JUDGMENT OF THE GENERAL COURT (Third Chamber)

5 October 2011 *

In Case T-39/06,

Transcatab SpA, established in Caserte (Italy), represented by C. Osti and A. Prastaro, lawyers,

applicant,

v

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

defendant,

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

* Language of the case: Italian.

THE GENERAL COURT (Third Chamber),

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

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 November 2010,

gives the following

Judgment

Background to the dispute

1 The applicant, Transcatab SpA, is an Italian company, now in liquidation, whose main activity is the first processing of raw tobacco. At the time of the facts forming the subject-matter of the present case, Transcatab was the wholly-controlled Italian subsidiary of Standard Commercial Corp. ('SCC'), one of the largest independent tobacco leaf traders in the world. On 13 May 2005, that is to say, during the administrative procedure, SCC merged with Dimon Inc. ('Dimon'), thus creating a new entity, Alliance One International, Inc. ('Alliance One'), which wholly controls Transcatab.

1. *Administrative procedure*

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

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

4 On 4 April 2002 a meeting was held at APTI's offices. In the context of that meeting, Deltafina informed the participants, including Transcatab and Dimon Italia Srl (a subsidiary of Dimon, now Mindo Srl), of its application for immunity and of the Commission's decision to grant it conditional immunity.

5 On the same date 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 of any fine, under points 20 to 27 of the Leniency Notice, and also, several hours later, an application on the same basis from Transcatab for a reduction of any fine.

6 On 9 April 2002 the Commission acknowledged receipt of Transcatab's application pursuant to point 25 of the Leniency Notice. Transcatab submitted a new application on 10 April 2002, consisting of an explanatory memorandum and 44 annexes. On 30 April 2002 the Commission also acknowledged receipt of that application pursuant to point 25 of the Leniency Notice.

7 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.

8 On 8 October 2002 the Commission informed Dimon Italia and Transcatab that they had been the first and second undertakings, respectively, to provide evidence of the infringement for the purposes of the Leniency Notice and that it thus proposed to grant them, at the end of the administrative procedure, a reduction of 30 to 50 % and 20 to 30 %, respectively, of the amount of the fines that would have been imposed on them with respect to any infringements found in the absence of cooperation.

9 On 25 February 2004 the Commission adopted a statement of objections, which it addressed to 10 undertakings or associations of undertakings, including Transcatab, Deltafina, Dimon Italia and Romana Tabacchi (together 'the processors') and the parent companies of certain of them, inter alia SCC, Dimon, and Universal Corp., the parent company of Deltafina. The addressees of the statement of objections had the opportunity to reply in writing and at a hearing, which was held on 22 June 2004.

10 Following the adoption, on 21 December 2004, of an addendum to the statement of objections concerning Deltafina's breach of the obligation to cooperate laid down in the Leniency Notice, in connection with the disclosure of its application for immunity (see paragraph 4 above), a second hearing was held on 1 March 2005.

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

2. *The contested decision*

12 The contested decision relates, first of all, to a horizontal agreement implemented by the processors on the Italian raw tobacco market.

13 In the context of that agreement, 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.

14 The contested decision also concerns 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.

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

16 In Article 1(1) of the contested decision, the Commission attributed liability for the cartel to the processors and also to Universal and Alliance One, as the company resulting from the merger between Dimon and SCC.

17 In Article 2 of the contested decision, the Commission imposed fines on the undertakings referred to in the preceding paragraph and also on APTI and Unitab (see paragraph 71 below).

Addressees of the contested decision

18 Recitals 325 to 351 to the contested decision deal with the determination of the addressees of that decision.

19 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 to the contested decision).

20 Next, the Commission stated that it was established that Deltafina, Dimon Italia, 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 to the contested decision).

21 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 and Transcatab a wholly-owned subsidiary of SCC (recital 328 to the contested decision).

22 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 that regard, 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 to the contested decision).

23 At recital 331 to 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.

24 While 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 to the contested decision).

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

26 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 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 to the contested decision).

27 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 to the contested decision).

28 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 to the contested decision).

29 As regards SCC, the Commission observed that before acquiring the whole of Transcatab's capital it already controlled the latter jointly with its Italian partner. The fact that SCC had 'not change[d] the management' of its subsidiary after acquiring it could not therefore be regarded as evidence that it had not exercised any influence over the management after becoming the sole owner. As concerns, in particular, 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 to the contested decision).

30 The Commission then rejected SCC's argument that there were no lines of communication between it and its subsidiary (recitals 343 and 344 to the contested decision).

31 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 to the contested decision).

32 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 (recital 349 to the contested decision).

33 In the light of those various elements, the Commission concluded, at recital 351 to 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.

Determination of the amount of the fine

34 At recitals 356 to 404 to the contested decision, the Commission examined the question of the fines to be imposed on the addressees of the decision.

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

Determination of the starting amounts of the fines

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

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

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

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

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

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

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

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

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

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

46 Thus, at recital 376 to 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.

Determination of the basic amount of the fines

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

48 The Commission considered that the restrictive practice involving the processors had begun on 29 September 1995 and had ceased to exist, according to their statements, on 19 February 2002. Thus, the Commission considered that the starting amounts of the fines imposed on the processors, apart from Romana Tabacchi, whose participation had been of shorter duration, should be increased by 60 %.

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

— Deltafina: EUR 60 million;

— Transcatab: EUR 20 million;

— Dimon Italia (Mindo): EUR 20 million;

— Romana Tabacchi: EUR 12.5 million.

Attenuating circumstances

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

51 As regards, in particular, Transcatab, the Commission rejected all the arguments alleging attenuating circumstances in its case.

52 First of all, the Commission observed that the establishment of the processors' cartel had no link with the conclusion of the interprofessional agreements by APTI. It inferred that the Italian regulatory framework had not encouraged the behaviour of the processors, which could not therefore benefit from any reduction of the amounts of their fines on the basis of that argument (recital 381 to the contested decision).

53 Next, the Commission rejected the processors' argument that they should receive a reduction on the ground that they had terminated the infringement before the

intervention of the Commission. In that regard, the Commission referred to the case-law according to which in cases of serious infringements of the competition rules where the parties knew or should have known that their conduct was fundamentally illegal, termination before the intervention of the Commission should not, as a matter of principle, lead to a reduction of the amount of the fine when it is being calculated (recital 382 to the contested decision).

54 The Commission also asserted that it was unable to consider that the cartel was never implemented, since it was apparent from the description of the facts that the parties had secured the implementation of the cartel through, in particular, their participation at regular meetings as well as regular exchanges of information regarding prices and quantities during the buying period (recital 383 to the contested decision).

55 The Commission, last, rejected Transcatab's argument that the specific social and economic circumstances of the market for raw tobacco in Italy ought to be taken into account in determining the amount of the fine, in application of Section 5(b) of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines'). The Commission observed that the application of Section 5(b) of the Guidelines was exceptional and that the present case did not have the same or similar features as those of the case cited by Transcatab in support of its argument. The Commission added that it was not accepted that the existence of illegal practices affecting the tobacco sector in certain Italian regions could have had a decisive effect in causing the practices at issue and that the effects of the reform of the common organisation of the markets were too uncertain and remote to justify the application of an attenuating circumstance (recital 384 to the contested decision).

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

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

— Deltafina: EUR 30 million;

— Dimon Italia (Mindo): EUR 20 million;

— Transcatab: EUR 20 million;

— Romana Tabacchi: EUR 8.75 million.

58 Last, the Commission observed that, according to Article 23(2) of Regulation No 1/2003, for each undertaking and association of undertakings participating in the infringement the fine is not to exceed 10 % of its total turnover in the preceding business year. It further observed that in cases where the undertakings in question belong to a group, where it is established that those undertakings were 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 (recitals 400 and 401 to the contested decision).

59 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 to the contested decision).

Application of the Leniency Notice

60 At recitals 405 to 500 to the contested decision, the Commission dealt with the application of the Leniency Notice in the present case.

61 Deltafina, Dimon Italia and Transcatab all applied for leniency under the Leniency Notice. As regards Deltafina, the Commission observed that it had already granted that undertaking conditional immunity. The Commission further stated that it had reached the preliminary conclusion that Dimon Italia and Transcatab had been, respectively, the first and second undertakings to submit evidence of the suspected infringement which represented significant added value with respect to the evidence already in its possession, within the meaning of point 22 of the Leniency Notice (recitals 405 to 407 to the contested decision).

62 After examining Deltafina's situation and concluding that it could not be granted immunity owing to its breach of the obligation to cooperate laid down in the Leniency Notice (see recitals 408 to 484 to the contested decision and paragraphs 4 and 10 above), the Commission examined the cases of Dimon Italia and Transcatab.

63 First, the Commission concluded that the fact that Deltafina had not been granted definitive immunity had no direct effect on the way in which the Leniency Notice should be applied to Dimon Italia and Transcatab (recitals 485 to 491 to the contested decision).

64 Second, it determined the reduction of the fines that could be granted, inter alia, to Transcatab under that notice.

65 In that regard, the Commission found, first of all, that Transcatab had complied with the conditions imposed on it, namely that it had ended its involvement in the infringement no later than the time when it submitted evidence (recitals 492 and 493 to the contested decision).

66 Next, the Commission asserted that, in order to determine the level of the reduction, it took into account the time at which the evidence was submitted, the extent to which it constituted added value and also the extent and continuity of the cooperation provided by the undertakings after the date on which the evidence was submitted (recital 494 to the contested decision).

67 Thus, in the first place, the Commission observed that Transcatab had applied for leniency before the Commission had taken any active investigation measures, that its application had covered the entire period of the infringement and that the evidence supplied had corroborated in many respects the evidence which the Commission already possessed (recital 495 to the contested decision).

68 In the second place, as specifically regards the documents supplied by Transcatab, the Commission accepted that the resulting account of the facts was particularly thorough and that it had been particularly useful in the understanding of the infringement and, in particular, some elements thereof (such as the conclusion of an interprofessional agreement in 1999 for the 1998 surplus tobacco production). However, the Commission observed that it was not unaware of any of the facts in respect of which Transcatab had supplied evidence (recital 497 to the contested decision).

69 Last, the Commission also recognised that Transcatab had proved to be cooperative with the Commission throughout the procedure and that it had not contested the facts on which the Commission had relied in the statement of objections (recital 498 to the contested decision).

70 The Commission thus concluded that Transcatab should receive the highest reduction of the fine within the corresponding band, namely a reduction of 30 % (recital 499 to the contested decision).

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

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

— Dimon Italia (Mindo) and Alliance One: EUR 10 million, Alliance One being 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

72 By application lodged at the Court Registry on 24 January 2006, Alliance One brought an action for, in particular, annulment in part of the contested decision (Case T-25/06). By application lodged at the Court Registry on 3 February 2006, Transcatab brought the present action.

73 In the application, Alliance One requested that that case be joined with the present case. That request was also set out by Transcatab in its application.

74 The Court did not grant the request for joinder.

75 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 Transcatab, which replied within the prescribed period. On 4 February 2010 the Commission submitted its observations on Transcatab's reply.

76 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure and, in the context of measures of organisation of procedure, requested Transcatab to produce a document. The document was produced within the prescribed period.

77 The parties presented oral argument and answered questions put by the Court at the hearing, which took place on 30 November 2010.

78 At the hearing, the Court requested Transcatab to produce another document, pursuant to Article 64 of the Rules of Procedure. Transcatab produced that document on 22 December 2010.

79 Transcatab claims that the Court should:

— annul the contested decision in part;

— reduce the fine imposed on it;

— order the Commission to pay the costs.

80 The Commission contends that the Court should:

— dismiss the action;

— set the fine at EUR 15 million, in exercise of the powers conferred on the Court by Article 229 EC;

— order Transcatab to pay the costs.

Law

81 In support of its action, Transcatab raises five pleas in law, some of which can be divided into several parts. In the first plea, Transcatab claims, in substance, that the Commission made errors of law in declaring that Alliance One was liable for its conduct; that the Commission did not state sufficient reasons for its position in that regard; and that it also breached the applicant's rights of defence. The second plea alleges an error of law, failure to state reasons and illogical reasoning, breach of the rights of the defence and breach of the principles of proportionality, equal treatment and the protection of legitimate expectations when setting the fine. The third plea alleges error of law and failure to state reasons in setting the amount of the fine, by reference to the evaluation of the duration of the infringement, breach of the principle *ne bis in idem* in relation to the fine imposed on APTI and also breach of the principle of equal treatment. In the context of the fourth plea, Transcatab claims that the Commission wrongly concluded in the contested decision that none of the attenuating circumstances on which Transcatab relied was applicable. In the context of the fifth plea, it claims, last, that the Commission erred in the application of the Leniency Notice.

82 The Commission contends that by its third plea Transcatab has gone back on its earlier cooperation, consisting in not substantially contesting the facts established in the statement of objections. Thus, by way of counterclaim, the Commission requests the Court to reduce the reduction of the fine imposed on Transcatab from 30 % to 25 % and thus, in the exercise of its unlimited jurisdiction, to set the fine at EUR 15 million.

1. *First plea, concerning the imputation of the infringement to Transcatab's parent company*

First part of the first plea, alleging misreading of the case-law, failure to understand the evidence supplied and breach of the rights of the defence

Arguments of the parties

83 In the first place, Transcatab challenges the finding made in the contested decision that the mere fact that during the infringement period SCC held 100 % of Transcatab's capital is sufficient for it to be presumed liable for its subsidiary's unlawful conduct. Such a presumption is, it maintains, contrary to the case-law. In Transcatab's submission, the Commission must prove the existence of other indicia which support the view that a parent company actually exercised decisive influence over its subsidiary. In the present case, the Commission merely presumed that SCC was liable and provided no other indicia capable of substantiating such liability. The Commission thus reversed the burden of proof, which is not borne by Transcatab or its parent company but by the Commission itself.

84 In the second place, Transcatab claims that SCC provided the Commission with sufficient evidence to prove that it had no connection with Transcatab's conduct. That evidence related both to the description of the local reality of the Italian market and to the characteristics of the structure of the SCC group, which show that its subsidiaries are independent. Furthermore, the evidence deals with the autonomy of its board and its chief executive officer.

85 In the reply, Transcatab claims, moreover, that the Commission's assertion that it is possible to rebut the presumption of decisive influence only where the participation is exclusively financial is contrary to the case-law. In its submission, the Commission has not carefully examined the evidence submitted during the administrative procedure and has confined itself to refuting all the arguments on the basis of unsubstantiated prejudices. First, the assertion that it is unlikely that a parent company can wholly delegate the management of a subsidiary is unfounded. As Transcatab demonstrated during the administrative procedure, the ramified structure of the group meant that a single management was not possible. Second, the Commission applied the presumption of decisive influence even for the period when SCC held only 50 % of Transcatab's capital, although Transcatab and SCC had proved that Transcatab's board and chief executive officer, to whom all power to manage the company was entrusted, had been appointed before SCC obtained exclusive control of Transcatab. Third, the fact that certain documents were drawn up in English is not sufficient to prove that the parent company influenced the management of Transcatab's business activity. In conclusion, the Commission was wrong to reject the evidence submitted, without sufficient or logical reason and without raising against it other documents having at least equivalent probative value. Thus, the Commission did not comply with its obligation to conduct the case impartially.

86 In the third place, the Commission failed to have regard for Alliance One's rights of defence, in so far as it used in the contested decision documents from the file that were not mentioned in the statement of objections, thus preventing SCC from commenting on their content and thereby breaching the legitimate expectation of its legal successor, Alliance One. Transcatab acknowledges that the documents in question were known to the parties. However, as they had not been mentioned in the statement of objections, the parties were entitled to take the view that they had no importance for the purposes of the case and that there was thus no need to express their opinion with respect to them. In the reply and at the hearing, Transcatab asserted that it was relying on a breach of its own rights of defence.

87 The Commission contends that Transcatab's arguments should be rejected. As regards, in particular, the allegation of breach of Alliance One's rights of defence, the Commission expresses doubt as to its admissibility, since Transcatab is not relying on a breach of its own rights, but of the rights of another party. The extension of the complaint to Transcatab's own rights of defence is out of time and thus inadmissible.

Findings of the Court

— Failure to observe the rules governing the imputability to the parent company of the practices of its subsidiary

88 As regards the first complaint raised by Transcatab, 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).

89 It follows from the case-law that, 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; *Akzo Nobel and Others* v *Commission*, paragraph 88 above, paragraph 55; and Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 85).

90 Where such an economic entity infringes the competition rules, 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 88 above, paragraph 56).

91 The infringement of 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 ('*PVC II*'), paragraph 978).

92 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 88 above, paragraph 58 and the case-law cited).

93 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 to 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 88 above, paragraph 59).

94 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 *Akzo Nobel and Others* v *Commission*, paragraph 88 above, paragraph 60 and the case-law cited).

95 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent company exercises a decisive influence over the subsidiary's commercial policy. The Commission will then be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see, to that effect, Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 29, and *Akzo Nobel and Others* v *Commission*, paragraph 88 above, paragraph 61).

96 While it is true that at paragraphs 28 and 29 of *Stora Kopparbergs Bergslags* v *Commission*, paragraph 95 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 94 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 88 above, paragraph 62 and the case-law cited, and Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 57).

97 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 to the contested decision).

98 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 to the contested decision).

99 At recital 331 to the contested decision, the Commission thus considered that, in the present case, Transcatab 'lack[ed] autonomy' since it was wholly controlled by its parent company, SCC.

100 Contrary to Transcatab's contention in the reply, 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 90 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.

101 The Commission therefore did not breach the rules governing the imputability to a parent company of the conduct of its subsidiary by holding, essentially, SCC, to which Alliance One is the legal successor, liable for the infringement committed by Transcatab.

102 That conclusion cannot be called in question by the arguments put forward by Transcatab in reply to the Court's written question regarding the consequences to be inferred from *Akzo Nobel and Others* v *Commission*, paragraph 88 above. According to Transcatab, first, in that judgment, the Court of Justice misinterpreted the earlier case-law, in particular the judgment in *Stora Kopparbergs Bergslags* v *Commission*, paragraph 95 above, and, in any event, the case-law is not unequivocal in that respect. Second, according to Transcatab, the facts of *Akzo Nobel and Others* v *Commission*, paragraph 88 above, can be distinguished from the facts of the present case, since in that 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 88 above (see also, to that effect, the Opinion of Advocate General Kokott in that case, ECR I-8241, points 60 and 61), that the Court of Justice not only took into consideration the case-law on which Transcatab bases a large part of its main reasoning, and, in particular, *Stora Kopparbergs Bergslags* v *Commission*, paragraph 95 above, but also gave an unequivocal interpretation of the earlier case-law (*Akzo Nobel and Others* v *Commission*, paragraph 88 above, paragraphs 58 to 62). With respect to the second argument, it is sufficient to observe that the alleged difference between the two cases is wholly irrelevant, since the test of the imputability of liability in *Akzo Nobel and Others* v *Commission*, paragraph 88 above, was not the parent company's direct or indirect knowledge 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.

— Failure to have regard to the evidence produced for the purposes of rebutting the presumption

103 As was recalled at paragraphs 94 and 95 above, where a subsidiary is wholly owned by the parent company, the Commission is entitled to presume that the parent company 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. The presumption in question is rebuttable and can be rebutted by evidence to the contrary. Contrary to Transcatab's contention, it is therefore for SCC — which, at the time of the infringement, held 100 % of Transcatab's capital (see recital 336 to the contested decision) — to rebut that presumption by producing evidence capable of showing that its subsidiary determines its course of action on the market autonomously and that the two companies therefore do not form 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 88 above, paragraphs 60 to 62 and the case-law cited, and judgment of 30 September 2009 in Case T-175/05 *Akzo Nobel and Others* v *Commission*, not published in the ECR, paragraph 93).

104 In the present case, the Commission devoted recitals 335 to 344 to the contested decision to examining the arguments and evidence put forward by SCC in its reply to the statement of objections in order to prove that it had not exercised decisive

influence over Transcatab's commercial policy and did not consider them capable of rebutting the presumption.

105 It must be emphasised that in the application Transcatab merely asserts, without substantiating its allegations, that SCC proved during the administrative procedure that it had a decentralised structure, with its own wholly independent local management, to which all functions were delegated, in the specific light of the special features of the Italian raw tobacco market, and that the members of its board and its chief executive officer were autonomous and had no direct or indirect link with SCC. However, Transcatab did not identify any errors which the Commission had made in the contested decision in evaluating that evidence. Only in the reply, in response to certain arguments raised by the Commission, did the applicant put forward a number of arguments designed to criticise, indirectly, the contested decision.

106 In any event, it should be observed, first of all, that, as the Commission rightly stated at recital 338 to 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. Entrusting the 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 applies to the argument based on the alleged characteristics of the Italian raw tobacco market, since those characteristics do not prevent a parent company from fully exercising effective control over its subsidiary.

107 It should further be observed that at recitals 341 and 342 to the contested decision the Commission stated, first, that before acquiring 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. Second, 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.

108 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 the board in whole or in part, took no steps to do so. It follows that the fact that the members of the board and, in particular, the chief executive officer remained in office can be attributed only to a decision by SCC, as sole shareholder of Transcatab.

109 Furthermore, the fact that one person alone, namely the chief executive officer, 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, precisely 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 a delegation of powers pre-dating 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 would not, de facto, be accountable for his actions to anyone.

110 Thus, and given also that a delegation of powers to the chief executive officer 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.

111 As regards, next, the argument whereby the applicant takes issue with what it claims to be the Commission's inference from the fact that certain documents were drafted in English, it is sufficient to observe that, contrary to Transcatab's contention, those documents, referred to at recitals 343 to 346 to the contested decision, were not intended either to prove that the parent companies were in a position to influence or did in fact influence the conduct of their Italian subsidiaries or, still less, to prove that the parent companies were aware of the cartel in question. On the contrary, the Commission merely used certain documents forming part of the administrative file in order to establish the degree of credibility of the evidence and arguments put forward by SCC in its reply to the statement of objections in order to rebut the presumption that it exercised decisive influence over Transcatab.

112 Last, it should be observed that, contrary to Transcatab's assertion in the reply, it does not follow from the contested decision that the presumption of decisive influence can be rebutted only if the parent company's participation is exclusively financial.

113 It follows that the complaint alleging failure to have regard to the evidence produced for the purposes of rebutting the presumption must be rejected.

— Breach of the rights of the defence

114 As regards Transcatab's third complaint, it should be recalled that respect for the rights of the defence in the conduct of administrative procedures relating to competition policy constitutes a general principle of EU law whose observance the EU 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).

115 According to consistent 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, and Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 21).

116 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 88 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).

117 However, that may be done summarily and the final decision is not necessarily required to be a replica of the statement of objections (see, to that effect, *Musique Diffusion française and Others* v *Commission*, paragraph 115 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 replies submitted by the parties, 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 of 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).

118 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).

119 Last, it should also be recalled that, according to the case-law, the rights of the defence are breached 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 a breach 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 Case C-407/08 P *Knauf Gips* v *Commission* [2010] ECR I-6375, paragraph 28).

120 In the present case, it should be observed that, in the statement of objections, the Commission, in order to justify attributing to SCC liability for the cartel offence of its wholly-owned subsidiary Transcatab, could, in principle, in the light of the case-law set out at paragraphs 94 to 96 above, limit itself to establishing the distribution of the capital between subsidiaries and parent companies (see paragraphs 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 recital 335 et seq. to the contested decision), whereby they sought to rebut the presumption in question.

121 Furthermore, as regards Transcatab's claim that the Commission used in the contested decision documents not referred to in the statement of objections, it should be observed that it is only when assessing the arguments and evidence put forward by the parties during the administrative procedure that the Commission, at recitals 335 to 344 to the contested decision, actually addresses certain specific aspects and documents concerning the relationship between SCC and Transcatab and, when doing so, refers to certain documents in the administrative file. The assessment of those aspects and documents was thus not capable of affecting the efficacy of the exercise of Transcatab's rights of defence, especially as it had access to those documents — which were in any event already in its possession — during the administrative procedure.

122 Moreover, it is apparent from the file that both SCC and Transcatab 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.

123 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 breach of the rights of the defence cannot be accepted (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 88 above, paragraph 64).

124 The complaint alleging breach of the rights of the defence must therefore be rejected on the substance, without there being any need to adjudicate on the question of its admissibility raised by the Commission.

125 In conclusion, in the light of all the foregoing, the first part of the first plea must be rejected in its entirety.

Second part of the first plea, alleging infringement of Article 23(2) of Regulation No 1/2003

Arguments of the parties

126 Transcatab maintains that, because it held Alliance One liable for the infringements in question, the Commission imposed a fine on Transcatab which exceeds the maximum limit provided for in Article 23(2) of Regulation No 1/2003 of 10 % of its turnover for the business year preceding the adoption of the contested decision. In fact, the fine imposed on it comes to around 43 % of its turnover.

127 For the remainder, Transcatab refers to the arguments developed by Alliance One in its action (Case T-25/06), a copy of which it has annexed.

128 The Commission contends that Transcatab's arguments should be rejected.

Findings of the Court

129 It should be observed, in the first place, that this part is closely linked to the first part of the present plea, in so far as the rejection of the first part necessarily has an impact on the merits of the present part. Consequently, regard being had to the considerations that led to the rejection of the first part of the present plea, it must be concluded that the Commission did not err in taking SCC's consolidated turnover as a reference for the calculation of the maximum amount of 10 % of turnover provided for in Article 23(2) of Regulation No 1/2003 (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 103 above, paragraph 114).

130 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, Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraphs 528 and 529, and *Akzo Nobel and Others* v *Commission*, paragraph 103 above, paragraph 114).

131 As regards, in the second place, Transcatab's general reference to the arguments developed in the action brought by its parent company, Alliance One, it should be observed that such a reference, which refers to the annexed document only generally

and does not enable the Court to identify precisely the arguments that it might regard as supplementing the pleas developed in the written submissions, must be considered inadmissible.

132 It should be borne in mind that, under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court, each application is required to state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. According to consistent case-law, it is necessary, for an action to be admissible, that the basic matters of law and of fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application. Moreover, it is not for the Court to seek and to identify, in the annexes, the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (see Case T-209/01 *Honeywell* v *Commission* [2005] ECR II-5527, paragraphs 56 and 57, and Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 94 and the case-law cited).

133 Consequently, the second part of the first plea must also be rejected as unfounded in part and as inadmissible in part.

134 It follows from the foregoing considerations that the first plea must be rejected in its entirety.

2. *Second plea, concerning the setting of the starting amount of the fine*

First part of the second plea, concerning the gravity of the infringement

135 In the first part of the second plea, Transcatab raises a number of complaints relating to the classification of the infringement as 'very serious' in the contested decision.

136 It is appropriate, at the outset, to recall the general principles governing the determination of the amount of fines and, in particular, the assessment of the gravity of the infringement.

137 Article 81(1)(a) and (b) EC expressly declare that agreements and concerted practices which consist in directly or indirectly fixing purchase or selling prices or other transaction conditions or in limiting or controlling production or outlets are incompatible with the common market. Infringements of that kind, particularly in the case of horizontal cartels, are classified by the case-law as 'particularly serious' since they involve direct interference with the essential parameters of competition on the market in question (Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 675) or clear infringements of the Community competition rules (Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 109, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 303).

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

139 It is settled case-law that the gravity of infringements of competition law has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (*Dansk Rørindustri and Others* v *Commission*, paragraph 88 above, paragraph 241; *Prym and Prym Consumer* v *Commission*, paragraph 114 above, paragraph 54; and Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 91).

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

141 The Guidelines are an instrument designed to clarify, in compliance with superior rules of law, the criteria which the Commission intends to apply when exercising the discretion conferred on it by Article 23(2) of Regulation No 1/2003 for the purpose of setting fines. The Guidelines do not constitute the legal basis of a decision imposing fines, which is based on Regulation No 1/2003, but they determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by that decision and, consequently, ensure legal certainty on the part of the undertakings (*Dansk Rørindustri and Others* v *Commission*, paragraph 88 above, paragraphs 209 to 213, and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraphs 219 and 223).

142 Thus, although the Guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 88 above, paragraphs 209 and 210, and Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91).

143 The fact that the Commission has limited its own discretion by adopting the Guidelines is not incompatible with its maintaining a significant discretion (see, to that effect, Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraphs 246, 274 and 275). The fact that, in the Guidelines, the Commission set out its approach to assessment of the gravity of an infringement does not prevent it from assessing infringements as a whole by reference to all the relevant circumstances of the case, including factors that are not expressly mentioned in the Guidelines (*Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 141 above, paragraph 237).

144 According to the method provided for in the Guidelines, the Commission takes as its starting point for calculating the amount of the fines to be imposed on the undertakings concerned an amount determined according to the intrinsic gravity of the infringement. In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market (Section 1.A, first paragraph, of the Guidelines).

145 Within that context, infringements are put into one of three categories, namely 'minor infringements', for which the likely fines will be between EUR 1 000 and EUR 1 million, 'serious infringements', for which the likely fines will be between EUR 1 million and EUR 20 million, and 'very serious infringements', for which the likely fines will

be above EUR 20 million (Section 1.A, second paragraph, first to third indents of the Guidelines). As regards very serious infringements, the Commission states that these will generally be horizontal restrictions, such as 'price cartels' and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly (Section 1.A, second paragraph, third indent of the Guidelines).

146 Moreover, the three factors to be taken into account in assessing the gravity of the infringement referred to at paragraph 144 above do not have the same weight in the context of the overall assessment. The nature of the infringement plays a major role, in particular, for the qualification of 'very serious' infringements (*Erste Group Bank and Others* v *Commission*, paragraph 139 above, paragraph 101, and Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky* v *Commission* [2010] ECR II-1443, paragraph 137).

147 On the other hand, neither the actual impact on the market nor the extent of the geographic market is a factor necessary for the infringement to be classified as very serious in the case of horizontal agreements concerning, as here, price fixing. While those two criteria are factors to be taken into consideration for the purpose of assessing the gravity of the infringement, they are two among other factors for the purposes of the overall assessment of gravity (see, to that effect, *Prym and Prym Consumer* v *Commission*, paragraph 114 above, paragraphs 74 and 81; *Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 141 above, paragraphs 240 and 311; and Case T-73/04 *Carbone-Lorraine* v *Commission* [2008] ECR II-2661, paragraph 91).

148 Thus, according to what is now settled case-law, it follows from the Guidelines that the Commission may classify horizontal agreements aimed in particular, as in the present case, at price fixing as 'very serious' solely on account of their nature, without being required to demonstrate an actual impact of the infringement on the market (*Prym and Prym Consumer* v *Commission*, paragraph 114 above, paragraph 75; see also, to that effect, Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v

Commission [2005] ECR II-3033, paragraph 178, and Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 150) and without such classification being precluded by the limited extent of the geographic market concerned (see, to that effect, *Erste Group Bank and Others* v *Commission*, paragraph 139 above, paragraph 103, and *Carbone-Lorraine* v *Commission*, paragraph 147 above, paragraph 91).

149 That conclusion is supported by the fact that, while the description of 'serious' infringements expressly mentions market impact and effects over extensive areas of the common market, the description of 'very serious' infringements makes no mention of a requirement that there be an actual impact on the market or that there be effects in a particular geographic area (*Gütermann and Zwicky* v *Commission*, paragraph 146 above, paragraph 137; see also, to that effect, *Brasserie nationale and Others* v *Commission*, paragraph 148 above, paragraph 178).

150 Furthermore, there is an interdependence between the three factors in the assessment of gravity of an infringement in that a high degree of gravity in respect of one of the factors may offset the lesser gravity of the infringement in respect of other factors (*Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 141 above, paragraph 241).

151 As specifically regards the present case, it is apparent from the contested decision that the Commission determined the amount of the fine imposed on the various addressees on the basis of the general method by which it undertook to be bound in the Guidelines, even though it does not expressly refer to the Guidelines in the decision.

Arguments of the parties

152 In the first place, Transcatab claims that it follows from the wording of the Guidelines, as set out at recital 365 to the contested decision, that in order to assess the gravity of the infringement the Commission is required to take three criteria into consideration, namely the nature of the infringement, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Thus, the Commission cannot classify the cartel as 'very serious' by reference solely to the nature of the infringement without taking the other two criteria into consideration.

153 In spite of the provisions of the Guidelines, however, the Commission regarded the infringement in question as 'very serious'. That classification is incorrect, in that it fails to take account of the fact that the infringement had no actual impact on the market or of the small extent of the geographic market concerned. In properly taking account of the three abovementioned criteria, the Commission ought to have classified the cartel as merely a 'serious' infringement. In several previous cases, the Commission has classified a price cartel such as that in the present case as a 'serious' infringement. In the present case, moreover, the Commission did not rely exclusively on the nature of the infringement in order to classify the infringement as 'very serious', as it asserts, but it evaluated the gravity of the infringement by taking the three abovementioned criteria into account, as is apparent from recitals 365 and 368 to the contested decision. The fact that the Commission set the penalty below the minimum threshold of EUR 20 million envisaged in the Guidelines does not permit the view that Transcatab has no interest in raising the plea, since that threshold is merely an indication of the minimum amount of the fines that may be imposed.

154 In the second place, Transcatab raises a number of complaints relating specifically to the effects of the cartel on the market. In its submission, the agreements penalised by the contested decision had no impact on the market or, at least, did not have the

effects agreed. Thus, it is apparent from several price comparisons made by the Commission in the statement of objections that the prices indicated by the parties in their agreements were never 'reflected' on the market. Transcatab cites a number of actual examples and certain data in support of its assertions and also claims that if the cartel had had effects there would have been a reduction and a stabilisation of prices, which did not occur. Furthermore, the contested decision itself states, at recital 97 et seq., that raw tobacco prices in Italy rose between 1990 and 2000 in a way that did not occur in any other Member State and that those increases continued until 2002, the year in which the processors terminated their agreements. In addition, in the case in which the Commission adopted Decision C (2004) 4030 final of 20 October 2004 relating to a proceeding pursuant to Article 81(1) [EC] (Case COMP/C.38.238/B.2 — Raw tobacco — Spain) ('Raw tobacco — Spain'), the Commission considered that the increases in tobacco prices, in spite of the existence of an agreement between processors, constituted evidence that the agreements were not implemented. In its previous practice in adopting decisions, moreover, the Commission took account of the absence of an actual impact on the market of the conduct regarded as particularly serious and classified that conduct as 'serious' infringements and not as 'very serious' infringements. The Commission also wrongly stated, and without stating its reasons for doing so, at recital 368 to the contested decision, that the cartel was likely to have effect on the downstream market for processing and the sale of processed tobacco. Downstream, the cartel could, at most, have had the effect of reducing cigarette manufacturers' costs.

155 Furthermore, the reasoning stated in the contested decision with respect to the impact of the infringement on the market is illogical, in so far as the Commission maintains that the cartel had the potential to reduce global tobacco production to the detriment of consumers (recital 282 to the contested decision) when the underlying problem of the European and Italian tobacco markets was surplus production of poor-quality tobacco. In addition, the Commission did not mention in the statement of objections that the cartel had had the effect of reducing production. In using that argument for the first time in the contested decision, the Commission breached Transcatab's rights of defence, since it was not put in a position to respond to that argument. The

Commission also mentioned for the first time in the contested decision the potential effect on the downstream market, thus again breaching Transcatab's rights of defence.

156 In the third place, Transcatab claims that the geographic market affected by the infringements penalised in the contested decision is particularly small, being limited to four regions in Italy, as is apparent from recital 84 to the contested decision. The geographic market involved is therefore much smaller than the national market. The Commission did not consider that element when determining the gravity of the infringement. The contested decision is therefore vitiated by lack of reasoning in that regard. Furthermore, in the light of the Commission's previous practice when adopting decisions, the infringement ought to have been regarded as 'serious' and not as 'very serious'. In addition, in the Raw tobacco — Spain decision, the Commission took into account the relatively small size of the product market, which covered only certain regions of Spain, when determining the fines.

157 The Commission contends that Transcatab's arguments should be rejected.

Findings of the Court

158 It should be observed, first of all, that Transcatab categorically disputes the 'basic amount' of the fine, which, pursuant to the fourth paragraph of Section 1.B of the Guidelines, is the sum of the amounts set for the gravity and the duration of the infringement. However, it follows from the applicant's argument that the contested amount of the fine is the amount determined by reference to the gravity of the infringement, so that the amount in issue in this plea is the starting amount of the fine, as mentioned at recital 376 to the contested decision (see, to that effect, Case T-161/05 *Hoechst* v *Commission* [2009] ECR II-3555, paragraph 107).

— The classification of the infringement as 'very serious'

159 As regards Transcatab's assertion that the Commission erred in classifying the infringement as 'very serious', it should first of all be observed that, as recalled at paragraphs 146 to 148 above, it follows from consistent case-law that, among the three criteria mentioned in the Guidelines for the assessment of the gravity of the infringement, the nature of the infringement plays a predominant role for the classification of very serious infringements. Thus, agreements or concerted practices designed to fix prices or share markets may, on the sole basis of their actual nature, carry with them the classification as 'very serious', without there being any need to characterise such conduct by a particular actual impact on the market or a particular geographic extent.

160 In the present case, as regards the nature of the infringement in issue, it should be observed that it had the object, in particular, of jointly fixing the prices which the processors paid for raw tobacco and allocating suppliers and quantities of raw tobacco. Such practices constitute horizontal restrictions of the 'price cartel' type within the meaning of the Guidelines and are therefore by nature 'very serious' infringements. Agreements of that type are classified by the case-law as clear-cut infringements of the competition rules or particularly serious infringements since they involve direct interference with the essential parameters of competition on the relevant market (see paragraph 137 above).

161 It follows that in the present case the Commission was able to classify the agreement as a very serious infringement on the basis of its actual nature, irrespective of its actual impact on the market and its geographic extent (see the case-law referred to at paragraphs 146 to 149 above and, in particular, *Erste Group Bank and Others* v *Commission*, paragraph 139 above, paragraph 103).

162 Furthermore, with specific regard to Transcatab's various references to decisions previously adopted by the Commission, it should be borne in mind that the Commission's practice in taking decisions does not in itself serve as a legal framework for fines imposed in competition matters, since that framework is defined solely in Regulation No 1/2003, as applied in the light of the Guidelines, and since the Commission has a wide discretion when setting the amount of fines and is not bound by assessments which it has made in the past (see, to that effect, Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 82, and *Erste Group Bank and Others* v *Commission*, paragraph 139 above, paragraph 123). It follows that Transcatab's allegations relating to the Commission's previous practice in taking decisions cannot succeed.

163 Nor do any of the arguments put forward by Transcatab call in question the classification of the cartel as 'very serious'. Thus, it is purely for the sake of completeness that they will be analysed.

— The actual impact of the infringement on the market

164 As specifically regards the arguments alleging errors in the determination of the gravity of the infringement, on the ground that the infringement is alleged to have had no actual impact on the market, it should be observed that, contrary to Transcatab's contention, it is clear upon reading the contested decision that, although at recital 365 thereto the Commission, when setting out the terms of the Guidelines, began from the premiss that in order to assess the gravity of the infringement it must take into consideration the three factors mentioned in the first paragraph of Section 1.A of the Guidelines (see paragraph 144 above), it did not then base its assessment of the gravity of the infringement on the actual impact of the infringement on the market.

165 In effect, the part of the contested decision concerning the assessment of the gravity of the infringement (recitals 365 to 369) contains no analysis of the actual impact of the infringement on the market. In particular, contrary to Transcatab's contention, such an analysis is not apparent from recital 368 to the contested decision. That recital, which is strictly linked to the preceding recital, concerning the nature of the infringement, refers generally to the capacity of buying cartels, as in the typical case of 'selling cartels', to affect competition. The Commission asserts at that recital that that type of cartel is capable of altering the competitive conduct of the undertakings concerned, whether they are producers or carry out downstream activities, since it has an impact on a fundamental parameter of the competitive conduct of undertakings involved in a processing system, namely the purchase price of the processed product. At the same recital, the Commission then asserts that that ability to alter competition is all the more significant in the case of a product such as that at issue in the present case.

166 Nor does the part of the contested decision concerning the analysis of the restriction of competition (recital 277 et seq.), to which recital 368 makes reference, contain an analysis of the actual impact of the infringement on the market. Contrary to Transcatab's contention, there is nothing to indicate that it would be possible to infer from that part of the contested decision, which analyses the extent to which the agreements between processors restrict competition, that the Commission relied on the actual impact of the agreements on the market in order to determine the gravity of the infringement for the purpose of setting the fine.

167 It is in the context of the considerations relating to the capacity of the buying cartel to influence the conduct of the processors, moreover, that the reference, in quite general terms, to the possible effects on the downstream markets contested by Transcatab (see paragraph 154 above, *in fine*) belongs. In so far as the cartel determined, inter alia, the quantities of tobacco purchased by each of the processors, Transcatab cannot claim that the Commission's assertion that the cartel had the capacity to affect the downstream activities of the processing and sale of processed tobacco is incorrect. Since it decided the quantities of the raw product purchased, the cartel was necessarily able to affect the conduct of the downstream processors concerning the

processed product. Nor has Transcatab put forward any argument or supplied any evidence capable of calling that assertion in question. Furthermore, it should be observed that there is no mention in the contested decision of any effects on the price of cigarettes for end-users, and the arguments put forward in that regard by Transcatab must therefore be rejected.

168 With specific regard to the data submitted by Transcatab or the data mentioned in the contested decision which, it claims, prove that the cartel had no effects on the market (see paragraph 154 above), it should be observed that it follows from the case-law that, in order to assess the gravity of the infringement, it is decisive to ascertain that the cartel members had done all they could to give concrete effect to their intentions. Since what then happened, so far as the market prices actually obtained were concerned, was liable to be influenced by other factors outside the control of the cartel members, the cartel members cannot benefit, by transforming them into factors that would justify a reduction of the fine, from external factors which counteracted their own efforts (see *Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 141 above, paragraph 287; *Carbone-Lorraine* v *Commission*, paragraph 147 above, paragraph 86; and *Gütermann and Zwicky* v *Commission*, paragraph 146 above, paragraph 130 and the case-law cited).

169 Furthermore, according to the case-law, the Commission cannot be required, where the implementation of a cartel has been established, systematically to demonstrate that the agreements in fact enabled the undertakings concerned to achieve a higher level or, as in the present case, in the case of buying cartels, a lower level of transaction prices than that which would have prevailed in the absence of a cartel. It would be disproportionate to require such proof, which would absorb considerable resources, given that it would necessitate making hypothetical calculations based on economic models whose accuracy it would be difficult for the Court to verify and whose infallibility is in no way proved (see, to that effect, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 141 above, paragraph 286; *Carbone-Lorraine* v

Commission, paragraph 147 above, paragraph 85; and *Gütermann and Zwicky* v *Commission*, paragraph 146 above, paragraph 129 and the case-law cited).

170 In the present case, analysis of the part of the contested decision relating to the impugned facts shows that the processors knowingly implemented the anti-competitive conduct in respect of which they were fined (see, by way of example, recitals 111, 124, 125, 141 and 158 to the contested decision). That consideration is also confirmed by the fact that the cartel was of a secret nature, as is apparent from recitals 363 and 473 to the contested decision. According to the contested decision, moreover, the processors agreed on several occasions on measures intended to ensure the effective implementation of the agreement, such as sending each other the invoices received from their respective suppliers (recitals 122 and 129 to the contested decision), an obligation to consult in the event of purchases outside the agreements (recital 139 to the contested decision), an obligation to control their employees in order to ensure that they did not take decisions without the necessary coordination (recital 140 to the contested decision) and the creation of a structure designed to ensure that anti-competitive aims were achieved (recital 187 to the contested decision). In that regard, it should further be observed that it follows from recital 383 to the contested decision that the Commission established that the cartel had been implemented.

171 In those circumstances, the allegations of errors on the Commission's part based on the failure to apply on the market the prices stated by the parties in their agreements and on the fact that the Commission had in its possession data showing that raw tobacco prices had increased at a higher rate than other agricultural products must be rejected.

— The geographic extent of the market

172 As regards the argument based on the small geographic extent of the market affected by the infringement, it follows from the case-law cited at paragraphs 147 to 149 above that the extent of the geographic market is not an autonomous criterion, in the sense that only infringements affecting the majority of Member States are capable of being classified as 'very serious' infringements. Neither the Treaty, nor Regulation No 1/2003, nor the Guidelines, nor the case-law support the conclusion that only geographically very extensive restrictions of competition may be so classified. Furthermore, as observed at paragraph 148 above, agreements aimed in particular, as in the present case, at fixing purchase prices and allocating quantities purchased may carry with them, on the sole basis of their actual nature, the classification of very serious infringement, without there being any need to characterise such conduct by a particular geographic extent. It follows that the size of the relevant geographic market, even on the assumption that it is limited, does not preclude the infringement found in the present case being classified as 'very serious'. The Commission therefore did not err in classifying the infringement as 'very serious' in the light of the geographic extent of the relevant market.

173 For the sake of completeness, it should be observed that, although it is common ground that raw tobacco production was concentrated in certain regions of Italy, it must none the less be held that the cartel concerned the market for the purchase of raw tobacco and not the market for its production, so that its scope was not confined to those regions, but covered the whole Italian territory. According to settled case-law, the territory of a Member State constitutes a substantial part of the common market (see, to that effect, Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 28, and *Groupe Danone* v *Commission*, paragraph 148 above, paragraph 150). Thus, Transcatab cannot claim that the geographic extent of the market affected by the infringement was limited.

— Breach of the obligation to state reasons

174 As regards the complaints alleging breach of the obligation to state reasons, it should be observed that it is settled case-law that the reasons for an individual decision must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. The assessment of the requirement to state reasons depends on the circumstances of each case. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited).

175 As regards the determination of fines for infringement of competition law, the obligation to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration (see Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 463 and the case-law cited).

176 In the present case, as regards the assessment of the gravity of the infringement, the Commission stated at recitals 365 to 369 to the contested decision its reasons for concluding that the infringement should be classified as 'very serious'. As stated at paragraph 159 et seq. above, the Commission based its conclusion on the very serious nature of the infringement concerned.

177 It should be observed that as the actual impact on the market and the geographic extent of the relevant market are not necessary elements of the classification of the infringement as 'very serious' in the case of horizontal agreements aimed in particular, as in this case, at price fixing, the Commission was not required to state reasons for its failure to take those criteria into consideration. In that regard, it should be borne in mind that, in the context of analyses relating to infringements of Article 81 EC, Article 253 EC cannot be interpreted as requiring the Commission to explain in its decisions the reasons why, in relation to calculation of the amount of the fine, it did not adopt alternative approaches to the one in fact adopted in the contested decision (see Case T-18/05 *IMI and Others* v *Commission* [2010] ECR II-1769, paragraph 153 and the case-law cited).

178 In those circumstances, the Commission did not fail to fulfil its obligation to state reasons with respect to the actual impact of the infringement on the market or the limited extent of the geographic market.

179 Last, with specific regard to the complaint raised by Transcatab concerning the illogical reasoning in the contested decision concerning surplus tobacco production (see paragraph 155 above), it should be observed that the existence of surplus production does not necessarily constitute proof that the implementation of the agreement designed to reduce that production had no effect. Indeed, it cannot be precluded that in the absence of the agreement tobacco production would have been even higher. Contrary to Transcatab's contention, there is thus no necessary contradiction between the existence of surplus production and the assertion in the contested decision that the agreement was of such a kind as to reduce global tobacco production. Transcatab cannot therefore claim on the basis of that argument that the reasoning in the contested decision on that point is illogical. That argument must therefore be rejected.

— Breaches of the rights of the defence

180 It should be observed that, according to settled case-law, where the Commission expressly states in its statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and it indicates the main factual and legal criteria capable of giving rise to the imposition of a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was committed intentionally or negligently, it fulfils its obligation to respect the undertakings' right to be heard. In so doing, the Commission provides the undertakings with the elements necessary to defend themselves not only against the finding of an infringement but also against the imposition of a fine (*Musique Diffusion française and Others* v *Commission*, paragraph 115 above, paragraph 21; Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 199; and judgment of 19 May 2010 in Case T-11/05 *Wieland-Werke and Others* v *Commission*, not published in the ECR, paragraph 129).

181 On the other hand, the Commission is not obliged, provided that it has indicated the elements of fact and of law on which it would base its calculation of the amount of the fines, to explain the way in which it would use each of those elements in determining the level of the fine (*Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 141 above, paragraph 369). Furthermore, in its decision, the Commission may also, in the light of the administrative procedure, revise or add arguments of fact or of law in support of its objections (see *Schneider Electric* v *Commission*, paragraph 117 above, paragraph 438 and the case-law cited).

182 It follows that, as regards the determination of the amount of fines, the rights of defence of the undertakings concerned are guaranteed before the Commission by the opportunity given to them to make submissions on the duration, the gravity and the anti-competitive nature of the alleged acts (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235, and *Wieland-Werke and Others* v *Commission*, paragraph 180 above, paragraph 131).

183 In the present case, it must be stated that, in the context of part IIA of the statement of objections, the Commission set out, in accordance with the case-law, the main elements of fact and of law likely to entail the imposition of the fine on Transcatab. In particular, the Commission stated there the elements of fact and of law on which it relied in the contested decision as the basis for calculating the starting amount of the fine imposed on the applicant. Transcatab had the opportunity to comment on those elements, so that it must be concluded that its right to be heard was duly observed in that regard. Furthermore, as was observed in the context of the present part of this plea, in the contested decision the Commission did not base the classification of the infringement as 'very serious' on the actual effects of the cartel on the market, both with respect to the reduction of production and the downstream activities, but, on the contrary, it based that classification on the very serious nature of the infringements in question.

184 In the light of all the foregoing, the first part of the second plea must be rejected in its entirety.

Second part of the second plea, alleging breach of the principles of proportionality, equal treatment and the protection of legitimate expectations in the setting of the basic amount of the fine

Arguments of the parties

185 In the first place, Transcatab claims that the Commission breached the principle of proportionality by imposing a fine of EUR 14 million on it. That fine is disproportionate by reference both to its total annual purchases on the reference market, which did not reach EUR 13 million, and to the total value of purchases of tobacco covered by the agreements, which did not exceed EUR 50 million a year. The Commission ought

to have taken account of the particularly small size of the market when setting the fine. In addition, the new Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines') establish that the basic amount of the fine must be set by reference to the value of the undertaking's sales on the market to which the infringement relates.

186 In the second place, Transcatab claims that the Commission breached the principles of equal treatment and the protection of legitimate expectations in setting the basic amount of the fine. It maintains that the Commission, without any justification, treated the cartel at issue in the present case differently from that in respect of which the decision in Raw tobacco — Spain was adopted, whereas the two cases presented significant similarities with respect to the object of the cartel and its limited geographic scope.

187 The Commission contends that Transcatab's arguments should be rejected.

Findings of the Court

— Breach of the principle of proportionality

188 It should be recalled that the principle of proportionality requires that measures adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must

be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 96, and judgment of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer* v *Commission*, not published in the ECR, paragraph 223).

189 In the procedures initiated by the Commission in order to penalise infringements of the competition rules, the application of that principle requires that fines must not be disproportionate to the objectives pursued, that is to say, by reference to compliance with those rules, and that the amount of the fine imposed on an undertaking for an infringement in competition matters must be proportionate to the infringement, seen as a whole, having regard, in particular, to the gravity thereof (see, to that effect, *Prym and Prym Consumer* v *Commission*, paragraph 188 above, paragraphs 223 and 224 and the case-law cited). In particular, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purpose of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 226 to 228, and Case T-446/05 *Amann & Söhne and Cousin Filterie* v *Commission* [2010] ECR II-1255, paragraph 171).

190 As regards, in the first place, the complaint alleging that the fine is disproportionate by reference to the total value of sales on the relevant market, it should be observed that it does not follow from either Regulation No 1/2003 or the Guidelines that the amount of the fines must be fixed in direct proportion to the size of the relevant market, as that factor is not mandatory, but just one among a number of other factors to be taken into account in evaluating the gravity of the infringement (Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 132, and *Prym and Prym Consumer* v *Commission*, paragraph 114 above, paragraph 55). Those provisions therefore do not as such require the Commission to take account of the limited size of the product market (see, to that effect, Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraph 148).

191 However, as observed at paragraph 139 above, according to the case-law, in assessing the gravity of an infringement, the Commission must have regard to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case. It cannot be ruled out that cases may arise in which one of the factors indicative of the gravity of an infringement is the size of the market for the product in question (*Musique Diffusion française and Others* v *Commission*, paragraph 115 above, paragraph 120, and *Gütermann and Zwicky* v *Commission*, paragraph 146 above, paragraph 267).

192 Consequently, although market size may constitute a factor to be taken into account in establishing the gravity of the infringement, its importance varies according to the nature of the infringement and the particular circumstances of the infringement concerned.

193 In the present case, as regards, first, the nature of the infringement, it should be observed that the agreement between the processors had the object, in particular, of jointly fixing the prices which the processors paid for raw tobacco and the allocation of suppliers and quantities of raw tobacco. Such practices constitute horizontal restrictions of the 'price cartel' type within the meaning of the Guidelines and are therefore by nature 'very serious' infringements. For that type of arrangements, which are characterised by the case-law as flagrant infringements of the competition rules or as particularly serious infringements, since they have a direct impact on the essential parameters of competition on the relevant market (see paragraph 137 above), the Guidelines envisage a penalty having a minimum starting amount of over EUR 20 million.

194 As regards, second, the particular circumstances of the infringement concerned, it should be noted that the size of the relevant market was by no means negligible, since it is apparent from recital 366 to the contested decision that the production of raw tobacco in Italy accounts for 38 % of in-quota production in the EU. Furthermore, it is apparent from footnote 290 to the contested decision that, as the cartel also extended to purchases from 'third packers' — namely intermediaries which themselves buy raw

tobacco from the producers and themselves carry out the initial processing of tobacco —, it concerned purchases having a value in excess of the mere value of purchases of raw tobacco produced in Italy.

195 In those circumstances, Transcatab cannot claim that its fine is disproportionate by reference to the total value of purchases on the relevant market.

196 In the second place, as regards the complaint alleging that the fine is disproportionate by reference to the value of Transcatab's purchases on the relevant market, it should first of all be pointed out that the applicable law contains no general principle that the fine must be proportionate to the undertaking's turnover on the relevant market (see *Gütermann and Zwicky* v *Commission*, paragraph 146 above, paragraph 277 and the case-law cited).

197 According to consistent case-law, it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. It is important not to confer on one or the other of those figures an importance disproportionate in relation to the other factors and, consequently, the fixing of an appropriate fine cannot be the result of a simple calculation based on total turnover. That is particularly the case where the goods concerned account for only a small part of that figure (*Musique Diffusion française and Others* v *Commission*, paragraph 115 above, paragraph 121; *Dansk Rørindustri and Others* v *Commission*, paragraph 88 above, paragraph 243; and Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191, paragraph 114).

198 It must be emphasised that, as is apparent from paragraphs 40 to 43 above, in the contested decision the Commission fixed the fine by reference to the market share of each undertaking in terms of purchases of the relevant product on the market on which the infringement took place. Thus the value of purchases on the relevant market was a criterion that was taken into account in the determination of the fine in the present case.

199 In addition, it follows from the case-law that, in so far as the amount of the final fine does not exceed 10 % of the total turnover of the undertaking concerned during the last year of the infringement, the fine cannot be regarded as disproportionate solely because it exceeds the turnover achieved on the relevant market (see, to that effect, Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 200).

200 Furthermore, as observed at paragraphs 160 and 193 above, the infringement in question had as its object practices constituting horizontal restrictions of a 'price cartel' type within the meaning of the Guidelines and therefore 'very serious' restrictions by their nature. For that type of particularly serious cartels, the Guidelines envisage a penalty having a minimum starting amount in excess of EUR 20 million; yet it follows from recital 376 to the contested decision that the starting amount of the fine imposed on Transcatab corresponds to an amount much lower than the amount which, under the Guidelines, the Commission could have envisaged for very serious infringements. In that context, Transcatab cannot claim that the fine imposed on it is disproportionate by reference to what it alleges to be the limited size of the relevant market and the total of its annual sales on the reference market.

201 Last, as concerns the argument which the applicant derives from the 2006 Guidelines, it should be emphasised, as Transcatab itself acknowledges, that they were not applicable to the facts of the present dispute (see, to that effect, Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraph 108).

— Breach of the principle of equal treatment

202 In accordance with settled case-law, the principle of equal treatment is breached only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and *Hoechst* v *Commission*, paragraph 158 above, paragraph 79).

203 It should also be borne in mind that, as observed at paragraph 162 above, according to settled case-law, the Commission's practice in previous decisions does not serve as a legal framework for fines imposed in competition matters, that the Commission enjoys a wide discretion when setting fines and that it is not bound by assessments which it has made in the past.

204 The mere fact that the Commission has found in its previous decisions that a type of conduct justified a fine of a certain amount in no way means that it is obliged to do so also in a subsequent decision (see Case T-329/01 *Archers Daniels Midland* v *Commission* [2006] ECR II-3255, paragraph 110 and the case-law cited).

205 Thus, in the present case, it must be held that Transcatab's mere reference to the Raw tobacco — Spain decision cannot succeed, since the Commission is not required to assess the present case in the same way (see, to that effect, *Archer Daniels Midland* v *Commission*, paragraph 162 above, paragraph 83).

206 As specifically regards the application of the principle of equal treatment in the present case, it should be noted that the Commission's other fining decisions are in principle only of an indicative nature, a fortiori where the facts of those other decisions are not the same as those of the decision in issue (*Archer Daniels Midland* v *Commission*, paragraph 204 above, paragraph 112). In the present case, while it is true that there are certain analogies between the Raw tobacco — Spain case and the present case, there are, however, significant differences between them that cannot be ignored. First, it is not disputed that the Spanish market was smaller and less important than the Italian market; and, second, the national legislative frameworks governing the sector concerned were different (see, more specifically, paragraph 317 et seq. below).

207 In the light of those not insignificant differences, the Commission was entitled, and even required, to treat the two cases differently when determining the penalty. Consequently, Transcatab cannot properly rely on the Commission's decision in the Raw tobacco — Spain case in order to claim that there has been a breach of the principle of equal treatment in the present case.

— Breach of the principle of the protection of legitimate expectations

208 It should be borne in mind that it follows from the case-law that the right to rely on the principle of the protection of legitimate expectations assumes that three conditions are satisfied. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules (see Case T-145/06 *Omya* v

Commission [2009] ECR II-145, paragraph 117 and the case-law cited; see also, to that effect, Case T-13/03 *Nintendo and Nintendo of Europe* v *Commission* [2009] ECR II-947, paragraph 203 and the case-law cited).

209 In the present case, it must be held that the first condition provided for in the case-law is not satisfied. It follows from the case-law that the determination of the amount of fines falls within the Commission's wide discretion, so that traders cannot have a legitimate expectation in the determination of such amounts (see, *Archer Daniels Midland* v *Commission*, paragraph 204 above, paragraph 109 and the case-law cited). Thus, the precedent relating to the Raw tobacco — Spain case on which Transcatab relies cannot be considered to have provided it with a precise, unconditional and consistent assurance within the meaning of the case-law referred to in the preceding paragraph.

210 Furthermore, it must be observed that the decision in the Raw tobacco — Spain case was adopted by the Commission in October 2004, that is to say, more than two years after Transcatab submitted its request for a reduction of its fine under the Leniency Notice. In those circumstances, Transcatab cannot in any way claim that it acted in reliance on a legitimate expectation that it based on the setting of the fine in that case.

211 In the light of the foregoing, the second part of the second plea must be rejected in its entirety.

Third part of the second plea, alleging breach of the principle of proportionality in the taking into account of the deterrence of the penalty and Transcatab's financial situation

Arguments of the parties

212 Transcatab disputes the application of the multiplier in setting the starting amount of the fine. First, it disputes the premiss of that application, namely the attribution of liability for the fine to its parent company, Alliance One.

213 Second, Transcatab claims that in this case the deterrent effect could have been obtained without the application of a multiplier and by setting a lower starting amount of the fine than that applied by the Commission.

214 Third, it maintains that, under the principle of proportionality, the Commission ought to have adjusted the amount of the fine to take account of Transcatab's precarious financial situation and the danger to the continuation of its activity. In effect, during the period 1995 to 2002, Transcatab made significant losses and was forced into liquidation following the fine imposed by the Commission. In addition, Transcatab is no longer present on the Italian market and was no longer active on the market on the date of the contested decision, so that there was no need for deterrence in its case. Likewise, in the present case there was no additional requirement for deterrence linked with a 'multiproducts' production. Last, even the 2006 Guidelines refer to the undertaking's ability to pay the fine, thus taking into consideration the danger that its economic viability will be jeopardised.

215 The Commission contends that Transcatab's arguments should be rejected.

Findings of the Court

216 It follows from the case-law 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 *Akzo Nobel and Others* v *Commission*, paragraph 103 above, paragraph 150).

217 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; Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 379; and *Akzo Nobel and Others* v *Commission*, paragraph 103 above, paragraph 154). Thus, while the need to ensure that the fine has a sufficient deterrent effect is a legitimate objective which the Commission is entitled to pursue when setting the amount of a fine, the fact none the less remains that it is required to comply with the general principles of law, and in particular the principle of proportionality, not only in the determination of the starting amount, but also when increasing that amount with a view to ensuring that the fine has a sufficiently deterrent effect (*Degussa* v *Commission*, paragraph 316).

218 The Guidelines mention the deterrent aim in Section 1.A, which deals 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'. In the present case, at recitals 374 and 375 to the contested decision, the Commission stated the reason for the need to apply a multiplier of 1.25, namely the desire to ensure that the fine imposed on Transcatab would have a sufficiently deterrent effect, bearing in mind that Transcatab belonged to a multinational group of

considerable economic and financial strength, among the biggest tobacco merchants in the world and operating at different levels of business in the tobacco industry and in different geographic markets.

219 As regards, first, the argument relating to the premiss of the application of the multiplier, namely the attribution of liability for the infringement to the parent company, Alliance One, it is sufficient to observe that, in the context of the first plea, it was concluded that the Commission had been correct to maintain that Alliance One should be held jointly liable for the infringement committed by Transcatab (see first part of the first plea). That argument cannot therefore succeed.

220 As regards, second, Transcatab's argument that the starting amount of the fine of EUR 10 million is already sufficiently deterrent, it must be held that Transcatab 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, *Lafarge* v *Commission*, paragraph 201 above, paragraph 107).

221 As regards, third, the complaint that the Commission did not take account of the applicant's precarious financial situation and thus breached the principle of proportionality in applying the multiplier to it, it should first of all be observed that, according to the case-law, since the objective of deterrence relates to the conduct of undertakings within the EU, the deterrence factor is assessed by taking into account a large number of factors and not merely the particular situation of the undertaking concerned (Case T-12/03 *Itochu* v *Commission* [2009] ECR II-883, paragraph 93; see also, to that effect, Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 23, and *Jungbunzlauer* v *Commission*, paragraph 189 above, paragraph 300).

222 Furthermore, according to settled case-law, the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to conferring an unfair competitive advantage on the undertakings least well adapted to market conditions (see *Dansk Rørindustri and Others* v *Commission*, paragraph 88 above, paragraph 327; Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 105 and the case-law cited; and Case T-452/05 *BST* v *Commission* [2010] ECR II-1373, paragraph 95).

223 Thus Transcatab cannot dispute the application of the multiplier for deterrence in reliance on the ground that it incurred losses during the period when the cartel was implemented, with the consequence that it has no longer been active on the market to which the cartel related since the initiation of the procedure. Furthermore, since Transcatab belonged to a multinational group with considerable economic and financial force and since liability was attributed to its parent company, the application of the multiplier to an amount determined by reference to the total turnover of that group cannot be regarded as rendering the fine disproportionate.

224 Furthermore, it must be held that, in the present case, Transcatab has not proved, either during the administrative procedure or before the Court, its assertion that it was forced into liquidation as a result of the Commission's initiation of the investigation in question and the fine envisaged. It should also be borne in mind that the fact that a measure adopted by an institution leads to the insolvency or liquidation of a given undertaking is not prohibited as such by EU law. Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the personal, tangible and intangible elements represented by the undertaking would also lose their value (see Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 372 and the case-law cited).

225 As for the argument concerning the additional requirement for deterrence for undertakings whose production is called 'multiproduct', it must be stated that the contested decision contains no reference to such a requirement, so that that argument is devoid of relevance in the present case. Last, as concerns the argument based on the 2006 Guidelines, it has already been pointed out that those guidelines were not applicable to the facts of the present case (see paragraph 201 above).

226 In the light of all the foregoing, the third part of the second plea and, consequently, the second plea in its entirety must be rejected.

3. Third plea, concerning the setting of the basic amount of the fine

First part of the third plea, alleging that the increase of the amount of the fine for the duration of the infringement was incorrect

Arguments of the parties

227 In the first place, Transcatab challenges the increase by 60 % of the starting amount of the fine on the basis of the finding that the processors had participated in a single infringement for a period of six years and four months. The Commission failed to take account of the fact that during the period 1999 to 2002 the agreements concluded on the Italian raw tobacco market had been to a large extent interprofessional agreements concluded between Unitab and APTI. The Commission ought therefore, when determining the fine, to have distinguished between the conduct that took

place between 1995 and 1998 and that which took place between 1999 and 2002, responsibility for which was borne exclusively by APTI. Furthermore, the Commission itself observes that APTI was exclusively responsible for its decisions (recital 253 to the contested decision). Thus, the Commission ought at least not to have increased the fine for the three years in question.

228 In particular, it follows from recitals 152 and 154 to the contested decision and from certain documents in the file that already from 1998 contacts between the processors took place in the context of the interprofessional agreements and for the purpose of drawing up those agreements. Such meetings between the processors then continued throughout the entire period during which APTI was responsible for negotiating the interprofessional agreements with Unitab. Transcatab refers specifically to recitals 104, 143, 151 to 153, 158 and 165 to the contested decision. As regards 1999, only recitals 158 and 159 to the contested decision do not relate directly to the interprofessional agreements. However, they relate to them indirectly. Even after 1999 contacts between the processors always took place within the framework of the definition of a common position to be taken with APTI. Transcatab cites, by way of example, recitals 199 and 212 to the contested decision or, in the context of the objectives pursued through Cogentab – the association created by APTI and Unitab —, recitals 187 to 189, 191 and 208 to the contested decision. In any event, contacts between the processors outside the interprofessional agreements were limited to certain aspects of the market and mainly took shape in simple exchanges of information.

229 In the second place, Transcatab proved, in the context of the second plea, that the cartel had no impact on the market and that it cannot have caused harm to consumers. According to the Guidelines, the precise purpose of the increase for infringements of long duration is to 'impos[e] effective sanctions on restrictions which have had a harmful effect on consumers over a long period'. It follows that, in automatically

applying an increase of 10 % per year without taking the situation in the actual case into consideration, the Commission erred in the application of the criteria which it had itself determined for the calculation of the fine.

230 The Commission contends that Transcatab's arguments should be rejected.

Findings of the Court

— The increase of the fine for the duration of the agreement

231 It should be borne in mind that, according to the case-law, an infringement of Article 81(1) EC may result not only from an isolated act but also from a series of acts or from continuous conduct (*Commission* v *Anic Partecipazioni*, paragraph 90 above, paragraph 81). When the different actions form part of an overall plan because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (*Aalborg Portland and Others* v *Commission*, paragraph 88 above, paragraph 258).

232 Furthermore, where, by virtue of the fact that they share the same object, the agreements and concerted practices found to exist form part of systems of regular meetings, target-price fixing and quota fixing, schemes which in turn formed part of a series of attempts made by the undertakings concerned in pursuit of a single economic aim, namely to distort the normal movement of prices, it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as a number of separate infringements when, on the contrary, what was involved was a

single infringement which progressively manifested itself both in the form of agreements and in the form of concerted practices (see, to that effect, *BST* v *Commission*, paragraph 222 above, paragraph 33 and the case-law cited).

233 In the present case, in the contested decision, the Commission considered, without being contradicted on that point by Transcatab, that the processors' practices gave rise to a single and continuous infringement of Article 81(1) EC, in so far as they formed part of an overall scheme which laid down the lines of their action on the market in purchasing matters with the aim of pursuing an identical anti-competitive object and a single economic aim, namely to distort the normal movement of prices on the raw tobacco market and to control supplies by their allocation. The Commission showed, in particular, without Transcatab having disputed that point, that the cartel had the same objectives during the entire period and presented the same structure over time and the same operating mechanisms (see recitals 264 to 269 to the contested decision).

234 The Commission also found, without being contradicted in that regard by Transcatab, that after 1999, alongside the coordination beyond the scope of the interprofessional agreements, the processors coordinated in order to determine APTI's conduct and that that coordination constituted in those years an important element of the processors' cartel strategy (see recital 244 to the contested decision). Thus, the preparations for the APTI meetings pursued the same anti-competitive objective as that pursued by the conclusion of the agreements between the processors, namely to distort the normal movement of prices on the raw tobacco market.

235 Since those findings were not contested, even if, as Transcatab maintains, from 1999 the meetings between the processors were of a preliminary nature, in preparation for the meetings of APTI, the Commission was entitled to consider that participation in

those meetings formed part of a single and continuous infringement, in so far as it found that the coordination between the processors for the purpose of determining APTI's conduct formed part of the cartel strategy and formed part of the single objective pursued by the processors before 1999.

236 Consequently, even on the assumption that, as Transcatab maintains, after 1999 the processors' conduct was exclusively preliminary and intended to prepare for the meetings of APTI, that fact could have no impact on the duration of the infringement, so that the Commission, even in that hypothetical situation, would none the less have been able to consider that the infringement committed by the processors had lasted approximately six years and four months. Thus, Transcatab's assertion that during the period 1999 to 2002 the processors' conduct consisted exclusively in preparing for the conclusion of the interprofessional agreements can have no effect on the lawfulness of the contested decision and must therefore be regarded as ineffective.

237 That finding cannot be called in question by the argument that the Commission found that it was APTI and not its members that should be held responsible for APTI's conduct (see recital 253 to the contested decision). In effect, APTI's conduct constituted a different infringement from that committed by the processors and had its own anti-competitive aim, even though it coincided in part with the anti-competitive aim pursued by the processors (see recitals 270 to 273 to the contested decision). That finding is not disputed by Transcatab.

238 In any event, it should be observed that the present complaint is also factually inaccurate.

239 First, Transcatab itself expressly acknowledges in its written pleadings that during the period concerned there were contacts between the processors 'beyond the interprofessional agreements', which related to 'certain aspects of the market' and in the context of which sensitive information was exchanged. Transcatab also asserts that in that period 'the greatest part' of the agreements concluded on the Italian raw tobacco market were interprofessional agreements concluded between Unitab and APTI, which suggests that during that period there were also other agreements between the processors in addition to the contacts relating to the interprofessional agreements.

240 Second, it is apparent from the contested decision and from the file that during that period contacts between the processors went well beyond mere preliminary meetings aimed at adopting a common course of conduct within APTI for the negotiation of the interprofessional agreements. In that regard, it should be borne in mind that, in accordance with Legge no 88 sulle norme sugli accordi interprofessionali e sui contratti di coltivazione e vendita dei prodotti agricoli (Law No 88 on the regulation of interprofessional agreements and contracts for the cultivation and sale of agricultural products) of 16 March 1988 (GURI No 69 of 23 March 1988; 'Law No 88/88'), the interprofessional agreements related to the setting of minimum prices to be inserted in cultivation contracts (see recitals 68 and 253 to the contested decision), while the object of the agreements between the processors was much wider, since the arrangement provided for, inter alia, the setting of maximum or average delivery prices and volumes of tobacco to be bought by each processor and the corresponding sources of supply (recital 363 to the contested decision).

241 It is apparent from a number of elements in the contested decision and in the file that, even from 1999, contacts between the processors related to a wider object than the mere coordination of APTI's position for the purpose of concluding the interprofessional agreements.

242 Thus, by way of example, it follows from recital 186 to the contested decision that, according to the Commission, in October 1999 the processors concluded a secret agreement, the structure and content of which were very similar to the Villa Grazioli agreement of September 1998 (see recital 142 to the contested decision). That agreement, annexed to the defence, was mainly aimed at fixing the purchase prices of raw tobacco (Burley and Bright) from 'third packers', allocating the 'third packers' with defined quantities to each processor and boycotting 'third packers' that had not joined Cogentab (see recital 186 to the contested decision).

243 Furthermore, it follows from recitals 202 to 204 to the contested decision that in 2000 coordination between processors continued. Transcatab does not show, however, that that coordination related exclusively to the positions to be taken within APTI. On the other hand, it follows from recital 204 to the contested decision that the processors met on 21 September 2000 in order to create a coordination mechanism between processors at purchasing manager level.

244 It also follows from recital 212 to the contested decision that on 14 September 2001 a meeting took place between the chairmen and purchasing managers of Deltafina, Dimon Italia and Transcatab, the proposed agenda for which included not only the interprofessional agreement between APTI and Unitab but also mutual relations between those undertakings, purchases from 'third packers', relations with Romana Tabacchi and the strategies to be adopted for the future.

245 All those examples show that during the period 1999 to 2002 contacts between the processors did not exclusively have the object of the interprofessional agreements, as Transcatab claims, and that, quite to the contrary, during that period the cartel between the processors continued to operate alongside the interprofessional agreements. Nor has Transcatab shown that the Commission erred in not considering that,

during the period 1999 to 2002, the processors' conduct had been exclusively preparatory in nature for the conclusion of the interprofessional agreements.

246 In the light of the foregoing, it must be concluded that the first complaint put forward by Transcatab in the context of the present part of the plea must be rejected.

— The absence of harm for consumers

247 Transcatab's argument that the Commission erred in increasing the fine by 10% per year, given the absence of harm for consumers as a result of the infringement, is incorrect both in law and in fact.

248 First, it cannot be inferred either from Article 23 of Regulation No 1/2003 or from the third paragraph of Section 1.B of the Guidelines, on which Transcatab relies, that those provisions make the increase for long-term infringements conditional on there being harmful effects for consumers. The passage in the Guidelines to which Transcatab refers is designed to justify in general terms the fining policy announced with the Guidelines, and in particular changes by comparison with previous practice. Transcatab cannot therefore base its argument on that provision of the Guidelines.

249 Second, contrary to Transcatab's contention, it has not been established that the cartel did not have an impact on the market and, less still, that it did not have negative effects for consumers. The data on which Transcatab relies in the context of the second plea do not enable such an absence of effects to be proved, in so far as they may have been influenced by other factors (see, in particular, paragraph 168 above). The

fact that the cartel lasted for several years shows, moreover, that the processors did not consider that the cartel served no purpose and that it had no effects. The premiss of Transcatab's argument is therefore flawed.

250 In the light of the foregoing, the first part of the third plea must therefore be rejected in its entirety.

Second part of the third plea, alleging breach of the principle ne bis in idem *and failure to state reasons*

Arguments of the parties

251 Transcatab claims that there has been a breach of the principle *ne bis in idem* by the Commission. The Commission found in the contested decision that responsibility for concluding the interprofessional agreements during the period 1999 to 2001 should be imputed exclusively to APTI. However, by failing to distinguish the period 1995 to 1998 from the period 1999 to 2001 the Commission attributed to the processors responsibility for the conduct pursued in the context of the interprofessional agreements, which it had already imputed exclusively to APTI.

252 In the present case, the facts in respect of which APTI was penalised and those in respect of which Transcatab was penalised for the period 1999 to 2002 were identical, in so far as the meetings between the processors during that period were preliminary to the APTI meetings. In addition, the 'offenders' were the same, in so far as

it is well known that professional associations are the expression of their members. The Commission thus penalised the processors twice for the same infringement. The processors were penalised for the first time as members of APTI and then penalised individually. It follows that an excessive fine was imposed on the processors, and that the contested decision contains an insufficient statement of reasons in that regard.

253 The Commission contends that Transcatab's arguments should be rejected.

Findings of the Court

254 As a preliminary point, it should be borne in mind that the principle *ne bis in idem*, which is also enshrined in Article 4 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, is a general principle of EU law, compliance with which is ensured by the EU Courts. In the field of competition law, that principle precludes an undertaking from being sanctioned by the Commission or made the defendant to proceedings brought by the Commission a second time in respect of anti-competitive conduct for which it has already been penalised or of which it has been exonerated by a previous decision of the Commission that is no longer amenable to challenge (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraphs 85 and 86, and *Tokai Carbon and Others* v *Commission*, paragraph 224 above, paragraphs 130 and 131). The application of the principle *ne bis in idem* is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be penalised more than once for a single unlawful course of conduct designed to protect the same legal asset (*Aalborg Portland and Others* v *Commission*, paragraph 88 above, paragraph 338, and Joined Cases T-217/03 and T-245/03 *FNCBV and Others* v *Commission* [2006] ECR II-4987, paragraph 340).

255 In the first place, the first condition, namely identity of the facts, is not satisfied. Indeed, even on the assumption that there was a certain overlap between a part of the various types of anti-competitive behaviour of which the processors are accused, in particular coordination in order to determine APTI's conduct (recital 244 to the contested decision), and the conduct of which APTI is accused, namely the determination of the position which it would adopt in the negotiations on prices for the purposes of concluding interprofessional agreements with Unitab (recitals 253 and 254 to the contested decision), it must be held that they were two different types of conduct. In effect, coordination preceding the adoption of a decision is different from the adoption of the decision properly so-called.

256 Furthermore, as was observed in the context of the first part of this plea, the coordination between processors for the purpose of determining APTI's conduct formed part of the wider strategy of the processors' cartel, of which it constituted an important element (see recital 244 to the contested decision). In that regard, it should also be observed that, in the contested decision, the Commission explained, clearly and precisely, that APTI and the processors were penalised for different infringements (see, for APTI, recitals 253, 254 and 270 to 273 and, for the processors, recitals 240 to 252 and 264 to 269 to the contested decision).

257 Thus, Transcatab cannot claim that in the present case there was identity between the facts of which the processors were accused and those of which APTI was accused.

258 As concerns the second condition, namely unity of offender, it must be held that that condition is not satisfied either in the present case. Although Transcatab is a member of APTI, there are two different entities, since APTI has its own legal personality, object and objectives, independent of and distinct from Transcatab's (see, to that effect, *FNCBV and Others* v *Commission*, paragraph 254 above, paragraph 342).

259 It follows that, in the present case, both the identity of the facts and unity of offender are absent, in so far as the contested decision does not penalise the same entities or the same persons more than once for the same acts. Therefore, it must be concluded that there has been no breach of the principle *ne bis in idem*.

260 As concerns the complaint alleging failure to state reasons, it must be observed that, in so far as the conduct of which the processors are accused and that in respect of which APTI is accused were different types of conduct implemented by different legal entities, the Commission was not required to provide reasons relating to the application of the principle *ne bis in idem*. Furthermore, in the contested decision the Commission did not confuse APTI's responsibility with that of the processors. In particular, in accordance with the case-law referred to at paragraph 174 above, the recitals cited at paragraph 256 above clearly and unequivocally reveal the Commission's reasoning in that regard, thus enabling Transcatab to know the justification for the measure adopted against it and the Court to exercise its power of review.

261 In the light of the foregoing, this part of the plea must be rejected in its entirety.

Third part of the third plea, alleging breach of the principle of equal treatment

Arguments of the parties

262 In the alternative, Transcatab claims that in contracting with the farmers the processors were convinced that they remained within the framework of the national legislation and, in particular, Law No 88/88 and the interprofessional agreements. As

concerns the interprofessional agreements, the Commission acknowledged that the legal framework applicable could give rise to a considerable degree of uncertainty as to the lawfulness of APTI's practices. For that reason, it imposed on APTI a symbolic fine of only EUR 1 000. Transcatab questions the failure to apply the same reasoning in its case, in spite of the considerable amount of evidence showing that the impugned conduct of the processors in the period 1999 to 2002 refers virtually exclusively to pre-contracts designed to determine a common position within APTI. The different evaluation of APTI's conduct and that of the applicant gives rise to a breach of the principle of equal treatment.

263 The Commission contends that Transcatab's arguments should be rejected.

Findings of the Court

264 It should be borne in mind that, as is apparent from the case-law cited at paragraph 202 above, the principle of equal treatment is breached only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified.

265 In the present case, first, it should be observed that, as already held in the context of the second part of this plea (see paragraph 256 above), the processors and APTI were penalised for different infringements (see, respectively, recitals 240 to 252 and 253 and 254 to the contested decision).

266 As specifically regards the period beginning in 1999, it is apparent from the contested decision that the processors were penalised for a course of anti-competitive conduct forming part of the same cartel strategy that had begun well before 1999. The processors were thus penalised both for the coordination of their prices outside the scope of the interprofessional agreements and for the parallel activity of coordination designed to determine APTI's conduct (see, in particular, recital 244 to the contested decision).

267 On the other hand, APTI was held liable only for the conduct associated with the conclusion of the interprofessional agreements. The Commission considered that APTI could not be held responsible for the processors' single and continuous infringement, since the Commission's file contained no elements indicating that that association had subscribed to the overall plan implemented by the processors and designed to coordinate their entire purchasing conduct or that it was aware of it (see recitals 270 and 271 to the contested decision).

268 Second, it follows from the contested decision that, even after 1999, the extent of the cartel between the processors went well beyond the scope of Law No 88/88 (see also paragraphs 240 to 245 above). Transcatab cannot therefore claim that the legal framework justified the application to the processors of a symbolic fine like the one imposed on APTI (see, in that regard, the considerations set out at paragraphs 298 to 311 below).

269 In those circumstances, it must be concluded that the situation of the processors, and in particular of Transcatab, and that of APTI so far as the infringements relating to the period 1999 to 2002 are not comparable. Consequently, Transcatab cannot claim that there has been a breach of the principle of equal treatment.

270 In the light of all the foregoing considerations, the third plea must be rejected in its entirety.

4. *Fourth plea, concerning certain attenuating circumstances*

First part of the fourth plea, concerning the attenuating circumstance of failure to implement the cartel

Arguments of the parties

271 Transcatab first of all takes issue with the Commission for not having granted it the benefit of the attenuating circumstance provided for in the second indent of Section 3 of the Guidelines, based on the fact that there was no effective application of the unlawful agreements or practices. The applicant maintains that it has already shown in the context of the first part of the second plea that the processors had not implemented the main part of their agreements. That finding is clear from the fact that the agreements had no effects on the market.

272 The Commission contends that Transcatab's arguments should be rejected.

Findings of the Court

273 First, it should be borne in mind that, according to settled case-law, the attenuating circumstance provided for in the second indent of Section 3 of the Guidelines, based on the fact that there was no effective application of the unlawful agreements or practices, is based on the actual conduct of each undertaking. It follows that in order to

assess that attenuating circumstance, it is necessary to take into account not the effects arising from the infringement as a whole, which must be taken into consideration in assessing the actual impact of an infringement on the market for the purposes of determining its gravity (first paragraph of Section 1.A of the Guidelines), but the individual conduct of each undertaking, for the purposes of examining the relative gravity of the participation of each undertaking in the infringement (*Groupe Danone* v *Commission*, paragraph 148 above, paragraph 384, and *Gütermann and Zwicky* v *Commission*, paragraph 146 above, paragraph 178).

274 It follows that Transcatab cannot claim that the Commission erred in the application of the attenuating circumstance in question on the ground that the infringement had no actual impact on prices.

275 Second, and in any event, it should also be borne in mind that the case-law shows that, in order to benefit from the second indent of Section 3 of the Guidelines, the offenders must show that they adopted competitive conduct or, at the very least, that they clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation and did not give the appearance of complying with the agreement, thereby encouraging other undertakings to implement the cartel in question (Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraph 292, and, to that effect, Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 113).

276 In the present case, Transcatab does not claim to have clearly and substantially opposed the implementation of the cartel in issue, to the point of disrupting its very operation. Consequently, it cannot claim that the Commission erred in not granting the applicant the benefit of the attenuating circumstance in question.

277 Last, it should further be stated, first, that the Commission established at recital 383 to the contested decision that the cartel had been implemented and, second, that, in itself maintaining that 'the greatest part' of the agreements had not been implemented, Transcatab acknowledges that the agreements in question were at least in part implemented (see paragraph 239 above).

278 In the light of the foregoing, this part of the plea must be rejected.

Second part of the fourth plea, concerning the attenuating circumstance consisting in termination of the unlawful activities before the Commission intervened

Arguments of the parties

279 Transcatab takes issue with the Commission for not having granted it the benefit of the attenuating circumstance, provided for in the third indent of Section 3 of the Guidelines, consisting in termination of the infringement as soon as the Commission intervenes.

280 First, the Guidelines do not make the application of that attenuating circumstance conditional on the more or less serious nature of the infringement, so that that attenuating circumstance has also been applied in cases of serious and very serious infringements. Second, after the Commission first intervened, Transcatab did not engage in any conduct that might constitute an infringement of the competition rules. Third, the Commission disregarded the particular features of the raw tobacco sector. Fourth, the non-application of that attenuating circumstance results from a reversal

of the case-law on fines effected by this Court in its 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. That reversal of the case-law, which took place after the beginning of the procedure, breaches the legitimate expectation of Transcatab, which expected to obtain a reduction of the fine after having ceased its unlawful conduct as soon as the Commission intervened.

281 The Commission contends that Transcatab's arguments should be rejected.

Findings of the Court

282 It should be borne in mind that, under the third indent of Section 3 of the Guidelines, the basic amount of the fine set by the Commission may be reduced when, for example, the undertaking which is the subject of the complaint terminates the infringement as soon as the Commission intervenes.

283 According to the case-law, however, a reduction of the fine on account of the termination of an infringement as soon as the Commission intervenes cannot be automatic, but depends on an assessment of the circumstances of the case by the Commission in the exercise of its discretion (see *Carbone-Lorraine* v *Commission*, paragraph 147 above, paragraph 228 and the case-law cited). The circumstances of the case may therefore lead the Commission not to grant such a reduction of the basic amount of the fine to an undertaking which is a party to an unlawful agreement (*Archer Daniels Midland* v *Commission*, paragraph 162 above, paragraph 148).

284 Thus, the Court of Justice has held that to recognise an attenuating circumstance in situations where an undertaking is party to a manifestly unlawful agreement which it knew or could not be unaware constituted an infringement could encourage undertakings to continue a secret agreement as long as possible, in the hope that their conduct would never be discovered, while knowing that if it were discovered they could expect, by then curtailing the infringement, their fine to be reduced. Such a recognition would deprive the fine imposed of any deterrent effect and would undermine the effectiveness of Article 81(1) EC (*Archer Daniels Midland* v *Commission*, paragraph 162 above, paragraph 149). Furthermore, this Court has already expressly held that the fact that an intentional infringement was terminated cannot be regarded as an attenuating circumstance where it was terminated as a result of the Commission's intervention (Case T-157/94 *Ensidesa* v *Commission* [1999] ECR II-707, paragraph 498, and *Wieland-Werke and Others* v *Commission*, paragraph 180 above, paragraph 229).

285 In the present case, the infringement in issue related to a secret cartel having as its object, in particular, price fixing and the allocation of suppliers and quantities to be purchased. Thus, as was observed at paragraph 137 above, that type of cartel is expressly prohibited by Article 81(1)(a) and (b) EC and constitutes an infringement classified in the case-law as 'particularly serious', since it has a direct impact on the essential parameters of competition on the relevant market. Furthermore, in the present case, as was observed at paragraph 170 above, the processors knowingly implemented the anti-competitive conduct in respect of which they were penalised and agreed on several occasions on measures intended to ensure the effective implementation of the cartel.

286 In those circumstances, in the light of the case-law referred to at paragraphs 283 and 284 above, Transcatab cannot maintain that the Commission erred in not applying the attenuating circumstance in question to it.

287 That conclusion cannot be called in question by the specific arguments raised by Transcatab.

288 Indeed, in the light of the case-law referred to above, the fact that Transcatab did not engage in any unlawful conduct after the Commission first intervened does not mean that the Commission is required to apply the attenuating circumstance in issue. Furthermore, the particular features of the sector, such as the absence of precedents on which Transcatab relies and the regulation of the sector, although they may play a role in the assessment of other attenuating circumstances (see, in particular, the third and fifth parts of the present plea), do not constitute relevant elements in the application of the attenuating circumstance in issue.

289 As regards, last, the alleged breach of the principle of the protection of legitimate expectations, it should be borne in mind that, as was recalled at paragraph 208 above, according to the case-law, the right to rely on that principle assumes that three conditions are satisfied. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules (see the case-law cited at paragraph 208 above).

290 In that regard, it is sufficient to observe that the first of those conditions is not satisfied in the present case, since Transcatab cannot claim that any precise, unconditional and consistent assurance was given by the Commission that the applicant would obtain a reduction of the fine by ceasing its unlawful conduct as soon as the Commission intervened.

291 In addition, it should be borne in mind that the mere fact that the Commission considered in previous decisions that certain factors constituted attenuating circumstances for the purposes of determining the amount of the fine does not mean that it is obliged to make the same assessment in a subsequent decision (Case T-374/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 368, and *LR AF 1998* v *Commission*, paragraph 180 above, paragraph 337). Accordingly, Transcatab cannot find support in the fact that that attenuating circumstance was applied in other cases of infringements. Nor does the judgment in *Tokai Carbon and Others* v *Commission*, paragraph 280 above, to which recital 382 to the contested decision makes reference, constitute a reversal of the case-law, since, as the Commission correctly observes, this Court had already expressly considered, before that judgment, that the fact that a deliberate infringement was brought to an end cannot be regarded as an attenuating circumstance where it was terminated as a result of the Commission's intervention (Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, paragraph 138, and *Ensidesa* v *Commission*, paragraph 284 above, paragraph 498). It follows that Transcatab cannot rely on a legitimate expectation in that respect.

292 In the light of the foregoing, the second part of the fourth plea must therefore be rejected.

Third part of the fourth plea, concerning the attenuating circumstance based on the existence of reasonable doubt as to the unlawful nature of the impugned conduct

293 In the context of the present part of the plea, Transcatab raises, in substance, two complaints. First, it claims that the Commission erred in not applying the attenuating circumstance based on the existence of reasonable doubt as to whether the conduct in issue constituted an infringement. Second, it claims that there has been a breach of the principle of equal treatment by reference to the Raw tobacco — Spain case.

The existence of reasonable doubt as to whether the conduct in issue constituted an infringement

— Arguments of the parties

294 Transcatab maintains that the existence of a mixed European and national legal context gave rise to reasonable doubt as to the unlawful nature of the conduct of the raw tobacco processors and APTI in Italy. The Commission ought therefore to have applied the attenuating circumstance provided for in the fourth indent of Section 3 of the Guidelines and, at least, have reduced the fines imposed on the individual processors. The Commission did not state its reasons for rejecting Transcatab's request that that attenuating circumstance be granted.

295 In particular, Transcatab claims that Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129) provides, on certain conditions, for an exemption for agreements that are necessary for attainment of the objectives set out in Article 33 EC. The agreements between the processors were considered necessary in order to ensure the rational development of agricultural production and to stabilise and ensure the survival of the Italian market. Their purpose was to limit the income of intermediaries without reducing, and on the contrary by increasing, those of farmers. Transcatab claims to have proved that, in consideration of the particular factual context of the present case, the agreements between the processors were designed to meet the objectives set down in Article 33 EC. Those considerations and the other EU interventions in the tobacco sector gave rise to a reasonable doubt among the processors as to the compatibility of the conduct in issue with the competition rules.

296 In Transcatab's submission, the national legislation, in particular Law No 88/88, was also of such a kind as to give rise to a significant degree of uncertainty as to the lawfulness of the conduct in issue. In the contested decision, the Commission ought to have recognised that circumstance for the processors as it did for APTI and Unitab, on which it imposed a symbolic fine of EUR 1 000.

297 The Commission contends that Transcatab's arguments should be rejected.

— Findings of the Court

298 It should first of all be observed that the present case concerns participation in a horizontal cartel, which its members kept secret for several years, concerning, inter alia, the determination of prices. The arrangement therefore constituted a manifest and very serious infringement of Article 81 EC. In addition, as concerns the undertaking in issue, it was one of the main Italian raw tobacco processors, belonging to one of the biggest independent tobacco leaf traders in the world. It is therefore an undertaking which had material and intellectual resources enabling it to evaluate the characteristics of its legislative environment and the consequences that might result, in that regard, from its conduct, in particular from the point of view of the competition rules. In those circumstances, it cannot reasonably be considered that Transcatab can have had doubts as to whether its conduct constituted an infringement (see, to that effect, *Groupe Danone* v *Commission*, paragraph 148 above, paragraph 406, and *Carbone-Lorraine* v *Commission*, paragraph 147 above, paragraph 229).

299 As regards, in the first place, specifically, Regulation No 26, on which Transcatab relies, it should be observed that that regulation, and in particular Article 2 thereof, establishes a derogation from the applicability of Article 81(1) EC for agreements, decisions and practices relating to production of or trade in the products listed in

Annex I to the EC Treaty, including, in particular, raw tobacco, which form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article 33 EC.

300 It follows from the case-law that, constituting as it does a derogation from the general rule in Article 81(1) EC, Article 2 of Regulation No 26 must be interpreted strictly. Furthermore, it has consistently been held that the first sentence of Article 2(1) of Regulation No 26, which provides for the exception claimed, applies only if the agreement in question is conducive to attainment of all the objectives of Article 33 EC. Last, as is clear from the very wording of the first sentence of Article 2(1) of Regulation No 26, the agreement in question must be 'necessary' for the attainment of those objectives (see *FNCBV and Others* v *Commission*, paragraph 254 above, paragraph 199 and the case-law cited).

301 In that regard, first, it should be noted that, at recitals 303 to 313 to the contested decision, the Commission expressly excluded the application in the present case of the derogations from Article 81(1) EC provided for in Article 2 of Regulation No 26. Transcatab does not dispute that analysis or the conclusion which the Commission reaches, but merely claims that the legislation in question had caused it to entertain a reasonable doubt that the Commission ought to have taken into account.

302 Second, it should be observed that Regulation No 26 provides, in Article 2(2) and (3), for a specific procedure which enables the Commission to determine the agreements to which the derogations provided for in Article 2(2) may be applied. That procedure provides, inter alia, that the Commission is to consult the Member States and the undertakings or associations of undertakings concerned.

303 However, there is nothing in the file to indicate that the agreements between the processors were notified to the Commission for the purpose of obtaining an exemption in the context of that specific procedure. Nor does Transcatab maintain that those agreements had been notified to the Commission. On the other hand, it follows expressly from notes taken at the APTI meeting of 4 April 2002 (see paragraph 4 above) by Dimon Italia's representatives that those meetings were not notified to the Commission, a fact not disputed by Transcatab. In the absence of notification and a formal procedure, Transcatab cannot claim that the processors were in any doubt as to the possibility that their agreements would fall within the scope of the derogation provided for by Regulation No 26. Furthermore, in a system such as that provided for by Regulation No 26, it must be precluded that private traders might substitute their own discretion for that of the Commission as to the most appropriate means of attaining the objectives determined by Article 33 EC and thus take unlawful initiatives that would be justified by the fact that the traders concerned pursued those objectives.

304 Third, it follows from the contested decision that the objective of the cartel was clearly anti-competitive from the outset (see, for example, recital 111 to the contested decision). It is not apparent from the circumstances of the present case, and Transcatab does not prove, that the processors intended to pursue by means of unlawful agreements the objectives fixed by Article 33 EC.

305 In that regard, the Court of Justice has held that the maintenance of effective competition on the market for agricultural products is one of the objectives of the common agricultural policy and the common organisation of the relevant markets (see recital 311 to the contested decision and Case C-137/00 *Milk Marque and National Farmers' Union* [2003] ECR I-7975, paragraph 57). Thus, Transcatab cannot claim that manifestly anti-competitive agreements, such as the cartel between the processors in the present case, pursued the objectives referred to in Article 33(1) EC.

306 In the light of all those considerations, it must be concluded that Transcatab cannot reasonably claim that Regulation No 26 caused it to entertain reasonable doubts as to the unlawful nature of the cartel in question.

307 As regards, in the second place, the national legislation, it should be observed that at recital 323 to the contested decision the Commission stated that the processors' cartel fell outside the provisions of Law No 88/88, in so far as its main purpose was to determine maximum or average delivery prices as well as the sharing of quantities and suppliers, whereas the objective of Law No 88/88 was to ensure minimum prices for farmers.

308 Thus, in so far as the cartel's activities were not covered by the national legislation, the processors could not entertain any doubt as to the unlawful nature of their conduct by relying on that legislation.

309 In those circumstances, and in the light of the considerations set out at paragraph 298 above, it must be concluded that the Commission did not err in not granting a reduction of the fine for the attenuating circumstance in question.

310 As regards the complaint raised in the reply, relating to the alleged lack of reasoning with respect to the rejection of the attenuating circumstance in question, it must be borne in mind that it has consistently been held that although Article 253 EC requires the Commission to state the reasons on which its decision is based by mentioning the facts forming the basis of the decision and the considerations which led it to adopt the decision, it does not require the Commission to discuss all the points of fact and of law dealt with during the administrative procedure (*Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 173 above, paragraphs 14 and 15, and Case T-319/94 *Fiskeby Board* v *Commission* [1998] ECR II-1331, paragraph 127).

311 Thus, no argument can be derived from the fact that, in the part of the contested decision dealing with attenuating circumstances, the Commission did not provide an explanation of the reasons why it had considered that it did not have to accept certain factors relied on as attenuating circumstances by Transcatab in its response to the statement of objections. Furthermore, it must be observed that, at recitals 303 to 324 to the contested decision, the Commission analysed the impact of both Regulation No 26 and the national legislation.

The difference in treatment by comparison with the Raw tobacco — Spain case

— Arguments of the parties

312 Transcatab claims that the Commission's failure to apply the attenuating circumstance in question in a legal context as confused as the present one resulted in a significant difference in treatment between the Italian processors and the Spanish processors. The reasons stated in the contested decision in that respect are manifestly illogical in that they fail to take account of certain considerations applied in the Raw tobacco — Spain case, which is very similar to the present case. In particular, in the Spanish case, the Commission had considered that the legal context and the conduct of the government were likely to give rise to such uncertainty that they justified a reduction of 40 % of the fine not only for the trade associations but also for the individual processors.

313 In the present case, on the other hand, in what was virtually an identical situation, the Commission concluded that the processors' cartel fell wholly under Article 81 EC in so far as it was aimed essentially at fixing maximum or average delivery prices, whereas Law No 88 fixed minimum prices. In the Raw tobacco — Spain case, the law also provided solely for the setting of minimum prices.

314 The Commission contends that Transcatab's arguments should be rejected.

— Findings of the Court

315 By the present complaint, Transcatab claims that there has been a breach of the principle of equal treatment, in that in a case that was comparable to the present case, namely the Raw tobacco — Spain case, the Commission applied the attenuating circumstance in question with respect to the processors.

316 In that regard, it has already been observed at paragraphs 202 and 264 above that, in accordance with settled case-law, the principle of equal treatment is breached where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified.

317 In the present case, a comparison of the two decisions in question as concerns the impact of the national legislation on the contested practices shows that the two situations were characterised by significant differences. In particular, it follows from recitals 52 et seq., 349 et seq., 426 to 429, 437 and 438 to the decision in the Raw tobacco — Spain case that in Spain the public authorities had played an important role

in negotiating the agreements between producers and processors. The negotiations in question were described as 'public'. In Spain, there was even a 'ministerial practice … aimed at authorising and encouraging the parties to negotiate jointly the buying and selling conditions for tobacco, including prices' (recital 60 to the decision in the Raw tobacco — Spain case). The Commission concluded that 'the public negotiations between the producers' representatives and the processors [had] determined, at least to a certain degree, the material framework (in particular as regards the opportunities for colluding with each other and adopting a common position) within which the processors were able to develop — in addition to the common position which they would adopt in public negotiations — their secret strategy on average (maximum) delivery prices and quantities' (recital 438 to the decision in the Raw tobacco — Spain case). It was essentially for that reason that the Commission granted a reduction of 40 % of the basic amount of the fines imposed on the Spanish processors.

318 It must be stated that the public authorities did not play such a role in the negotiations between processors and producers in the present case.

319 Transcatab cannot therefore claim that by not applying the attenuating circumstance in question the Commission breached the principle of equal treatment.

320 Last, as regards the argument alleging illogical reasoning, it must be stated that Transcatab merely makes a very general reference to the decision in the Raw tobacco — Spain case, without making clear what considerations were not applied in the contested decision and rendered the reasons for that decision illogical.

321 The third part of the fourth plea must therefore be rejected in its entirety.

Fourth part of the fourth plea, concerning the attenuating circumstance based on Transcatab's effective cooperation during the proceedings

Arguments of the parties

322 Transcatab claims, in the first place, that the Commission ought to have applied to it the attenuating circumstance provided for in the sixth indent of Section 3 of the Guidelines, concerning effective cooperation by the undertaking in the proceedings, outside the scope of the Leniency Notice. It maintains that its cooperation with the Commission was total throughout the proceedings and went beyond the cooperation required in the context of the Leniency Notice. Transcatab refers specifically to spontaneous statements made by its chief executive officer and its purchasing manager concerning the functioning of the cartel and also to the positive evaluation of its cooperation made by the Commission officials who carried out the inspection. Furthermore, in various previous cases the Commission has already reduced the initial amount of the fine that it intended to impose, in order to take account of the undertaking's cooperative approach.

323 Transcatab claims, in the second place, that by not applying that attenuating circumstance to it, but applying it to Deltafina, the Commission breached the principle of equal treatment. The Commission granted Deltafina a reduction of 50 % for its cooperation in consideration of the fact that no reduction of the fine had been granted to it under the Leniency Notice. However, it is apparent from the contested decision that Deltafina did not comply with its obligations to cooperate under the Leniency Notice. Thus, an undertaking that did not comply with its obligation to cooperate obtained a larger reduction of its fine than that obtained by Transcatab, which, on the contrary, cooperated consistently and to a much greater degree than was strictly necessary. Such an approach eliminates the incentive effect of the Leniency Notice.

324 In Transcatab's submission, the fact that Deltafina knowingly breached its obligation to cooperate does not make its situation exceptional. Thus, it maintains, there are two possibilities: either the system of the Leniency Notice and the attenuating circumstance based on cooperation can coexist, in which case the Commission was correct to reduce Deltafina's fine, but ought, in all fairness, to have applied the same treatment to Transcatab, which cooperated at least as much as Deltafina; or the two systems cannot coexist, in which case the application of the attenuating circumstance to Deltafina in the present case is precluded, since it was the first undertaking to claim the application of the Leniency Notice.

325 In the alternative, Transcatab requests that it be granted an additional reduction of its fine, to an extent at least equal to that granted to Deltafina, on account of its total cooperation outside the system of the Leniency Notice.

326 The Commission contends that Transcatab's arguments should be rejected.

Findings of the Court

327 As regards Transcatab's first complaint, it should be borne in mind that, according to the sixth indent of Section 3 of the Guidelines, the basic amount of a fine may be reduced to take account of effective cooperation by the undertaking in the proceedings, outside the scope of the Leniency Notice.

328 It follows from the case-law that that specific attenuating circumstance applies only to infringements which do not fall within the scope of the Leniency Notice (*Dansk Rørindustri and Others* v *Commission*, paragraph 88 above, paragraph 380).

329 In that regard, it should be observed that the application of the sixth indent of Section 3 of the Guidelines cannot have the consequence of depriving the Leniency Notice of its practical effect. The Leniency Notice defines a framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the EU. It therefore follows from the wording and the structure of that notice that undertakings can, in principle, obtain a reduction of the fine for cooperation only where they satisfy the strict conditions laid down in that notice.

330 In order to preserve the practical effect of the Leniency Notice, therefore, the Commission can grant a reduction of the fine to an undertaking on the basis of the sixth indent of Section 3 of the Guidelines only in exceptional situations. That is the case, in particular, where cooperation provided by an undertaking, which goes beyond its legal obligation to cooperate, but does not give rise to the right to a reduction of the fine under the Leniency Notice, is of objective use to the Commission.

331 In the present case, it is apparent from recitals 493 to 498 to the contested decision that the Commission evaluated, in the framework of the Leniency Notice, the evidence supplied by Transcatab and also its attitude and the duration of its cooperation throughout the proceedings. In that regard, it should be borne in mind that the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking (Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 88).

332 As Transcatab was the second undertaking, after Mindo, to satisfy the conditions laid down in the Leniency Notice in order to obtain a reduction of the fine, the Commission granted it, on the basis of its assessment of the cooperation provided, a reduction of its fine of 30 % under that notice, namely a reduction at the highest level of the band provided for in the Leniency Notice for the second undertaking to fulfil the conditions necessary for a reduction.

333 Thus, it must be held that the Commission took into consideration the cooperation provided by Transcatab in the framework of the Leniency Notice. Furthermore, there is no dispute that there was a cartel in this case and, consequently, there was an infringement that does indeed fall within the scope of that notice (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 88 above, paragraph 381).

334 Nor has Transcatab demonstrated the existence in the present case of exceptional situations justifying its cooperation being taken into account outside the scope of the Leniency Notice and thus an application of the attenuating circumstance provided for in the sixth indent of Section 3 of the Guidelines. In effect, the circumstances on which Transcatab relies, such as the spontaneous statements or the positive evaluation of its cooperation, are not elements that could justify the application of that attenuating circumstance in the present case.

335 As regards Transcatab's second complaint, alleging breach of the principle of equal treatment given that that attenuating circumstance was applied to Deltafina, it cannot succeed either.

336 It has already been observed that, according to settled case-law, the principle of equal treatment is breached only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (see paragraphs 202, 264 and 316 above).

337 However, it must be held that in the present case Deltafina's situation is not comparable to that of Transcatab. Deltafina was the first undertaking to contact the Commission and to request immunity under the Leniency Notice, whereas Transcatab was the third undertaking to make an application to the Commission under that notice. Thus, after having granted Deltafina conditional immunity under the Leniency Notice, the Commission, having found that Deltafina was in breach of its obligation to cooperate as an immunity applicant, decided at the close of the proceedings not to grant it definitive immunity. The Commission considered that Deltafina should not be granted any reduction of the fine under the Leniency Notice, which, in the Commission's view, was no longer applicable to it. It was for that reason that the Commission considered that Deltafina's situation had exceptional characteristics that justified granting it a reduction in respect of the attenuating circumstance in question.

338 It follows from those considerations that Deltafina's situation and Transcatab's situation were very different so far as the assessment of their cooperation is concerned, so that Transcatab cannot claim that there has been a breach of the principle of equal treatment on the ground that the Commission did not apply to it the attenuating circumstance based on effective cooperation throughout the administrative procedure.

339 The fourth part of the fourth plea must therefore be rejected.

Fifth part of the fourth plea, concerning the attenuating circumstance that there was no precedent on the raw tobacco market at the time when the Commission began its inspections

Arguments of the parties

340 Transcatab claims that the Commission ought to have taken into consideration as an attenuating circumstance the fact that at the time when it initiated the procedure in the present case there was no precedent relating to the raw tobacco market. The Commission rejected the application of that attenuating circumstance without providing any indication in the contested decision, thus breaching its obligation to state reasons. In support of its argument, Transcatab cites a number of precedents.

341 The Commission contends that Transcatab's arguments should be rejected.

Findings of the Court

342 The Guidelines do not expressly provide for any attenuating circumstance relating to the absence of precedents on the market affected by the infringement. However, the final indent of Section 3 of the Guidelines provides that the Commission may take into account attenuating circumstances other than those set out in the preceding indents in order to grant a reduction of the basic amount of the fine.

343 In that regard, it should be borne in mind that the Commission has a discretion as regards the application of attenuating circumstances (*Mannesmannröhren-Werke* v *Commission*, paragraph 143 above, paragraph 307). Furthermore, this Court has held that the Commission is not required to moderate fines when taking action for the first time in a particular sector (Case T-52/02 *SNCZ* v *Commission* [2005] ECR II-5005, paragraph 84).

344 It must be held that Transcatab has not proved how the Commission erred in not considering that the absence of a precedent in the tobacco sector should lead it to reduce Transcatab's fine. Transcatab merely refers to a range of cases in which the Commission took into account as an attenuating circumstance the fact that Article 81 EC had never yet been applied in the sector in respect of which the fine had been imposed.

345 However, it must be borne in mind in that regard that the mere fact that the Commission considered in previous decisions that certain factors constituted attenuating circumstances for the purposes of determining the amount of the fine does not mean that it is obliged to make the same assessment in a subsequent decision (*Mayr-Melnhof* v *Commission*, paragraph 291 above, paragraph 368, and *LR AF 1998* v *Commission*, paragraph 180 above, paragraph 337).

346 As regards the complaint alleging failure to state reasons, it has already been observed at paragraphs 310 and 311 above that Article 253 EC does not require the Commission to discuss all the points of fact and of law dealt with during the administrative procedure and that, thus, no argument can be derived from the fact that, in the part of the contested decision dealing with attenuating circumstances, the Commission did not provide an explanation of the reasons why it had considered that it did not have to accept certain factors relied on as attenuating circumstances by Transcatab.

347 In the light of those considerations, the fifth part of the fourth plea must also be rejected.

Sixth part of the fourth plea, concerning the socioeconomic characteristics of the raw tobacco sector in Italy and the crisis in that sector

Arguments of the parties

348 Transcatab maintains that the Commission ought to have reduced the fine under Section 5(b) of the Guidelines by taking into account the context of the crisis on the Italian market and the pressure applied to the processors by the intermediaries, including by means of the illegal activities. Such a particular economic and social context made it necessary to take measures for the survival of the processing undertakings. A number of documents show the enormous pressure to which the processors were subject and the 'terrible intimidation and threats' which they experienced. In addition, the processors' conduct satisfied the requirement of countering the power of the intermediaries. The processors were able to resist that situation only by means of agreements having a real deterrent effect. The Commission ought to have taken that situation into consideration and granted a reduction of the fine.

349 Furthermore, during the period under consideration, Transcatab, like other processors operating in Italy, suffered consistent and significant losses and was placed in liquidation. Those assertions show that the sole aim of the cartels was to provide remedies for the crisis in the sector and to ensure its survival.

350 Transcatab claims that in Commission Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 [EC] (Case COMP/C.38.279/F3 — French beef) (OJ 2003 L 209, p. 12, recitals 180 to 185) the Commission considered that the crisis in the sector justified a reduction of the fine of 60 %. The particular features of the market in question have also been taken into consideration in the case-law and in other precedents. Furthermore, in Transcatab's submission, Section 5(b) of

the Guidelines should not be applied only in exceptional cases. The expression 'account should be taken' shows, in effect, that the Commission has no discretion as to whether the elements mentioned in that provision are to be taken into account.

351 The Commission contends that Transcatab's arguments should be rejected.

Findings of the Court

352 It has consistently been held that the Commission is not required to regard as an attenuating circumstance the poor financial state of the sector in question (see *Tokai Carbon and Others* v *Commission*, paragraph 224 above, paragraph 345 and the case-law cited; Case T-64/02 *Heubach* v *Commission* [2005] ECR II-5137, paragraph 139; and *Wieland-Werke and Others* v *Commission*, paragraph 180 above, paragraph 227). In effect, it has been observed that, in general, cartels come into being at a time when a sector is experiencing difficulties. Thus, if Transcatab's reasoning were to be followed, the fine should be reduced in virtually all cartel cases (see, to that effect, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 141 above, paragraph 510; *Prym and Prym Consumer* v *Commission*, paragraph 188 above, paragraph 207; and *Wieland-Werke and Others* v *Commission*, paragraph 180 above, paragraph 227).

353 Admittedly, it is true that in the Commission's practice in taking decisions structural crises have sometimes been regarded as attenuating circumstances. According to the case-law cited in the preceding paragraph, however, the fact that in previous cases the Commission has taken the economic situation of the sector into account as an attenuating circumstance does not mean that it must necessarily continue to observe that practice (*Prym and Prym Consumer* v *Commission*, paragraph 188 above,

paragraph 208, and *Wieland-Werke and Others* v *Commission*, paragraph 180 above, paragraph 227).

354 Thus, Transcatab cannot claim that the Commission was required to reduce the fine on account of the crisis on the Italian raw tobacco market.

355 Furthermore, in application of the case-law referred to at paragraphs 352 and 353 above, and also that referred to at paragraphs 162 and 346 above, it must be held that the reference to Decision 2003/600 is not relevant. In any event, it should be observed that the Commission has indeed explained that the situation in which that decision had been adopted was considerably different from the present case in so far as, in the French beef case, the impugned conduct responded to an unforeseen crisis resulting from a dramatic fall in demand attributable to factors wholly independent of the economic situation in the sector, while in the present case the difficulties in the sector were long-standing and were to a large extent of a structural nature.

356 As regards the assertion that the processors' conduct had responded to the requirement to counter the intermediaries' power, the Commission explained at recitals 289 and 290 to the contested decision the reasons why it rejected that argument. In particular, at recital 289, it correctly asserted that it was not the task of undertakings to take steps contrary to Article 81(1) EC to counteract practices which they rightly or wrongly regarded as illegal.

357 In addition, it must be stated that Transcatab has not proved the 'terrible intimidation and threats' which it claims to have experienced. As the Commission observes, document No 2573 in the file, which it invoked, is nothing more than a report drawn up by the representatives of Dimon Italia of a meeting which took place in 1997 between, among others, Deltafina, Transcatab and APTI, concerning the tobacco produced

off-quota and the need for the authorities to take appropriate initiatives to ensure its sale. That document merely mentions the possibility that there might be protests on the part of the growers owing to the difficulties in their sector. That document does not show, however, that those possible protests — and there is no evidence that they actually took place — were necessarily directed against the processors. The mere possibility of the existence of protests is not capable of constituting an exceptional crisis situation justifying conduct contrary to Article 81 EC. In addition, the report of the parliamentary committee of inquiry to which Transcatab refers makes no specific reference to illegal activities on the tobacco market and is therefore irrelevant in that context.

358 Last, the argument based on Transcatab's financial situation has been examined and rejected in the context of the third part of the second plea.

359 The sixth part of the fourth plea must therefore also be rejected and, consequently, that plea must be rejected in its entirety.

5. *Fifth plea, concerning the application of the Leniency Notice*

Arguments of the parties

360 In the first place, Transcatab claims that as the Commission considered that the Leniency Notice was not applicable to Deltafina, it ought to have treated Transcatab as the first company to benefit from a reduction of its fine.

361 In the second place, Transcatab maintains that, in application of the final paragraph of point 23 of the Leniency Notice, it ought not to have been penalised for its conduct during the period 1999 to 2002. It was the first undertaking to have informed the Commission of the existence of the agreements entered into during that period. Its contribution was extremely detailed, decisive and complete. Before Transcatab produced its information, the Commission had in its possession only some information supplied by Deltafina and by Dimon Italia. Transcatab gives a number of examples of information produced relating to each year during the period 1999 to 2002.

362 Thus, concerning that period, Transcatab supplied 'evidence relating to facts previously unknown to the Commission' and those facts had a 'direct bearing on the gravity or duration' of the cartel within the meaning of the final paragraph of point 23 of the Leniency Notice. The purpose of that paragraph is to enable the Commission to compensate for the percentage reduction that an undertaking might not obtain because the evidence arrived late by comparison with its competitors owing to the time spent drawing up a complete statement.

363 The Commission contends that Transcatab's arguments should be rejected.

Findings of the Court

The capacity as first company to benefit from a reduction of the fine

364 It should be borne in mind that the conditions for the admissibility of an action concern an absolute bar to proceeding with the action which the EU Courts must consider of their own motion should such an issue arise (see *Honeywell* v *Commission*,

paragraph 132 above, paragraph 53 and the case-law cited; see also, to that effect, judgment of 29 November 2007 in Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others* v *Commission*, not published in the ECR, paragraph 18).

365 As observed at paragraphs 131 and 132 above, according to Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court, the application must set out, inter alia, 'the subject-matter of the proceedings' and 'a summary of the pleas on which the application is based'. According to Article 48(2) of the Rules of Procedure, moreover, '[n]o new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure'. It follows from those provisions that any plea which is not adequately articulated in the application initiating the proceedings must be held inadmissible. Furthermore, the summary of an applicant's pleas in law must be sufficiently clear and precise to enable the defendant to prepare his defence and to enable the Court to give judgment in the action without the need to seek further information (Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 66, and Case T-157/01 *Danske Busvognmænd* v *Commission* [2004] ECR II-917, paragraph 45). Similar requirements are called for where a submission is made in support of a plea in law (Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 333).

366 Furthermore, according to settled case-law, in order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential elements of fact and of law on which it is based must be apparent from the text of the application itself, at the very least in summary form, provided that the statement is coherent and comprehensible (*Honeywell* v *Commission*, paragraph 132 above, paragraph 56). In that regard, while the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application (order in Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703, paragraph 49). Furthermore, it is not for the Court to seek and identify, in the annexes, the pleas and

arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (see Case T-151/05 *NVV and Others* v *Commission* [2009] ECR II-1219, paragraph 61 and the case-law cited).

367 In the present case, the presentation of the submission is summary in the extreme, as Transcatab devotes only a single sentence to it in its application.

368 At the hearing, while acknowledging that the submission was presented in a laconic manner, Transcatab expanded on its scope. In substance, Transcatab claims that in the event that the Court should find that the Leniency Notice was not applicable to Deltafina and, thus, that Mindo ought to be regarded as the first company to benefit from immunity from fines instead of Deltafina, Transcatab ought to be regarded — on the basis of a kind of 'domino effect' — as the first company to benefit from a reduction of the fine under subparagraph (b) of the first paragraph of point 23 of the Leniency Notice. Consequently, the reduction of the fine granted to Transcatab by the Commission ought to be increased.

369 In that regard, it must be stated that the success of Transcatab's argument is predicated on the hypothesis, first, that Mindo has brought an action against the contested decision before the Court; second, that it has raised a plea alleging that it ought to be regarded as enjoying immunity from fines instead of Deltafina, on the ground that the Leniency Notice does not apply to that undertaking; and, third, that the Court upholds that plea in the case concerning Mindo.

370 Thus, Transcatab's submission is based on an implicit reference to a plea that might possibly be raised in a different case and to which no explicit reference is even made. Furthermore, such a submission can be upheld only if the plea that might be raised by Mindo in the other case is upheld by the Court.

371 However, to accept the admissibility of pleas not set out in sufficient detail in the application but referring to pleas hypothetically raised by a third party in a different case, to which reference is implicitly made in the application, would be to allow the mandatory requirements of Article 44(1)(c) of the Rules of Procedure, set out at paragraph 365 above, to be circumvented (see, to that effect, *Honeywell* v *Commission*, paragraph 132 above, paragraph 64).

372 In any event, it is clear from the case-law of the Court of Justice that the General Court is obliged to reject as inadmissible a head of claim in an application brought before it if the essential matters of law and of fact on which the head of claim is based are not indicated coherently and intelligibly in the application itself, and that the failure to state such matters in the application cannot be compensated for by putting them forward at the hearing (Case C-214/05 P *Rossi* v *OHIM* [2006] ECR I-7057, paragraph 37).

373 In the light of all those considerations, the submission in question must be considered inadmissible.

The final paragraph of point 23 of the Leniency Notice

374 As regards Transcatab's argument that, under the final paragraph of point 23 of the Leniency Notice, it ought not to have been penalised for its conduct during the period 1999 to 2002 in its capacity as the first undertaking to have informed the Commission of the existence of agreements entered into during that period, it must be borne in mind that, in the words of that provision, 'if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these

elements into account when setting any fine to be imposed on the undertaking which provided this evidence'.

375 It should also be borne in mind that, in assessing the cooperation provided by members of a cartel, only an obvious error of assessment by the Commission is capable of being censured, since the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking (see, to that effect, *SGL Carbon* v *Commission*, paragraph 331 above, paragraph 88).

376 Thus, it is appropriate, first, to clarify the scope of the final paragraph of point 23 of the Leniency Notice and, second, to ascertain whether, in applying that provision, the Commission made a manifest error of assessment in penalising Transcatab for its conduct during the period 1999 to 2002.

377 First of all, the interpretation proposed by Transcatab, namely that the purpose of the final paragraph of point 23 of the Leniency Notice is to enable the Commission to compensate for the percentage reduction that an undertaking might not obtain because its evidence arrived late by comparison with its competitors owing to the time spent in drawing up a complete statement (see paragraph 362 above) must be rejected. Such an interpretation is contrary to the logic of the Leniency Notice, in that it jeopardises the main objective put in place by that notice, namely to encourage the members of the cartel to 'betray' the cartel and to cooperate with the Commission.

378 Indeed, it follows from the introduction to the Leniency Notice that the logic of that notice is to encourage undertakings participating in illegal cartels to cooperate with the Commission in its efforts to combat cartels on the ground that cartels of that type

constitute practices which are among the most serious restrictions of competition. In that context, in order to encourage such cooperation, the Commission envisages a system designed to grant undertakings which cooperate with it either immunity or reductions of the fines that might be imposed on them.

379 It is inherent in that logic that the effect sought by the Leniency Notice is to create a climate of uncertainty within cartels by encouraging those participating in them to denounce the cartels to the Commission. That uncertainty results precisely from the fact that the cartel participants know that only one of them can benefit from immunity from fines by denouncing the other participants in the infringement, thereby exposing them to the risk that they face more severe fines. In the context of that system, and according to the same logic, the undertakings that are quickest to provide their cooperation are supposed to benefit from greater reductions of the fines that would otherwise be imposed on them than those granted to the undertakings that are less quick to cooperate.

380 The chronological order and the speed of the cooperation provided by the members of the cartel therefore constitute fundamental elements of the system put in place by the Leniency Notice.

381 The interpretation of the purpose of a provision of the Leniency Notice must be consistent with the specific logic of that notice. From that aspect, the final paragraph of point 23 of that notice must be interpreted as being aimed at rewarding an undertaking, even if it was not the first to submit an application for immunity in relation to the cartel concerned, if it is the first to provide the Commission with evidence concerning facts of which the Commission was not aware and which have a direct impact on the gravity or duration of the infringement. In other words, if the evidence supplied by an undertaking relates to facts which enable the Commission to modify the assessment which it then has of the gravity or duration of the infringement, the undertaking

which provides that evidence is rewarded by immunity concerning the assessment of the facts which that evidence is capable of demonstrating.

382 Thus, the final paragraph of point 23 of the Leniency Notice does not concern cases in which an undertaking merely submits new or more complete evidence relating to facts of which the Commission is already aware. Nor does that paragraph apply to cases in which an undertaking informs the Commission of new facts which, however, are not capable of modifying the Commission's assessment in relation to the gravity or duration of the infringement. That provision applies, on the contrary, exclusively to cases in which two conditions are satisfied: first, the undertaking in question is the first to prove facts of which the Commission was previously unaware; and, second, those facts, which have a direct impact on the gravity or the duration of the supposed cartel, enable the Commission to make new findings concerning the infringement.

383 It is therefore in the light of those considerations that the Court must ascertain whether the Commission erred in penalising Transcatab for its conduct during the period 1999 to 2002. In that regard, it must be observed, first, that at recital 497 to the contested decision the Commission expressly asserted that none of the facts in respect of which Transcatab had supplied evidence had been unknown to the Commission and, second, that in the context of the present complaint, Transcatab's arguments relate only to the duration of the cartel. On the contrary, those arguments do not refer to facts that might have had an impact on the gravity of the infringement.

384 It is apparent from the file that when Deltafina submitted its application for immunity on 19 February 2002 the Commission was aware of the fact that the cartel had begun in 1995 and had lasted until 2001. Indeed, in its leniency application, Deltafina had expressly admitted that fact and had also submitted eight handwritten notes concerning meetings and discussions between the processors relating to 1999, two

handwritten notes relating to 2000 and two others relating to 2001. Furthermore, it should be observed that Transcatab merely claims to have been the first to supply evidence of a number of agreements and contacts between the processors during that period. It does not claim that the Commission was not already aware of the fact that the cartel between the processors was in operation during the period 1999 to 2002.

385 Furthermore, a detailed analysis of the contested decision also shows that the Commission based its decision on information concerning contacts between the processors which originated with Deltafina and Dimon Italia and, thus, independently of the information supplied by Transcatab.

386 As regards, in particular, 1999, it is apparent from the contested decision that Deltafina supplied a number of indications of the contacts between the processors during that year, for example at recitals 159 (footnote 181), 195 (footnote 206), 199 (footnote 212) and 200 (footnote 214). It is apparent from all those footnotes that Deltafina had described what was discussed at those meetings in statements produced before Transcatab applied for a reduction of its fine.

387 As regards the extension of the cartel to surplus production, it is apparent from the contested decision that recitals 144 and 148 were drafted on the basis of information supplied by Deltafina. The Commission made clear in the rejoinder that those recitals are based on documents supplied by Deltafina on 22 February 2002, namely, once again, before Transcatab applied for a reduction of its fine. The fact that that extension was subsequently put on a formal basis in an agreement supplied by Transcatab does not alter the assessment of Transcatab's present complaint in the light of the final paragraph of point 23 of the Leniency Notice.

388 As regards, 2000, recitals 203 (footnote 216) and 204 (footnote 218) to the contested decision show that Deltafina supplied evidence of the contacts between the processors during that year. Footnote 218 explains, in particular, that Deltafina had described what was discussed at the meeting referred to at recital 204 to the contested decision in statements that pre-dated the submission of the application for a reduction of the fine by Transcatab, which was confirmed by the Commission in the rejoinder. It is apparent from the file, moreover, that on 19 March 2002 Deltafina had also supplied information and documents to the Commission relating to the contacts which had taken place during that year.

389 As regards 2001, it follows from recitals 209 (footnote 223) and 211 (footnote 225) to the contested decision that, before Transcatab submitted its application for a reduction, Deltafina had already supplied the Commission with documents proving the existence of contacts between the processors during that year. In particular, documents 495, 498, 524 and 614, mentioned in those two footnotes, prove unequivocally the existence of contacts between the processors during that period. Those documents also show that, before Transcatab submitted its application for a reduction of the fine, the Commission was already aware of the illegal contacts between the processors, including Transcatab, at least until 15 October 2001.

390 As regards 2002, the Commission maintains that it was already aware that the contacts between the processors continued during that year, owing to the fax mentioned in footnote 235 to the contested decision, produced by Dimon Italia. Transcatab contends, none the less, that that document was produced after 18 April 2002, the date on which it produced the documents mentioned in footnote 234 in respect of 2002.

391 In that regard, it should be observed that, even on the assumption that that document was produced by Dimon Italia after Transcatab and, thus, that Transcatab was the first undertaking to have supplied evidence of the meetings held at the beginning of 2002, that circumstance would have no practical consequence.

392 First, as observed at paragraph 389 above, it follows from the file that, before Transcatab submitted its application for a reduction of the fine, the Commission had in its possession evidence relating to the duration of the cartel at least until 15 October 2001. As the cartel had begun on 29 September 1995 (see recital 377 to the contested decision), and as that circumstance has not been disputed by Transcatab, it must be held that before Transcatab produced those documents the Commission therefore already had sufficient information to establish that the cartel had lasted for more than six years. That finding in itself thus enabled the Commission to increase the starting amount of the fine by 60 %. It follows that the fact that the Commission established a period four months longer (until 19 February 2002) had no impact on the determination of the final penalty.

393 Second, it should be borne in mind that, at recital 256 et seq. to the contested decision, the Commission established, without that finding being disputed by Transcatab (see paragraph 233 above), that the cartel was a single and continuous infringement. The Commission also found that that infringement had ended on 19 February 2002, namely the date on which Deltafina submitted its application for immunity. Transcatab has neither asserted nor proved that its participation in the infringement ceased before that date.

394 In that regard, it should be borne in mind that an undertaking that has taken part in an infringement through conduct of its own which falls within the scope of an agreement or concerted practice having an anti-competitive object for the purposes of Article 81(1) EC and which is intended to help to bring about the infringement as a whole is also responsible, throughout the entire period of its participation in that infringement, for conduct of other undertakings in the context of the same infringement (see *BST* v *Commission*, paragraph 222 above, paragraph 33 and the case-law cited).

395 Likewise, an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel if it knew, or must have known, that the collusion in which it

participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel (*PVC II*, paragraph 91 above, paragraph 773; *HFB and Others* v *Commission*, paragraph 130 above, paragraph 231; and Case T-19/05 *Boliden and Others* v *Commission* [2010] ECR II-1843, paragraph 61.

396 In those circumstances, it must be concluded that Transcatab did not supply evidence of facts not previously known to the Commission and having a direct impact on the gravity or the duration of the supposed infringement that would justify the application of the partial immunity provided for in the final paragraph of point 23 of the Leniency Notice. Consequently, Transcatab cannot claim that the Commission made a manifest error of assessment and that Transcatab must thus not be regarded as liable for the entire infringement.

397 Consequently, the claims seeking annulment in part of the contested decision must be rejected in their entirety. As regards the claims seeking a variation of the contested decision, the Court considers that, as no element in the present case is capable of justifying a reduction of the amount of the fine, those claims should not be upheld. It follows from all the foregoing that the action must be dismissed in its entirety.

6. *The Commission's counterclaim*

Arguments of the parties

398 The Commission claims that Transcatab contested the facts, in particular the duration of the cartel, as found by the Commission in the contested decision. In asserting, in the first part of the third plea, that from 1999 it confined itself to conduct exclusively

coming within the interprofessional agreements (see paragraphs 227 and 228 above), Transcatab did not merely contest the Commission's interpretation of the facts but called in question facts which it had previously admitted. Transcatab's contestation of the duration of the cartel, which is an essential element of the description of the facts, means that the 30 % reduction which the Commission granted it is unjustified in part. The Commission thus requests the Court to reduce the reduction of the fine from 30 % to 25 % and, in the exercise of its unlimited jurisdiction, to set the fine at EUR 15 million.

399 Transcatab opposes the Commission's counterclaim.

Findings of the Court

400 It is clear from the contested decision that the fact that Transcatab did not 'contest the facts on which the Commission based the statement of objections' was one of the considerations on the basis of which the Commission granted it a reduction of 30 % of its fine (see recitals 498 and 499 to the contested decision).

401 However, it is apparent from Transcatab's reply to the statement of objections that, while it did not expressly respond to the Commission's objections concerning the duration of the infringement, it none the less claimed that, since the processors had acted since 1999 in accordance with Law No 88/88, they should not be considered liable for the anti-competitive conduct implemented as from that year.

402 Thus, even though the presentation of that argument is inconsistent with certain assertions made during the administrative procedure and with Transcatab's failure to contest certain aspects of the Commission's analysis, that does not detract from the finding that the argument in the first part of the third plea was already raised during the administrative procedure. Consequently, when the Commission granted Transcatab the reduction, it was already aware of that argument and the argument cannot therefore constitute a substantial contestation of the facts calling in question the reduction granted under the Leniency Notice in the contested decision.

403 The Commission's counterclaim must therefore be dismissed.

404 In the light of all the foregoing, the action must be dismissed in its entirety, as must the Commission's counterclaim.

Costs

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

406 In the present case, Transcatab's application has been unsuccessful, and the Commission's counterclaim has also been unsuccessful. As the Commission sought to secure only a marginal increase in the amount of the fine, it must be held that it is essentially the applicant that has been unsuccessful in the form of order sought and in its pleas in law. In those circumstances, the applicant should bear its own costs and pay 90% of the costs incurred by the Commission, and the Commission should bear 10% of its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Dismisses the action;

2. Dismisses the European Commission's counterclaim;

3. Orders Transcatab SpA to bear its own costs and to pay 90% of the costs incurred by the Commission;

4. Orders the Commission to bear 10% of its own costs.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 5 October 2011.

[Signatures]

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