the financial capacity of the undertaking in question, in accordance with the requirements resulting from, first, the need to ensure that the fine is effective and, second, respect for the principle of proportionality (Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 283; *Hoechst* v *Commission*, paragraph 215 above, paragraph 379, and Case T-175/05 *Akzo Nobel and Others* v *Commission*, paragraph 125 above, paragraph 154).

236 The Court notes that, in the present case, the Commission applied the method laid down in the Guidelines, even if it did not make express reference to them, which mention the deterrent purpose in Section 1A thereof dealing with the gravity of infringements. More specifically, the fourth paragraph of that section states that it will be necessary 'to set the fine at a level which ensures that it has a sufficiently deterrent effect'.

237 That purpose is mentioned in the heading of section 2.6.3.2 of the contested decision ('Individual weight and deterrence') and, in particular, in recitals 374 and 375 thereof. The Commission decided to apply a multiplier of 1.5 — an increase of 50 % — to the starting amount of the fine set for Deltafina (Universal), and of 1.25 — an increase of 25 % — to the starting amount of the fine set for Dimon Italia (Dimon Inc.) and Transcatab (SCC) in order to ensure that the fine had a sufficiently deterrent effect; that effect would be lacking if the starting amount were to be limited to reflecting solely the market position of those undertakings. The Commission relied, in particular on their respective worldwide turnovers of USD 3.276 billion, USD 1.311 billion and USD 0.896 billion in 2005, in order to take account of the 'considerable economic and financial strength' of those groups, in the light of the fact that they also represent the

biggest tobacco merchants in the world and operate at different levels of business in the tobacco industry and in different geographic markets.

238 First, in arguing that the starting amount of EUR 10 million is already sufficiently deterrent, Alliance One does not substantiate its assertion that the amount of the fine, had it been determined without taking into account the multiplier for deterrent effect, would have been sufficient to ensure that the fine had such effect (see, to that effect, Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraph 107).

239 In any event, the Court would point out that that argument is based on a false premiss, namely that the increase of the fine in question is based on an assessment that a particular amount of a fine is appropriate to the deterrent objective of the fine assessed in the light of the size and overall resources of the undertakings.

240 It is not apparent from the contested decision that the operation whereby account is taken of size and overall resources for the purposes of deterrence is part of such an assessment. By the increase in the starting amounts set out in recital 376 of the contested decision, the Commission, regardless of the size of those amounts, in reality merely applied — to ensure the deterrent objective of the fines — differential treatment to the participants in the same cartel to take account of the way in which they are actually affected by the fine. That differentiation is carried out by means of multipliers set in the light of the size and overall resources of the undertakings, irrespective of the size of the amounts to which those multipliers are applied (see, to that effect, *BASF* v *Commission*, paragraph 234 above, paragraph 241).

241 The Commission was therefore right to find that, given the size and overall resources of the SCC and Dimon Inc. groups, assessed on the basis of the total turnover for

the business year ending on 31 March 2005, it was appropriate to increase for the purposes of deterrence the fine to be imposed on them and that, contrary to Alliance One's claim, the question whether they were aware of the practices of their Italian subsidiaries could not be considered to be of any importance in this connection (see, in this respect, paragraph 125 above).

242 As regards, second, the argument based on sufficient deterrent effect in the light of the Commission's practice when setting multipliers, it is sufficient to point out that the Commission's practice in earlier decisions does not itself serve as a legal framework for fines imposed in competition matters, since that framework is defined solely in Regulation No 1/2003 and the Guidelines (see, to that effect, Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 233 and the case-law cited, and Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 292).

243 As regards, third, the argument based on the very limited size of the geographic market, in the first place, the Court would point out that the cartel in question was national and was not limited, contrary to what Alliance One seems to suggest, to the tobacco-producing regions. The cartel established by the processors concerned the purchasing market and not the production market, which is concentrated in certain regions of the Italian peninsula (see recital 83 of the contested decision). In the second place and in any event, the Court observes that that issue has no connection with the application of the multiplier. The size of the geographic market is a factor that the Commission takes into consideration when assessing the gravity of the infringement (see, in the present case, recitals 365 and 366 of the contested decision). That factor corresponds to an objective and intrinsic feature of the infringement, whereas the application of a multiplier for the purposes of deterrence presupposes that the objective characteristics of the participants, such as their size and economic resources, are taken into account. Moreover, the very wording of the fourth paragraph of Section 1A of the Guidelines supports that proposition, inasmuch as the taking into consideration of the factors which justify the application of a deterrence factor is effected irrespective of the nature of the infringement, its actual impact on the market and the size

of the geographic market (see, to that effect, *Degussa* v *Commission*, paragraph 235 above, paragraph 273). That argument must, therefore, be rejected as ineffective.

244 As regards, fourth, the argument in the reply that the Commission departed in the present case from the Guidelines, in so far as those guidelines prevent the application of an automatic increase in the basic amount of the fine to multinational groups, the Court finds that that argument has no factual basis. It is apparent from the contested decision that, when setting the starting amount, the Commission first of all assessed the specific weight of each undertaking, according to its market share, and then took into account the economic and financial power of the multinational groups to which the undertakings which committed the infringement belonged, in order to ensure that that amount had a sufficiently deterrent effect. Thus, the increase in that amount was not applied automatically at all.

245 In the light of those considerations, the Court concludes that the Commission did not err in increasing the starting amount of the fines imposed on SCC and Dimon Inc. in order to ensure that they had a sufficiently deterrent effect.

2. *Third part: inconsistency in the reasoning which the Commission employed when applying the multiplier to Mindo*

(a) Arguments of the parties

246 Alliance One takes issue with the Commission for having employed inconsistent reasoning in not applying a multiplier to Mindo, on the ground that Mindo no longer

had any ties with it and was therefore a separate undertaking. Since Alliance One International is liable for the fine imposed on Dimon Italia (Mindo), if a multiplier is not applicable to Dimon Italia (Mindo) it is even less applicable to Alliance One.

247 By applying a multiplier separately to Dimon Italia and to Transcatab on the ground that they belonged to two multinational groups at the time of the infringement, the Commission failed to take account of the fact that at the time when the contested decision was adopted and the fine was payable, only Transcatab still formed part of a multinational group, while Dimon Italia had been sold in the meantime.

248 Furthermore, in view of the deterrent effect pursued by the application of the multiplier, the application of such a multiplier is justified only with respect to the company which committed the unlawful act and not to a company which was wholly unconnected with the cartel and whose sole link with the company directly involved is that it held that company's shares in the past.

249 Since Mindo has not ceased to exist, any multiplier should be applied to it, in its capacity as a direct participant in the cartel. An unacceptable consequence of the criterion used by the Commission is, according to Alliance One, that the company that directly committed the infringement receives a lighter penalty than the company that previously controlled it, which not only did not participate in the infringement and was not even aware of its existence, but no longer even has any links with that company.

250 All in all, in Alliance One's submission, the Commission cannot hold two companies jointly and severally liable for different and separate amounts of the same fine, as it has done in the present case.

251 The Commission disputes Alliance One's arguments.

(b) Findings of the Court

252 First of all, the Court would point out that in the present case the Commission rightly took account of the total turnover of the parent companies, namely Dimon Inc. and SCC, in order to calculate the multiplier, and not solely that of the subsidiaries concerned, given that parent company and subsidiary, as was observed in the analysis of the first plea, constituted a single undertaking under Article 81 EC (see, to that effect, Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraph 49, and Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 379). Moreover, the application of a multiplier in respect of deterrent effect was justified in the present case specifically by the fact that the undertakings which committed the infringement belonged to multinational groups (see recital 374 of the contested decision).

253 In footnote 291 in recital 374 of the contested decision, the Commission states that the application of a multiplier in respect of the fine imposed on Mindo (formerly Dimon Italia) is justified on the basis of the joint and several liability of Alliance One, whereas as far as Mindo's own liability is concerned, the application of a multiplier to it would not be justified as it has severed all ties with its shareholder. However, in view of the capping of Mindo's liability within 10% of its turnover, the Commission concluded that it was unnecessary to calculate a separate starting amount in its respect. It follows that the argument that the Commission did not take account of the situation at the time of the adoption of its decision has no factual basis.

254 In recitals 403 and 404 of the contested decision (in section 2.6.3.6, entitled 'Resulting fines and application of the upper limit to the fine'), the Commission clarifies Mindo's situation. In particular, in recital 404 of the contested decision, it states:

'… the joint and several liability of Mindo (which currently maintains no links with the former Dimon group) should be apportioned within the 10 % of its turnover in its most recent business year (that is to say, EUR 3[.]99 million)'.

255 Where the economic entity has subsequently broken up, each addressee of the decision is entitled to have that ceiling applied individually to it (judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraph 390, and judgment of 13 September 2010 in Case T-26/06 *Trioplast Wittenheim* v *Commission*, not published in the ECR, paragraph 113).

256 However, it must be stated that, in the present case, the question of the application of a multiplier in respect of deterrence to Mindo was of no practical consequence because its fine was limited to 10 % of its turnover. Alliance One's argument is therefore ineffective.

257 In any event, an undertaking's overall resources must be assessed, so as properly to achieve the objective of deterrence, in accordance with the principle of proportionality, at the date when the fine is imposed, which Alliance One does not moreover contest (see, to that effect, *Degussa* v *Commission*, paragraph 235 above, paragraph 285).

258 The Commission cannot therefore be criticised for having taken into consideration, when determining the increase in respect of deterrent effect, the turnover achieved by the groups whose merger occurred between the end of the infringement and the adoption of the contested decision.

259 The Commission was also right to hold Mindo jointly and severally liable for payment of the fine with Alliance One to the extent of EUR 3.99 million, while Alliance One remains liable for payment of the total amount of the fine, namely EUR 10 million.

260 It follows from all those considerations that this plea must also be rejected.

261 It follows that the action must be dismissed in its entirety, and there is no need, in the present case, to examine the admissibility of the second and third heads of claim put forward by Alliance One.

Costs

262 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. Since Alliance One has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders Alliance One International, Inc. to pay the costs.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 9 September 2011.

[Signatures]

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