OPINION OF ADVOCATE GENERAL KOKOTT delivered on 3 July 2007 [1]

I — Introduction

1. Under what circumstances can a cartel offence committed by an undertaking previously operating in the relevant market be attributed to its successor on that market? This is the essence of the question which the Italian Consiglio di Stato has referred to the Court in the present case.

2. The background to this case is a cartel which influenced retail prices on the cigarette market in Italy between 1993 and 2001 in an anti-competitive manner and which was discovered by the Italian competition authority. The Amministrazione Autonoma dei Monopoli di Stato (the autonomous body administering State monopolies) was originally a member of this cartel. However, with effect from March 1999 its economic activity in the area of manufacturing and marketing tobacco products, including its participation in the cartel, was taken over by the newly-established Ente Tabacchi Italiani, which was subsequently privatised. There should now — at least according to the Italian competition authority — be attributed to it and punished with a fine not only its own participation in the cartel from March 1999 but also the previous cartel participation of the Amministrazione Autonoma dei Monopoli di Stato.

3. The limits of such attribution of cartel offences in case of succession to an undertaking are of considerable practical relevance to the actual structure of the disposal, restructuring and privatisation of undertakings. This is because the risks on sellers and acquirers of undertakings as regards liability depend on the criteria applied by competition authorities and courts for attributing cartel offences.

4. The present case is of great interest from another point of view too. The Italian competition authority's decision imposing a fine is based solely on national antitrust law, but the latter is aligned with Community law, the interpretation of which is requested from

1 — Original language: German.

the Court in the present case. Whether a reference for a preliminary ruling can be admissible in such circumstances is of great importance for future cooperation between the Court and national courts in relation to antitrust law, in particular given that national law and Community law in this area are continually becoming more closely interlinked.

II — Legal framework

5. The *Community law framework* of this case is laid down by Articles 81 et seq. EC and 3(1)(g) EC. As regards *national law*, one must refer on the one hand to provisions of Italian competition law, and on the other to some provisions relating to the administration of the Italian tobacco monopoly.

A — *Italian competition law*

6. So far as Italian competition law is concerned, Law No 287 of 10 October 1990 concerning provisions for the protection of competition and the market [2] is relevant, and its Title I contains the following provisions in particular:

'*Article 1*

(1) The provisions of this Law, which is enacted under Article 41 of the Constitution for the purposes of protecting and guaranteeing the right to economic initiative, apply to cartels, abuses of a dominant position and concentrations of undertakings which do not fall within the scope of application of Article 65 and/or Article 66 of the Treaty establishing the European Coal and Steel Community, Article 85 and/or Article 86 of the Treaty establishing the European Economic Community (EEC), Regulations of the EEC, or Community acts having the same legal effect.

...

(4) The provisions in this Title shall be interpreted in accordance with the principles laid down in the competition law of the European Communities.

2 — Legge 10 ottobre 1990, No 287, Norme per la tutela della concorrenza e del mercato (GURI No 240 of 13 October 1990, p. 3; 'Law No 287/1990').

Article 2

(1) "Cartels" means agreements and/or concerted practices of undertakings as well as decisions of consortia, associations of undertakings and similar organisations, even where made on the basis of their statutes or administrative rules.

(2) Cartels between undertakings which have as their object or effect the material prevention, restriction or distortion of competition within the national market or a substantial part of that market are prohibited, and in particular those which

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, turnover, access to the market, investment, technical development, or technological advancement;

(c) share markets or sources of supply;

(d) apply objectively dissimilar conditions to equivalent transactions with other trading parties, thereby unjustifiably placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(3) Prohibited cartels shall be void for all purposes.'

7. Title II of Law No 287/1990 provides for the creation of a national competition authority, namely the *Autorità Garante della Concorrenza e del Mercato* ('Autorità Garante'), which is given the following powers by Article 15(1) of that law:

'If [Autorità Garante] establishes the existence of infringements of Article 2 or 3, it shall lay down a time-limit for the undertakings and operations concerned to cease

the infringements. In case of serious breaches, it may also impose, having regard to their gravity and duration, an administrative fine of up to 10% of the turnover which the undertaking or establishment in question achieved in the last accounting year prior to the issue of the notice, and shall fix the time-limits within which the undertaking must pay the fine.'

8. Title VI of Law No 287/1990 also contains Article 31, which provides as follows:

'So far as applicable, the provisions of Chapter I, Sections I and II, of Law No 689 of 24 November 1981 apply in relation to administrative fines for breaches of this Law.'

B — *The legal provisions concerning the administration of the Italian tobacco monopoly*

9. By Royal Legislative Decree [3] No 2258 of 8 December 1927, [4] there was created in Italy an Autonomous State Monopolies Administration, the so-called *Amministrazione Autonoma dei Monopoli di Stato* ('AAMS'). AAMS is an administrative organ of the State, which is today still subject to the Ministry of the Economy and Finance. [5] As regards both its administration and its finance and accounting functions, it is autonomous, although it does not have its own legal personality. Up to and including February 1999 AAMS was entrusted with, inter alia, the Italian tobacco monopoly.

10. Legislative Decree [6] No 283 of the President of the Republic of 9 July 1998 [7] created a public economic body [8] named *Ente Tabacchi Italiani* ('ETI'). All of AAMS' manufacturing and trading operations, with the exception of lotteries, were transferred to it by operation of law. ETI is the successor in title to AAMS in respect of all the matters transferred as regards all assets, liabilities, rights and property. [9] ETI commenced its operations on 1 March 1999.

11. ETI was initially subject to the supervision of the Ministry of the Economy and Finance, which laid down guidelines for its operations, appointed its directors and

3 — Regio decreto legge.

4 — Re-enacted as Law No 3474 of 6 December 1928.

5 — Ministero dell'Economia e delle Finanze.

6 — Decreto legislativo.

7 — GURI No 190 of 17 August 1998, p. 3 (Legislative Decree No 283/1998).

8 — Ente pubblico economico.

9 — Article 3(1) of Legislative Decree No 283/1998.

supervised its decisions. [10] However, as had been intended from the start, [11] on 23 June 2000 ETI was transformed into a public limited company, namely Ente Tabacchi Italiani — ETI SpA. Its shares were initially owned as to 100% by the Ministry of the Economy and Finance. Finally, in 2003 ETI was privatised, and since then it has been under the sole control of British American Tobacco plc, a holding company established under English law, which belongs to the BAT (British American Tobacco) group.

12. As regards AAMS, since 1 March 1999 in the area of tobacco products it has carried out only sovereign activities, [12] no longer carrying out any economic activities in that area. By contrast, according to the information before the Court AAMS has continued to carry on economic activities beyond that date in the area of gambling and games of chance, and in particular of lotteries.

III — Facts and main proceedings

13. By Decision No 11795 of 13 March 2003 [13] Autorità Garante held that between 1993 and 2001 various companies in the Philip Morris group [14] had formed a cartel first with AAMS and thereafter with ETI which had had the intention and effect of significantly distorting competition on a permanent basis as regards the retail price of cigarettes in the Italian domestic market. Autorità Garante imposed fines on the cartel participants for breach of Article 2(2)(a) and (b) of Law No 287/1990 of in total EUR 50 million for Philip Morris and EUR 20 million for ETI. In addition, Autorità Garante ordered the cartel participants to cease the offending conduct.

14. In its decision Autorità Garante attributed AAMS' cartel participation prior to 1 March 1999 to ETI, and justified this by reference to AAMS' cessation of economic activity in the production and marketing of tobacco products and the acquisition of this economic activity by ETI.

15. Both Philip Morris and ETI challenged the decision of Autorità Garante before the Tribunale amministrativo regionale del Lazio — Roma [15] ('TAR'). Whereas at first instance

10 — According to information given by the Italian Government in response to a question by the Court.

11 — Article 1(6) of Legislative Decree No 283/1998.

12 — The examples given were supervision of trade in smoking products and the grant of concessions to sell tobacco products to the public.

13 — Provvedimento 13 marzo 2003, n. 11795, I 479 'Variazione di prezzo di alcune marche di tabacchi' (*Bollettino settimanale*, Volume XIII, No 11/2003, p. 5). This decision was preceded by an investigation initiated in June 2001.

14 — Philip Morris Products SA, Philip Morris Holland BV, Philip Morris GmbH, Philip Morris Products Inc. and Philip Morris International Management SA. For ease of reference, in the following these undertakings will be referred to together as 'Philip Morris'.

15 — Administrative Court for the region of Lazio, having its seat in Rome.

Philip Morris' challenges did not succeed, the TAR granted ETI's challenge to the extent that AAMS' cartel participation was not to be attributed to it. This meant that Autorità Garante's decision was set aside in part. In this regard the TAR based its decision on the principle of personal responsibility under Articles 1 and 7 of Law No 689/1981, to which Article 31 of Law No 287/1990 refers, and explained that the same principle also applied in Community law. The criterion of objective economic continuity could be applied only in narrowly defined, exceptional circumstances, which did not obtain here.

16. After not only ETI and Philip Morris but also Autorità Garante appealed against the decision at first instance, the proceedings came before the Italian Consiglio di Stato [16] ('the national court') in its capacity as the supreme administrative court. The Consiglio di Stato has already rejected the complaints by ETI and Philip Morris as regards the commission of cartel offences and is now considering the question raised in Autorità Garante's appeal as regards whether AAMS' cartel participation may be attributed to ETI in the period 'before its incorporation'.

16 — Council of State.

IV — Request for a preliminary ruling and proceedings before the Court

17. By order dated 8 November 2005 lodged at the Court on 27 June 2006 the Consiglio di Stato stayed its proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) What, in accordance with Article 81 et seq. EC and with the general principles of Community law, is the criterion to be adopted in determining the undertaking on which a penalty is to be imposed for contravention of the rules in the sphere of competition when, in connection with conduct penalised as a whole, the last part of those actions was carried out by an undertaking having succeeded the original undertaking in the economic sphere concerned whenever the original body, while still in existence, no longer operates as a commercial undertaking, or at least not in the economic sector affected by the penalty?

(2) Does it fall to the national authority responsible for the application of "anti-trust" rules, when determining the person to be penalised, to assess at its own discretion whether circumstances exist which warrant the attribution to the economic successor of responsibility for contraventions of the competition rules committed by the legal person

which it has succeeded, even when that latter has not ceased to exist at the date of the decision, so that the effectiveness of the competition rules is not compromised by alterations made to the legal form of the undertakings?'

18. Before the Court, ETI, Philip Morris, the Italian Government and the Commission of the European Communities submitted written and oral observations.

V — Analysis

A — *Admissibility of the reference for a preliminary ruling*

19. The subject of the main proceedings before the Italian courts is a decision by the Italian competition authority, Autorità Garante, in a cartel matter. The decision is based solely on national antitrust law, specifically Law No 287/1990. In assessing its lawfulness the national court none the less considers it necessary to interpret Community competition law. In that regard it refers to Article 1(4) of Law No 287/1990, according to which the principles of Community competition law form the basis for the interpretation of the provisions in Title I of that law, that is to say, they are relevant also to national law.

20. In those circumstances it is necessary to make some remarks on the admissibility of the questions referred, in particular as regards whether they are relevant to the decision to be made.

1. Introductory remarks

21. The sole fact that in the present case Community law is relevant only because of a reference to it by national law does not mean that the questions referred by the Consiglio di Stato are not relevant to the decision, or that the Court has no jurisdiction to answer them.

22. According to consistent case-law, going back to the judgment in *Dzodzi* ('the *Dzodzi*

case-law'), [17] neither the wording of Article 234 EC nor the aim of the preliminary ruling procedure precludes answering questions referred on the interpretation of Community provisions to which national law refers to determine rules applicable to a purely internal situation which is purely internal to that State.

23. On the contrary, as the Court has repeatedly recognised, it is manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied. [18]

24. In the area of competition law this interest in interpretation and application of provisions at Community level which are as uniform as possible is particularly strong, [19] because in this area national law is particularly frequently orientated to Community law. This did not just become so on the entry into force of Regulation (EC) No 1/2003, [20] which created a particularly close interplay between national competition law and Community law. Already before that, that is at the time when Regulation No 17 still applied, [21] the national competition law of numerous Member States was orientated to Community law even in its application to purely internal situations. The latter applies not least to Italian Law No 287/1990, which is applicable to the dispute in the main proceedings.

25. Against this background cooperation between the Court and national courts in the field of competition law has a particular value. It contributes to the highest possible degree of legal certainty and to conditions of competition being comparable for all economic participants to whom Community law applies, whether directly or indirectly.

26. However, in the present case the Commission expresses doubts as to the admissi-

17 — Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 36; see also Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 25, Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 25, Case C-130/95 *Giloy* [1997] ECR I-4291, paragraph 21, Case C-1/99 *Kofisa Italia* [2001] ECR I-207, paragraph 21, Case C-170/03 *Feron* [2005] ECR I-2299, paragraph 11, Case C-3/04 *Poseidon Chartering* [2006] ECR I-2505, paragraph 15, and Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 19; to similar effect see Case C-306/99 *BIAO* [2003] ECR I-1, paragraph 90.

18 — *Dzodzi* (cited above, footnote 17), paragraph 37, and Case C-88/91 *Federconsorzi* [1992] ECR I-4035, paragraph 7; to similar effect see *Leur-Bloem* (cited above, footnote 17), paragraph 32, *Giloy* (cited above, footnote 17), paragraph 28, *Kofisa Italia* (cited above, footnote 17), paragraph 32, *Poseidon Chartering* (cited above, footnote 17), paragraph 16, and *Confederación Española de Empresarios de Estaciones de Servicio* (cited above, footnote 17), paragraph 20, as well as Case C-267/99 *Adam* [2001] ECR I-7467, paragraph 27, Case C-43/00 *Andersen and Jensen* [2002] ECR I-379, paragraph 18, Case C-300/01 *Salzmann* [2003] ECR I-4899, paragraph 34, and Case C-222/01 *British American Tobacco* [2004] ECR I-4683, paragraph 40. See also the case-law of the Court concerning its jurisdiction to interpret provisions in mixed treaties of public international law, and in particular Case C-53/96 *Hermès* [1998] ECR I-3603, paragraph 32.

19 — On that point see my Opinion in *Confederación Española de Empresarios de Estaciones de Servicio* (cited above, footnote 17), point 21 et seq.

20 — Council regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1; 'Regulation No 1/2003'). This regulation modernised the rules for enforcing Articles 81 EC and 82 EC and involved national authorities and courts more extensively in the application of European competition law: see for example the 6th, 7th and 15th recitals to Regulation No 1/2003 and Articles 5 and 6 thereof.

21 — Regulation of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

bility of the request for a preliminary ruling. For various reasons it regards the *Dzodzi* case-law as not relevant to the present case.

27. I say immediately that none of the Commission's objections persuades me. The Commission loses itself in the details of the Italian provisions and in doing so forgets that in the preliminary ruling procedure it is not the task of the Court to interpret national law. [22] It also disregards the fact that in the factual and legislative context which the national court is responsible for defining and the accuracy of which is not a matter for this Court to determine, the questions submitted by the national court enjoy a presumption of relevance. [23] If the questions submitted relate to the interpretation of Community law, the Court is, in principle, obliged to give a ruling. [24]

28. In the following I shall consider each of the Commission's objections in detail.

22 — This is the consistent case-law; see simply Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 63, and Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, paragraph 70.

23 — *Salzmann* (cited above, footnote 18), paragraph 31, Case C-213/04 *Burtscher* [2005] ECR I-10309, paragraph 35, and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22.

24 — This is the consistent case-law; see simply Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, *Dzodzi* (cited above, footnote 17), paragraph 35, Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125, paragraph 15, and *Confederación Española de Empresarios de Estaciones de Servicio* (cited above, footnote 17), paragraph 17.

2. The Commission's objections as to admissibility

29. The Commission raised in total four objections to the admissibility of the Consiglio di Stato's request for a preliminary ruling. First, it was of the view that the applicable Italian provisions did not contain any reference to Community law. Second, it submitted that anything that might be a reference was in any event not unconditional and binding. Third, the Commission did not think there to be any interest in the interpretation of Community law. Fourth, it relied on the lack of Community law requirements.

(a) First objection: no reference to Community law

30. By its first objection the Commission submitted that for cases such as the present Italian law did not refer to Community law at all. Only Title I of Law No 287/1990 was to be interpreted in accordance with Community law. However, the present case did not concern the substantive provisions of Title I at all, but the provisions on sanctions in Titles II and VI of Law No 287/1990, because it concerned only the 'attribution of the

penalty' to a specific natural or legal person. In that regard Italian law was not orientated to Community law. It followed that national law alone would determine the dispute.

31. This argument does not persuade me. Contrary to what the Commission appears to assume, it is by no means obvious that in cases of succession to undertakings the attribution of cartel offences is undertaken exclusively within the framework of the *provisions on sanctions* and may be determined without any regard to the *substantive competition provisions* and the concept of an undertaking. Thus, for example, the Court considers the question of attribution of cartel offences not only in the context of the relevant provisions on financial penalties (Article 15 of Regulation No 17, now Article 23 of Regulation No 1/2003), but also in the context of the substantive provisions of Article 81 EC, [25] whereby an important role may be played not least by the criterion of economic continuity or identity of the undertaking. [26]

32. If the Consiglio di Stato wishes to take a comparable approach in the context of domestic Italian competition law, the Court cannot reject this as obviously wrong without contradicting its own case-law.

33. Admittedly, the Court could hold the request by the Consiglio di Stato for a preliminary ruling to be inadmissible if it were *obvious* that the interpretation of Community law requested bore no relation to the actual facts of the main action or its purpose. [27] Thus, if it were clear that in respect of cases such as the present Italian law did not orientate itself to Community law, the questions referred to the Court as to the interpretation of Community law would fall to be rejected as inadmissible on the ground of irrelevance to the decision. [28]

34. However, this is definitely not the case here. In its reference for a preliminary ruling the Consiglio di Stato proceeds on the footing that Title I of Law No 287/1990, including its reference to Community law, is

25 — The connection between Article 81 EC (formerly Article 85 of the EEC Treaty) and the question of attribution is made particularly clear in Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 9, and 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.

26 — *CRAM and Rheinzink* v *Commission* (cited above, footnote 25), paragraph 9, and Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 145.

27 — This is the consistent case-law; see simply *Bosman* (cited above, footnote 24), paragraphs 59 and 61, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 24, *Asnef-Equifax* (cited above, footnote 24), paragraph 17, and *Confederación Española de Empresarios de Estaciones de Servicio* (cited above, footnote 17), paragraph 17.

28 — To the same effect see the following judgments cited above in footnote 17: *Dzodzi* (paragraph 40), *Gmurzynska-Bscher* (paragraph 23), *Leur-Bloem* (paragraph 26), *Giloy* (paragraph 22) and *Kofisa Italia* (paragraph 22).

relevant to the dispute in the main proceedings. [29] This finding as regards the national legal framework, and nothing else, is binding on the Court for the purposes of the preliminary ruling procedure.

35. As already stated, within the framework of the preliminary ruling procedure it is not for the Court to make findings as regards the interpretation of national provisions and to decide whether the national court's interpretation of them is correct. [30] In particular, in a case such as the present it is for the national court alone to assess the precise scope of the reference in national law to Community law; in its reply to the national court, the Court of Justice cannot take account of the general scheme of the provisions of domestic law which, while referring to Community law, define the extent of that reference. [31]

36. Accordingly, the Commission's first objection is unsustainable

(b) Second objection: no unconditional and binding reference to Community law

37. By its second objection the Commission claimed that even if applicable the reference to Community law in Article 1(4) of Law No 287/1990 was not direct and unconditional; moreover, in this area the interpretation of Community law by the Court was not binding on the national courts. For that reason, as in *Kleinwort Benson* [32] the request for a preliminary ruling in the present case was inadmissible.

38. This submission is likewise unconvincing.

39. Specifically, it follows from the judgment in *Kleinwort Benson* that the decisive point is whether the national legislature has made a distinction between purely domestic situations and situations governed by Community law, or seeks to treat both categories of situation the same and therefore orientates itself by reference to Community law with regard to both. [33] In that context it is

29 — At the oral hearing before the Court Philip Morris also referred to judgment No 1189 of the Consiglio di Stato dated 2 March 2001 (in particular paragraph 4.4 et seq.), according to which the national court orientates itself to Community law and the case-law of the Court even in relation to the penalty provisions.

30 — Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 24, Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42, and Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraph 21.

31 — *Dzodzi* (cited above, footnote 17), paragraphs 41 and 42, and *Leur-Bloem* (cited above, footnote 17), paragraph 33.

32 — Case C-346/93 [1995] ECR I-615.

33 — To this effect see also the discussion of *Kleinwort Benson* in subsequent judgments, in particular *Leur-Bloem* (cited above, footnote 17), paragraphs 29 (in fine) and 31, *Giloy* (cited above, footnote 17), paragraphs 25 (in fine) and 27, and *Confederación Española de Empresarios de Estaciones de Servicio* (cited above, footnote 17), paragraphs 21 (in fine) and 22. The judgment in *Poseidon Chartering* (cited above, footnote 17) is supported on the same basis: paragraph 17.

irrelevant whether national law expressly or merely impliedly refers to Community law; instead, what is decisive is *orientation in substance* to Community law. [34]

40. So far as can be seen, the Italian legislature has not made any distinction between purely domestic situations and those governed by Community law. The reference in Article 1(4) of Law No 287/1990 to Community law applies in both cases. This itself indicates that the questions referred by the Consiglio di Stato are admissible on the basis of the *Dzodzi* case-law, including the judgment in *Kleinwort Benson*.

41. Apart from that, contrary to the Commission's view the present case is not at all comparable to *Kleinwort Benson*.

42. In the first place, in *Kleinwort Benson* the national legislature restricted itself merely to using European law (the Brussels Convention) only partially as a model, and repeated its terms only in part. National law was based on European law, but did not contain any direct and unconditional reference to it, instead even expressly allowing divergences from it, as well as modifications 'designed to produce divergence'. [35]

43. As regards Article 1(4) of Law No 287/1990, no such provision is apparent here. Instead, the provision contains an express reference to 'the principles laid down in the competition law of the European Communities. In any event, neither the wording of this provision nor the order making the reference nor the documents lodged indicate that this reference to Community law is subject to any condition.

44. Second, according to the national provisions applicable in *Kleinwort Benson* in relation to domestic situations the national courts were required only to 'have regard' to the case-law of the Court, without actually being bound by it. [36]

34 — The judgment in *BIAO* (cited above, footnote 17), paragraphs 92 and 93, is particularly clear to this effect.

35 — *Kleinwort Benson* (cited above, footnote 32), paragraphs 9, 10 and 16 to 18. The Court has underlined this aspect of its judgment in *Kleinwort Benson* in subsequent case-law, for example *Leur-Bloem* (cited above, footnote 17), paragraph 29, *Giloy* (cited above, footnote 17), paragraph 25, *Kofisa Italia* (cited above, footnote 17), paragraph 30, *BIAO* (cited above, footnote 17), paragraph 93, and *Confederación Española de Empresarios de Estaciones de Servicio* (cited above, footnote 17), paragraph 21.

36 — *Kleinwort Benson* (cited above, footnote 32), paragraphs 10 and 20 to 23. The Court has underlined this aspect of its judgment in *Kleinwort Benson* in subsequent case-law, for example *Leur-Bloem* (cited above, footnote 17), paragraph 29, and *Giloy* (cited above, footnote 17), paragraph 25.

45. Contrary to the Commission's view, in the present case there can likewise be no suggestion that there is no such obligation on the national courts: the provisions in Title I of Law No 287/1990 'shall be interpreted in accordance with the principles laid down in the competition law of the European Communities' (Article 1(4) of Law No 287/1990). Neither the wording of this provision nor the order making the reference nor the documents lodged indicate that the case-law of the Court is not binding in the context of such interpretation. [37]

46. The Commission itself does not provide any single piece of evidence for its assertion that for those applying the law in Italy Community law is merely one of a number of elements to be taken into account in interpreting the relevant provisions of national law, but is not the decisive one, and that the Italian courts are not by statute obliged to apply the case-law of the Court to national law. All the other participants in the oral proceedings emphasised that in a case such as the present the Italian courts were bound by the case-law of the Court.

47. Finally, what is in any event decisive is whether or not the answer to the questions referred *can be useful* to the national court. This is because the preliminary ruling procedure under Article 234 EC is an instrument of judicial cooperation, by means of which the Court provides the national courts with the points of interpretation of Community law which may be helpful to them in assessing the effects of a provision of national law at issue in the disputes before them. [38] As regards the question of helpfulness, the national court has a margin of discretion. [39]

48. On that basis the Commission's second objection likewise does not stand up.

(c) Third objection: no interest in the interpretation of Community law

49. By its third objection the Commission submitted that in the present case — by contrast to the cases of *Bronner* [40] and *Asnef-Equifax* [41] — there was no interest in the interpretation of Community law, because in any event this could not be applied in parallel with national law.

37 — The Court has held similar circumstances not to be analogous with *Kleinwort Benson*, for example in *Kofisa Italia* (cited above, footnote 17), paragraph 31, and *Poseidon Chartering* (cited above, footnote 17), paragraph 18.

38 — *Salzmann* (cited above, footnote 18), paragraph 28, and Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 77.

39 — The consistent case-law as regards relevance of questions referred is to this effect; see for example *Bosman* (cited above, footnote 24), paragraph 59, *EVN and Wienstrom* (cited above, footnote 38), paragraph 74, *Asnef-Equifax* (cited above, footnote 24), paragraph 15, and *Confederación Española de Empresarios de Estaciones de Servicio* (cited above, footnote 17), paragraph 16.

40 — Case C-7/97 [1998] ECR I-7791.

41 — Cited above, footnote 24.

50. This argument too is unconvincing. The Commission fails to recognise that the *Dzodzi* case-law is not confined to cases in which Community law and national law, as the case may be, may be applicable next to one another.

51. Admittedly, more than any other area antitrust law is characterised by the fact that not infrequently both national provisions and Community law may be applicable to one and the same set of facts. [42] This is always the case where the scope of application of national antitrust law and of Community antitrust law overlap, and thus where agreements between undertakings are covered not only by national antitrust law but also by Article 81 EC, in particular because they are capable of distorting trade between Member States within the meaning of that provision. Already before Regulation No 1/2003 entered into force, in such cases the interest in the uniform interpretation and application of Community law was particularly obvious. [43]

52. But by no means does it follow from this that only where national and Community law provisions may be applied in parallel there is an interest in the answer to the request for a preliminary ruling within the meaning of the *Dzodzi* case-law. On the contrary, to date that case-law has concerned principally cases in which the scope of application of Community law as such has not been engaged at all and there could therefore be no suggestion of Community law and national law being applied in parallel. [44]

53. In competition law too the interest in the uniform interpretation and application of Community law is not confined only to cases in which Community law and national law apply in parallel, the scope of application of each being engaged. The legislature of many Member States orientates itself to corresponding provisions of Community law *also for purely domestic situations* which fall exclusively within the scope of application of national competition law, so that the former *applies indirectly*. This tendency has not just been observed since the entry into force of Regulation No 1/2003, which is not yet applicable in the present case. The provisions of Italian competition law in dispute in the present case, which were enacted as early as 1990, clearly show that

42 — Case 14/68 *Wilhelm and Others* [1969] ECR 1, paragraph 3; to the same effect see Joined Cases 253/78 and 1/79 to 3/79 *Giry and Guerlain* [1980] ECR 2327, paragraph 15, Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, paragraph 11, *Bronner* (cited above, footnote 40), paragraph 19, and *Asnef-Equifax* (cited above, footnote 24), paragraph 20.

43 — Indeed, since the entry into force of Regulation No 1/2003 national competition authorities and courts are expressly prohibited from applying their national competition law in isolation in cases which also fall within the scope of application of Article 81 EC. Instead, Regulation No 1/2003 requires that in such cases Article 81 EC must be applied in parallel with national competition law (Article 3(1) of the regulation), whereby higher-ranking evaluations made by Community law take precedence (see the first sentence of Article 3(2) of the regulation).

44 — This is made particularly clear for example in *Leur-Bloem* (cited above, footnote 17), paragraph 27, *Giloy* (cited above, footnote 17), paragraph 23, *BIAO* (cited above, footnote 17), paragraph 90, *Feron* (cited above, footnote 17), paragraph 10, *Poseidon Chartering* (cited above, footnote 17), paragraph 17, and *Andersen and Jensen* (cited above, footnote 18), paragraphs 16 and 19.

already much earlier such substantive orientation to Community law was practised.

54. Regardless of whether Community competition law applies *in parallel* with national cartel law or is relevant to purely domestic situations only *indirectly* by virtue of a reference in national antitrust law, it should be interpreted and applied uniformly, to achieve as high a degree of legal certainty as possible and comparable conditions of competition for all market participants to whom Community law applies, whether directly or indirectly. Ensuring this is one of the principal purposes of the preliminary ruling procedure under Article 234 EC in cases concerning competition law.

55. Consequently, in competition law cases the Court too regards requests for preliminary rulings as admissible not only where it appears possible that Community competition law and national antitrust law are applicable in parallel, [45] but also where national law alone is applicable and Community competition law is relevant only indirectly, by means of a reference in national law. [46]

56. Accordingly, the Commission's third objection too is not sustainable.

(d) Fourth objection: no Community law requirements

57. The Commission's fourth and final objection is based on Article 5 of Regulation No 1/2003, specifically the fourth indent thereof. From this provision it appears that in antitrust proceedings national competition authorities must always impose the *penalties provided for in the relevant national law*, even where they apply Community law (Article 81 EC). From this the Commission inferred that Community law did not lay down any requirements in relation to a case such as the present, which concerned only the 'attribution of the penalty'. For that reason there was no interest in its interpretation.

45 — *Bronner* (cited above, footnote 40), paragraphs 18 to 20, and *Asnef-Equifax* (cited above, footnote 24), paragraphs 19 to 21.

46 — *Confederación Española de Empresarios de Estaciones de Servicio* (cited above, footnote 17), in particular paragraphs 19 to 22.

58. This view is unconvincing. This is because, as already mentioned, [47] it is by no means obvious that in cases of succession to undertakings the attribution of cartel offences is a matter relating exclusively to the *provisions on sanctions* and can be assessed without any reference to the *substantive competition law provisions.*

59. The present case does not concern principally whether criminal or administrative law penalties may be applied and whether such penalties may, as the case may be, be imposed on natural persons such as the directors of undertakings participating in the cartel. Instead, what has to be determined is whether an undertaking may be held responsible at all for a cartel offence committed by another undertaking in a particular period. Contrary to what the Commission thinks, this problem cannot be narrowed down to the mere 'attribution of the penalty', but concerns the *attribution of the cartel offence* as a whole. Accordingly, the Court does not assess this question exclusively in connection with the penalty provisions but in the context also of the *substantive provisions* of Article 81 EC. [48]

60. However, the fourth indent of Article 5 of Regulation No 1/2003 indicates only what *penalty provisions* a national authority may apply in cartel proceedings it carries out. It follows that that provision does not allow any clear conclusions as regards the answer to the question arising in the present case as to the *attribution of cartel offences* in the case of succession to an undertaking.

61. Thus, the Commission' fourth objection is likewise to be rejected.

3. Final remarks on admissibility

62. Purely for the sake of completeness, it is also to be observed that there is nothing in the judgment in *Ynos* [49] which would prevent the application of the *Dzodzi* case-law to the present case.

63. In *Ynos* the Court did not abandon the *Dzodzi* case-law. Instead, it declined jurisdiction to answer a reference for a preliminary ruling because the facts in that case occurred before the accession of the Member State in question to the European Union, that is *outside the temporal scope of application of*

47 — On this point see the discussion of the Commission's first objection, in particular at point 31 above.

48 — Again, see above, point 31, as well as *CRAM and Rheinzink* v *Commission* (cited above, footnote 25) paragraph 9, and *Aalborg Portland and Others* v *Commission* (cited above, footnote 25), paragraph 59.

49 — Case C-302/04 [2006] ECR I-371.

Community law. [50] The Court regards itself as having jurisdiction to interpret Community law in relation to its application in a new Member State only from the time of accession. [51]

4. Interim conclusion

64. On the basis of the foregoing considerations I conclude that the request for a preliminary ruling is admissible.

B — *Substantive analysis of the questions referred*

65. By its two questions the national court asks in substance as to the circumstances in which Community law permits the attribution of cartel offences to the economic successor to the cartel participant [52] (first question) and whether the competition authorities have a discretion as regards such attribution (second question).

66. So far as the main proceedings are concerned, this determines whether Autorità Garante was correct to attribute the participation by AAMS in the cartel to ETI, or whether it should instead have held AAMS and ETI separately responsible, and only for the duration of their respective participation in the cartel. Whereas the Italian Government argued in favour of attribution to ETI, not only ETI itself but also Philip Morris and the Commission took the opposite viewpoint.

1. The criteria for attributing cartel offences (first question)

67. The Consiglio di Stato's first question concerns the criteria for attributing cartel offences in the case of succession to an undertaking.

68. The fundamental problem of attributing cartel offences is based on the fact that the addressees of the competition rules and the addressees of decisions by the competition authorities are not necessarily the same.

50 — *Ynos* (cited above, footnote 49), paragraph 37.

51 — *Ynos* (cited above, footnote 49), paragraph 36.

52 — The related problem of attributing cartel offences within a group, for example between subsidiary and parent, is not the subject of the present case and shall accordingly not be considered in detail in the following. Nor does this case concern the question as to whether and under what circumstances an economic successor is liable for debts consisting of fines already imposed on his predecessor.

69. Specifically, whereas the competition rules are directed to *undertakings* and apply to them directly regardless of how they are organised and their legal nature, decisions by competition authorities penalising breaches of competition rules can be directed only to *persons*, not least because such decisions must be enforced. [53] For that reason, in every case in which a competition authority penalises a cartel offence the question arises as to the attribution of that conduct to a specific person. [54]

(a) Personal responsibility and economic continuity

70. In selecting criteria for attributing offences, both the sanctionative nature of the measures imposed and their purpose must be taken into account. The measures serve the effective enforcement of competition rules in order to prevent distortions of competition (Article 3(1)(g) EC); accordingly, they are intended to deter economic operators from committing cartel offences. [55]

— The principle of personal responsibility

71. The consequence of the sanctionative nature of measures imposed by competition authorities for punishing cartel offences — in particular fines — is that the area is at least akin to criminal law. Therefore, what is decisive for the attribution of cartel offences is the *principle of personal responsibility*, [56] which is founded in the rule of law and the principle of fault. [57] Personal responsibility means that in principle a cartel offence is to be attributed to the natural or legal person

53 — Article 256(1) EC provides that decisions of the Commission which impose a pecuniary obligation on persons other than States shall be enforceable. Whereas the German language version does not contain any further clarification, it may be concluded from a host of other language versions that this must refer to enforceability of decisions made against natural or legal persons: see for example the French ('personnes'), Italian ('persone'), English ('persons'), Portuguese ('pessoas') and Spanish ('personas') as well as — particularly clearly — the Dutch ('natuurlijke of rechtspersonen') language versions.

54 — The judgment in Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 236, is particularly clear on this point; to the same effect, see *Aalborg Portland and Others* v *Commission* (cited above, footnote 25), paragraph 60.

55 — For that see the early Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 173, according to which the purpose of penalties for cartel offences is 'to suppress illegal activities and to prevent any repetition'; see also Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 22. As regards the purpose of deterring future infringements, see also Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 61, and Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 37.

56 — *Commission* v *Anic Partecipazioni* (cited above, footnote 26), paragraph 145. The principle of personal responsibility is normally also the starting point taken by the national legal orders of the Member States for attributing cartel offences.

57 — On this point see the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-204/00 P *Aalborg Portland* v *Commission* [2004] ECR I-123, at I-133, in particular at points 63 to 65. The principle of fault receives expression in, for example, Article 23(2) of Regulation No 1/2003, which provides that conduct which is either *intentional* or *negligent* may be punished by a fine.

who operates the undertaking which participates in the cartel;[58] in other words the principal of the undertaking is liable.

72. Taking personal responsibility as a reference point normally supports the effective enforcement of the competition provisions, given that the person conducting the undertaking also has decisive influence over its market behaviour; the pressure of the penalties imposed should lead him to alter this conduct, such that in future the undertaking conducts itself in compliance with competition law. At the same time the penalty has general deterrent effect in that it also deters other economic participants from committing cartel offences.

73. Admittedly, reorganisations, disposals of undertakings and other changes can lead to the situation in which at the time a cartel offence is penalised the person who conducts an undertaking which participated in the cartel is not the person who conducted the undertaking at the time of the infringement. In that scenario it follows from the principle of personal responsibility that in principle the cartel offence is to be attributed to the natural or legal person who conducted the undertaking at the time of the infringement (*original operator*), even if at the time of the decision by the competition authorities a different person is responsible for its operation (*new operator*);[59] if the undertaking continued the infringement under the responsibility of the new operator, the cartel offence is to be attributed to the new operator only from the time at which he took over the undertaking.[60]

— The risks of an excessively formalistic application of the principle of personal responsibility

74. However, if the original operator of the undertaking no longer exists or does not carry on any significant economic activity, the penalty for the cartel offence may be ineffective. An excessively formalistic application of the principle of personal responsibility could thus result in the purpose of the penalties for cartel offences, namely the effective enforcement of the competition rules, being thwarted.[61] In addition, it would

58 — To this effect see Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 71, Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78, Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 37, and Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 27; see also Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 63.

59 — Again, see the case-law cited above in footnote 58; to the same effect, see *Commission* v *Anic Partecipazioni* (cited above, footnote 26), paragraph 145.

60 — See, in particular, *Cascades* v *Commission* (cited above, footnote 58), paragraphs 77 to 80.

61 — That the Court attaches particular importance to this criterion is demonstrated for example in *CRAM and Rheinzink* v *Commission* (cited above, footnote 25), paragraph 9, *Commission* v *Anic Partecipazioni* (cited above, footnote 26), paragraph 146 (in fine), and *Aalborg Portland and Others* v *Commission* (cited above, footnote 25), paragraph 59; see also Case T-134/94 *NMH Stahlwerke* v *Commission* [1999] ECR II-239, paragraph 127, and Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraphs 106 and 107.

create an incentive for operators of undertakings to escape their responsibility under antitrust law deliberately by means of certain organisational changes.

— The criterion of economic continuity

75. Therefore, for the effective enforcement of competition law it may become necessary, *by way of exception*, to attribute a cartel offence not to the original operator but to the new operator of the undertaking which participated in the cartel.

76. However, such attribution to the new operator is possible only if in economic terms he may in fact be regarded as the successor to the original operator, [62] that is if he continues the undertaking which participated in the cartel [63] (*criterion of economic continuity* [64]).

77. Moreover, particular circumstances must exist which justify a departure from the principle of personal responsibility. Essentially two categories of cases have been developed in the case-law.

78. First, the criterion of economic continuity is applied where the changes affect only the operator of the undertaking which participated in the cartel and have the result that it no longer exists in law. [65] Thus, having regard to economic continuity ensures that legal persons cannot escape their responsibility under antitrust law merely by changing their legal form or their name. [66] The same must be true for example in respect of a merger in which the original operator of the undertaking which participated in the cartel surrenders its legal personality to another legal person which is its successor in law.

79. Second, the case-law also applies the criterion of economic continuity to reorganisations within a group of companies in which the original operator does not necessarily cease to exist in law but no longer carries on any significant economic activity, not even on a market other than that affected

62 — To this effect see Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 84.

63 — To this effect see *CRAM and Rheinzink* v *Commission* (cited above, footnote 25), paragraph 9, and *Aalborg Portland and Others* v *Commission* (cited above, footnote 25), paragraph 59.

64 — *Commission* v *Anic Partecipazioni* (cited above, footnote 26), paragraph 145, and *Aalborg Portland and Others* v *Commission* (cited above, footnote 25), paragraph 359.

65 — *Commission* v *Anic Partecipazioni* (cited above, footnote 26), paragraph 145.

66 — To this effect see *CRAM and Rheinzink* v *Commission* (cited above, footnote 25), paragraph 9, and *Aalborg Portland and Others* v *Commission* (cited above, footnote 25), paragraph 59.

by the cartel. [67] Specifically, the existence of a structural link between the original operator of the undertaking which participated in the cartel and the new one [68] may allow the persons concerned to escape their responsibility under antitrust law, whether intentionally or unintentionally, by means of the structural possibilities available to them. Thus, for example, an internal group restructuring may have the effect that the original operator of the undertaking is changed into an 'empty shell'. A penalty imposed on it under antitrust law would be ineffective. [69]

— The limits of the application of the criterion of economic continuity

80. In these categories of cases it is only by attributing the cartel offence to the new operator of the undertaking that one can ensure that on the one hand the person made responsible is the one who gains from any profits and increases in value of the undertaking in consequence of participation in the cartel, [70] and on the other that the penalty as such is not ineffective. This is because it is only the economically active new operator who can have the undertaking conduct itself in future in compliance with competition law. A penalty would not have a comparable effect if it were imposed on the original operator of the undertaking who was no longer economically active. The general deterrent effect on other economic participants too would be at least less.

81. However, the principle of personal responsibility cannot be undermined by reliance on economic continuity, and in practice transformed into its opposite. Specifically, the criterion of economic continuity is intended not to be a substitute for the principle of personal responsibility, but merely to supplement it so far as is necessary in order to punish cartel offences according to fault and effectively, and thus to contribute to the effective enforcement of

67 — See *Aalborg Portland and Others* v *Commission* (cited above, footnote 25), paragraph 359; it is emphasised there that the criterion of economic continuity is inapplicable where there are 'two existing and functioning undertakings one of which had simply transferred part of its activities to the other and where there was no structural link between them'; to similar effect see *NMH Stahlwerke* v *Commission* (cited above, footnote 61), paragraphs 127 to 137.

68 — As regards the meaning of the term 'structural link', see *Aalborg Portland and Others* v *Commission* (cited above, footnote 25), paragraph 359, in conjunction with paragraph 344. In that case the Court held that a 50% shareholding in the new operator held by the original operator of the undertaking which participated in the cartel was sufficient for there to be a 'structural link' between the two.

69 — In that regard it is to be borne in mind in particular that the turnover of the undertakings plays a decisive role in calculating the fines (see for example Article 23(2) of Regulation No 1/2003). If an undertaking no longer has any significant turnover, it is no longer possible to impose an effective fine on it.

70 — In the case-law it is recognised that the profit which an undertaking has been able to achieve by means of its anti-competitive conduct is one of the factors relevant to determining the gravity of the offence, and that taking this factor into account is intended to ensure that a fine has deterrent effect (see 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, paragraphs 260 and 292.

competition law. Accordingly, reliance on the criterion of economic continuity must remain the exception.

82. This does not prevent new categories of cases from being recognised in addition to the two mentioned above. [71] However, the application of the criterion of economic continuity must be subject to particularly narrow limits where the undertaking which participated in the cartel is transferred to an independent third party and there is no structural link between the original operator and the new operator. In that scenario reliance on the criterion of economic continuity, and thus attribution of the cartel offence to the new operator, should be permissible only if the undertaking has been transferred to him *abusively*, that is with the intention of avoiding the antitrust law penalties. [72]

83. By contrast, if there is no such element of abuse and the undertaking was acquired by the third party at arm's length, the criterion of economic continuity should not be available. In that scenario the effective enforcement of competition law does not necessarily require a derogation from the principle of personal responsibility. Instead, the penalty under cartel law will usually be effective against the undertaking's original operator too.

84. In addition, in the case of an arm's length disposal it is not necessarily the case that it is only the new operator who gains from any profits and increases in value of the undertaking which are referable to its cartel participation. Instead, this depends on the contractual agreements between the seller and the buyer, and in particular on whether or not any imminent fines for cartel offences are taken into account by way of price reduction.

(b) Features of the present case

85. Even if the Court is not called upon to evaluate the facts of the main proceedings, it can none the less give the national court any guidance that would be helpful for resolving the main dispute having regard to the particular facts of the case. In this context the following is to be emphasised.

86. The present case is characterised by the fact that by means of its undertaking, AAMS, the Italian State was initially economically active in two areas, being, first, games of

71 — See above, points 78 and 79.

72 — To this effect see *Commission* v *Anic Partecipazioni* (cited above, footnote 26), paragraphs 145 and 146 (in fine), and *HFB and Others* v *Commission* (cited above, footnote 61), paragraph 107; see also the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-204/00 P *Aalborg Portland* v *Commission* (cited above, footnote 57), points 66 and 67.

chance and lotteries and, second, the tobacco sector. Only one of these two areas, namely the production of and trade in tobacco products, was then transferred to the public economic body ETI, which was established for this purpose and which initially remained under the control of the Ministry of the Economy and Finance and only subsequently was transformed into a public limited company and privatised.

87. Thus, there was a first step consisting in merely internal restructuring, in terms of which the economic activities in question of the State in the areas of games of chance and tobacco together remained the responsibility of the Ministry of the Economy and Finance and also remained subject to its control. However, in a second step the State's economic activities in the tobacco sector were removed from the sphere of influence of the Ministry of the Economy and Finance and were transferred to private control.

88. There is no dispute that the public economic body ETI and the public limited company ETI SpA are to be regarded as the *economic successors* to AAMS in the area of the production of and trade in tobacco products. This is indicated not only by the formal transfer of those activities to ETI and the position of ETI as legal successor to the assets, liabilities, rights and property of AAMS.[73] In economic terms too, on the available information ETI seamlessly took over the functions of AAMS, including even participation in the cartel with Philip Morris.

89. However, the sole fact that ETI continues to carry on AAMS' trading activity in the area of the production of and trade in tobacco products and that the criterion of economic continuity is thus satisfied is not enough for the cartel offences of AAMS to be attributed to ETI by way of derogation from the principle of personal responsibility. This is because, as already mentioned,[74] the criterion of economic continuity is not intended to substitute for the principle of personal responsibility, but merely to supplement it so far as is necessary in order to punish cartel offences according to fault and effectively, and thus to contribute to the effective enforcement of competition rules.

90. In a case such as the present no such necessity is apparent.

73 — Regulation No 283/1998; on this, see above, point 10.
74 — See above, point 81.

— Continuing economic activity of AAMS

91. First, it is to be remembered that not all of AAMS' economic activity was transferred to ETI: instead, according to the information provided by the national court AAMS continues to exist as an independent economic participant with significant activities in the area of games of chance and lotteries. Thus, the present case is not comparable to that in which the original operator of the undertaking which participated in the cartel no longer exists in law, or at least no longer plays any role as an economic participant. [75]

92. Accordingly, the purpose of the penalty does not necessarily require that it should be imposed on ETI rather than on AAMS. A penalty imposed on AAMS as the original operator of the undertaking can still have specific deterrent effect and thereby contribute to the effective enforcement of competition law. This is because AAMS continues to participate in economic life and can by means of a penalty be brought to behaving in the future in conformity with competition law.

93. Admittedly a fine payable by a State-owned undertaking such as AAMS would return to the State; however, the financial and accounting autonomy enjoyed by AAMS [76] indicates that the penalty may none the less have an effect on the individual market behaviour of AAMS.

94. Nor does the fact that AAMS is no longer economically active in the tobacco sector preclude attributing the cartel offence to AAMS on the basis of the principle of personal responsibility. [77] This is because, in any event, any fine it pays can still have general deterrent effect in that sector, so that undertakings still active in that branch of the economy may be brought to conduct themselves in compliance with competition law and deterred from committing new cartel offences.

75 — See above, points 78 and 79.

76 — See above, point 9. At the oral hearing the representative of the Italian Government added in this regard that AAMS' budget was separate from that of the Ministry of the Economy and Finance.

77 — On this point see *Commission* v *Anic Partecipazioni* (cited above, footnote 26), paragraph 145, in which Anic had withdrawn from the branch of the economy affected by the cartel but was none the less held liable by reference to the principle of personal responsibility; this was clarified in the subsequent judgment in *Aalborg Portland and Others* v *Commission* (cited above, footnote 25), paragraph 359, in which *Commission* v *Anic Partecipazioni* was described as a 'case [which] concerned two existing and functioning undertakings one of which had simply transferred *part of its activities* to the other' (emphasis added).

— Privatisation and disposal of ETI to an independent third party

95. Second, it must be remembered that in the meantime ETI has been transformed into a public limited company and privatised, as had been moreover planned from the very start. In this connection there is no basis for regarding the transfer of the undertaking to ETI as being abusive, with the purpose of circumventing competition law penalties.

96. In addition, so far as appears, at least at the time the penalty was imposed, there was no longer any structural link between AAMS as the former operator of the undertaking which participated in the cartel and ETI as its new operator. Instead, when the penalty was imposed the undertaking was already owned by an independent third party.

97. Thus, ultimately the present case is less similar to the internal restructuring of a group than it is to a disposal of an undertaking to an independent third party at arm's length, to which the criterion of economic continuity, as already explained,[78] should not be applied.

98. By contrast to the Italian Government I do not regard any cartel-related increase in the value of the undertaking which ETI has continued to carry on as reason to derogate from the principle of personal responsibility. This is because, as already explained, it is not necessarily the case that the new operator of the undertaking gains from such increase in value. On the contrary, such an increase in value may have been reflected in the purchase price of the shares in ETI SpA at the time it was completely privatised, and would in that case even have been realised by the seller, namely the Italian State.

99. Finally, it is to be mentioned that so far as attribution of cartel offences is concerned it should not matter whether a private person or the State has disposed of the undertaking which participated in the cartel to an independent third party. In any event, the State should not be put in a better position than a private seller.

100. Admittedly, the Commission is of the view that in certain circumstances the responsibility for a cartel offence committed by a public undertaking which has been privatised transfers to its new, private operator on the basis of the principle of economic continuity. It takes this view specifically in relation to the case in which following privatisation the State no longer

78 — See above, points 81 to 84.

carries on any economic activity through the particular organisational structure to which the privatised undertaking initially belonged, albeit that it may continue to be economically active within the framework of other structures, for example within the sphere of competence of other ministries. [79]

101. However, arguing against this is the fact that the mere privatisation of a public undertaking should not free the State from its responsibility for any cartel offences committed by the undertaking it previously operated. Instead, this responsibility of the State is the logical consequence of its economic activity, in relation to which it cannot in principle escape the competition rules which apply for all undertakings (see also Article 86(1) EC). Thus, if a private person continues to be liable on the basis of the principle of personal responsibility for cartel offences committed by an undertaking it operated also after its disposal, no other rule can apply for the State.

102. Ultimately, however, the problem raised by the Commission need not be definitively resolved in the present case. This is because, according to the information provided by the national court, in the present case the Italian State continues to be economically active through AAMS in any event. Thus, its economic activity continues through the same organisational structure from which the sphere of activity subsequently transferred to ETI and privatised comes.

103. In all, I am accordingly of the view that in a case such as the present competition authorities and courts may rely on the principle of personal responsibility and should not attribute the cartel offence by reference to the criterion of economic continuity.

2. Discretion of the cartel authorities as regards attribution (second question)

104. By its second question the Consiglio di Stato asks in substance for guidance as to whether the competent competition authority has free discretion to attribute a cartel offence to either the original or the new operator of the undertaking which partici-

79 — By way of example the Commission points to the fact that State undertakings in the postal and rail sectors in Italy have traditionally been part of other organisational structures, and in particular subject to different ministries from AAMS.

pated in the cartel in order to ensure that the practical effectiveness of the competition rules is not endangered.

105. As already explained, in case of succession to undertakings cartel offences are to be attributed according to the principle of personal responsibility. The criterion of economic continuity is not intended to substitute for the principle of personal responsibility, but merely to supplement it so far as is necessary in order to punish cartel offences according to fault and effectively, and thus to contribute to the effective enforcement of competition rules.

106. From this it follows that neither the competent competition authorities nor the competent courts have any choice as to whether they attribute a cartel offence committed by an undertaking to its original or to its new operator. Instead, the criterion of economic continuity can be applied only if on application of the principle of personal responsibility the antitrust law penalty would not achieve its purpose.

107. However, whether an antitrust law penalty would fail to achieve its purpose can, in the individual case, require an assessment of complex economic situations.

108. Thus it may be necessary to assess whether, at the time the conduct is being punished, the original operator of the undertaking which participated in the cartel still carries on any significant economic activity, so that a penalty imposed on him could constitute an effective contribution to the enforcement of the competition rules. In addition, the existence or absence of a structural link between the original and the new operator of the undertaking can require such an assessment of complex economic situations, equally with the question as to whether the undertaking was disposed of to the new operator at arm's length or with an abusive purpose.

109. As the Commission rightly underlines, Community law allows the competent competition authority a margin of discretion when making such assessments. [80]

80 — The consistent case-law is to this effect; see simply Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34, Joined Cases 142/84 and 156/84 *BAT and Reynolds Industries* v *Commission* [1987] ECR 4487, paragraph 62, and *Aalborg Portland and Others* v *Commission* (cited above, footnote 25), paragraph 279.

VI — Conclusion

110. Against the background of the foregoing considerations, I submit to the Court that it should answer the Consiglio di Stato as follows:

(1) (a) According to the principle of personal responsibility, a cartel offence committed by an undertaking is in principle to be attributed to its original operator who was responsible for the undertaking at the time of the offence, even if at the time of the decision by the competition authority a new operator is responsible for the undertaking.

This applies also if at the time of the offence the undertaking was operated by the State and responsibility for it was subsequently transferred to a private person.

(b) By way of exception only, a cartel offence is to be attributed to the undertaking's new operator if

— the new operator has continued to operate the undertaking up to the time of the decision by the competition authority,

— at the time of the decision by the competition authority the original operator no longer exists in law or no longer carries on any significant economic activity, not even on a market other than that affected by the cartel, and

— either there is a structural link between the new and the original operator or the undertaking was transferred to the new operator abusively in order to circumvent the cartel law penalty.

(2) In attributing cartel offences the competent authority has no discretion. However, it has a margin of discretion in so far as it has to assess complex economic situations within the framework of such attribution.