ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

13 July 2006 *

In Case T-11/06 R,

Romana Tabacchi SpA, established in Rome (Italy), represented by M. Siragusa and G.C. Rizza, lawyers,

applicant,

v

Commission of the European Communities, represented by É. Gippini Fournier and F. Amato, acting as Agents,

defendant,

Application for suspension of the operation of the Commission Decision of 20 October 2005 relating to a proceeding under Article 81(1) EC (Case COMP/C.38.281/B.2 — Raw tobacco — Italy) in so far as it imposes a fine of EUR 2.05

* Language of the case: Italian.

million on the applicant, together with an application for an exemption from the obligation to provide a bank guarantee as a condition for that fine not being recovered immediately,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts, procedure and forms of order sought

1 On 20 October 2005, the Commission adopted a decision relating to a proceeding pursuant to Article 81(1) EC (Case COMP/C.38.281/B.2 — Raw tobacco — Italy) ('the Decision'). Under Article 1 of the Decision, the Commission established that seven of the major Italian processors of raw tobacco, including Romana Tabacchi SpA, had entered into agreements or participated in concerted practices aimed at fixing the conditions for the purchase of raw tobacco in Italy, in respect both of direct purchases from producers and purchases from third party packers. The Commission established, in particular, that the applicant had participated in such concerted practices from October 1997 to 5 November 1999 and from 29 May 2001 to 19 February 2002.

2 Article 2 of the Decision imposes on the applicant a fine of EUR 2.05 million, payable within three months of the date of notification of the Decision, which occurred on 10 November 2005.

3 The Decision was notified by letter of 9 November 2005, in which it was stated that, if the applicant brought an action before the Court of First Instance, the Commission would not take any steps to recover the fine while the case was pending before that Court, provided that interest accrued on the amount due from the date on which the period for payment expired and that an acceptable bank guarantee was provided by that date at the latest, that is by 10 February 2006.

4 By application lodged at the Court Registry on 19 January 2006, the applicant brought an action pursuant to the fourth paragraph of Article 230 EC for partial annulment of the Decision in so far as the calculation of the amount of the fine is concerned and, as a consequence, for a reduction of the fine.

5 By a separate document lodged at the Court Registry on the same day, pursuant to Article 242 EC and Article 104 of the Rules of Procedure of the Court of First Instance, the applicant brought the present action, firstly, for suspension of the operation of the Decision and, secondly, for an exemption from the obligation to provide a bank guarantee for payment of the fine as a condition for it not being recovered immediately.

6 On 10 February 2006, the Commission submitted its written observations on the application for interim measures.

7 At the request of the court ruling on its application for interim measures, on 3 March 2006 the applicant submitted additional observations, in respect of which the Commission lodged its own observations on 29 March 2006.

8 On 8 May 2006, the applicant lodged further documents from which it is apparent that, by letter of 20 April 2006, it proposed payment of the fine in instalments, which was rejected by the Commission by letter of 5 May 2006.

9 On 15 May 2006, the parties presented oral argument to the President of the Court of First Instance.

10 At the hearing, the parties undertook to examine the possibility of an agreed staggering of the payment of the fine and to inform the President of the Court of the outcome of their discussions.

11 By a separate document lodged at the Court Registry on 26 May 2006, which was subsequently amended on 30 May 2006, the applicant communicated to the President of the Court a proposal for staggered payments, which the Commission rejected by a document lodged at the Court Registry on 6 June 2006.

12 In its application, the applicant claims that the court ruling on its application for interim measures should:

— suspend the operation of the Decision, in so far as it imposes an obligation on the applicant to pay the fine, until delivery of the judgment bringing the main proceedings to an end;

— release the applicant from the obligation to provide, no later than 10 February 2006, a bank guarantee as a condition for the fine not being recovered immediately;

— order the Commission to pay the costs of these proceedings for interim relief;

— order any other measure which it considers necessary.

13 In its observations, the defendant contends that the Court ruling on the application for interim measures should :

— dismiss the application for interim measures;

— order the applicant to pay the costs.

Law

14 Pursuant to Articles 242 EC and 243 EC in conjunction with Article 225(1) EC, the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.

15 Article 104(2) of the Rules of Procedure prescribes that applications for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (order in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30). The judge hearing an application for interim measures must also, where appropriate, balance the interests concerned (order in Case T-245/03 R *FNSEA and Others* v *Commission* [2004] ECR II-271, paragraph 13).

Admissibility of the application

Arguments of the parties

16 The Commission contends that none of the pleas in law put forward by the applicant in its application satisfy the requirements laid down in Article 104 of the Rules of Procedure, in particular in so far as they are not adequately substantiated and do not state the essential facts on which the applicant relies.

17 The applicant considers, on the other hand, that an application for interim measures does not have to set out all the evidence relied on in the substantive action. Moreover, according to the applicant, Article 104 of the Rules of Procedure is intended to ensure legal certainty and the sound administration of justice and, in particular, to ensure that the defendant has the opportunity to submit its observations. In the present case, the Commission was not prevented from submitting its observations since it replied to the application for interim measures in considerable detail.

Assessment by the President of the Court

18 If, as the Commission claims, the applicant's statement of the pleas in law on which it relies in the substantive proceedings does not meet the requirements as to clarity laid down in Article 104 of the Rules of Procedure, the application must be deemed inadmissible (see, to that effect, the order in Case T-236/00 R *Stauner and Others* v *Parliament and Commission* [2001] ECR II-15, paragraph 34).

19 The Commission's arguments on this point are to be considered in the course of the examination of each of the pleas in law put forward in support of the argument that there is a prima facie case.

20 It is therefore appropriate to defer the examination of the admissibility of the application for interim measures until the admissibility of the pleas in law relied on has been examined.

The subject matter of the application

Arguments of the parties

21 The Commission submits that the applicant's action should be construed as having the sole purpose of obtaining a release from the obligation to provide a bank guarantee as a condition for the full amount of the fine imposed by that decision not being recovered immediately and that it is not therefore directed at suspending the operation of that decision.

22 The applicant has not submitted any observations in that regard.

Assessment by the President of the Court

23 In its application, the applicant seeks, firstly, suspension of the operation of the Decision, in so far as it imposes an obligation to pay the fine imposed by the Commission, pending the Court's judgment in the main proceedings and, secondly, a release from the obligation to provide a bank guarantee as a condition for the fine not being recovered immediately.

24 It is not in dispute that, in its letter of notification of the Decision of 9 November 2005, the Commission informed the applicant that, if it brought an action before the Court of First Instance, no steps would be taken to recover the fine while the case was pending before that Court, provided that interest accrued on the amount due from the date on which the period for payment of the fine expired and that a bank guarantee acceptable to the Commission and covering both the amount of the principal sum and the interest and accruals becoming due thereon were provided at the latest by 10 February 2006.

25 Moreover, at the hearing, the Commission stated that, pending the decision of the court hearing the present application for interim measures, it had refrained from commencing enforcement of the Decision.

26 It follows from the foregoing that, as the Commission maintains, the only purpose of the applicant's claim must be to be released from the obligation to provide a bank guarantee as a condition for the fine imposed by the Decision not being recovered immediately.

Prima facie case

Arguments of the parties

27 According to the applicant, the condition concerning a prima facie case is satisfied.

28 Firstly, the applicant submits that the Decision is vitiated by a failure to investigate, by the illogicality of its statement of reasons and, moreover, by a breach of the principles of equal treatment and proportionality in that, in calculating the basic amount of the fine, the Commission omitted to take account of the fact that the cartel had in fact no, or at most a modest, practical impact on the market.

29 Secondly, the applicant submits that the Decision is vitiated on account of the illogicality of the statement of reasons and a breach of the principle of equal treatment. Firstly, the Commission should have taken account of the difference between the applicant's share of the market and the share held by its competitors in setting progressive amounts for the basic fine in order to adjust it to the size of the undertaking on which the fine was imposed. Secondly, the Commission should have taken account of the applicant's average market share for the whole period of its participation in the breach and not simply its market share for the last year of its participation. In any event, according to the applicant, the Commission omitted to take account of periods when its participation in the breach was interrupted.

30 Thirdly, the Decision suffers from an inadequate statement of reasons and inadequate inquiries, fails to satisfy the requirements relating to the burden of proof and is vitiated by a manifest error of assessment of the facts in that, in determining the basic amount of the fine, the Commission calculated the duration of the applicant's participation in the breach without taking account of evidence which

would have shown that its participation in the cartel came to a complete stop in February 1999 and was never resumed. The duration of the applicant's participation in the cartel should therefore be reduced by two years and six months and be fixed at 19 months.

31 Fourthly, the Commission failed to meet its obligation to state reasons and committed a manifest breach of its duty to conduct its inquiries diligently and impartially in that, firstly, it failed to take account of mitigating circumstances connected with the pressure put on the applicant by the other undertakings and the purely passive role it played and, secondly, it failed to take adequate account, on the facts, of the systematic failure to apply the principles of the cartel.

32 Fifthly and finally, the Commission misused its powers in that the Decision is unjust and disproportionate in the light of the applicant's organisational and asset structure and its real ability to pay, to the extent that its survival is in serious jeopardy since the amount of the fine imposed on the applicant is almost double its assets.

33 The Commission submits that the pleas raised by the applicant are inadmissible and that, even if they were admissible, would not permit it to be concluded that there is a prima facie case.

34 With regard to the first plea, the Commission is of the view that the applicant has failed to state the facts from which it concluded that the cartel had no, or only a very modest, impact on the market. It is therefore impossible, without examining the main action, to determine whether that plea meets the minimum requirements for demonstrating that there is a prima facie case. For that reason, the plea in question fails to satisfy the conditions under Article 104(2) of the Rules of Procedure and is, accordingly, inadmissible and cannot be taken into account for the purposes of establishing whether there is a prima facie case.

35 In any event, even if the first plea were admissible, it is unfounded. The Commission submits that, according to established case-law, by their nature, agreements to fix prices, such as those at issue in the present case, always constitute very serious infringements of Article 81 EC and, with regard to such infringements, the Commission enjoys a wide discretion when setting fines, provided that the criteria laid down in the Guidelines for calculating fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3) ('the Guidelines') are complied with.

36 With regard to the second plea, the Commission contends that the applicant has omitted to provide the essential facts which would enable it to be determined, without examining the main action, whether the plea in question meets the minimum requirements for establishing that there is a prima facie case. In particular, the applicant does not specify what, in its opinion, is or was its market share or that of its two competitors, either by stating those shares during the last year of the breach or by giving the average market shares during the years when the cartel was being operated. That plea must therefore be regarded as inadmissible for the purposes of considering whether there is a prima facie case.

37 In any event, even if the second plea were admissible, it is unfounded. According to the Commission, it is settled case-law that applying the same basic amount of fine to undertakings holding market shares within a range that is not excessively wide does not constitute a breach of the principle of equal treatment. In the present case, that range is between 9 and 11% and is therefore not excessively wide.

38 With regard to the third plea, which concerns the duration of the applicant's participation in the cartel, it is, according to the Commission, inadmissible or, at least, clearly inadequate for the purposes of establishing that there is a prima facie case since the applicant has not adduced any evidence to substantiate it.

39 With regard to the fourth plea, the Commission submits that the applicant, firstly, failed to provide any proof of the alleged pressure it was placed under by the other undertakings participating in the cartel and, secondly, failed to explain why it considers that the Decision did not give appropriate emphasis to the passive or disruptive nature of its conduct in the cartel. The plea is therefore inadmissible or, at least, manifestly unfounded.

40 With regard to the fifth plea, the Commission considers that it is based on criticisms that are too generalised for it to be possible to determine whether that plea is serious and well-founded. As a consequence, it is not admissible for the purposes of examining whether there is a prima facie case.

41 As regards the Commission's arguments on inadmissibility, the applicant contends that, in order for an application for interim measures to be admissible, the basic legal and factual particulars relied on must be indicated, at least in summary form, coherently and intelligibly in the application itself. On the other hand, contrary to the Commission's assertions, it is not necessary immediately to adduce proof of the pleas relied on, given that the applicant will be have to meet the requirements relating to the standard of proof fully in the main proceedings.

42 The applicant submits that where the Commission has submitted observations and the President is in a position to carry out his examination, the application can only be regarded as admissible. Indeed, the fact that the Commission has submitted observations proves that the pleas in law relied on in the application satisfy the conditions laid down in Article 104(2) of the Rules of Procedure and that that application is admissible. The applicant observes that, notwithstanding its plea of inadmissibility, the Commission responded to the application by submitting specific clear observations, thus demonstrating the consistency and clarity of the arguments put forward by the applicant in support of its plea that its action is, prima facie, admissible.

Assessment by the President

43 It must be acknowledged that at least some of the pleas relied upon by the applicant appear prima facie to be relevant and, in any case, not entirely without substance.

44 That is the case in particular with regard to the first plea and part of the second plea in law.

— The first plea in law alleging, inter alia, breach of the principle of equal treatment

45 The applicant submits that, in calculating the starting point for the fine, the Commission failed to take account of the practical impact of the cartel on the market, which, in the applicant's view, was negligible or, at most, modest.

46 The Commission claims, firstly, that the plea is inadmissible in that it does not state the facts from which the applicant concludes that the cartel had no impact on the market and, secondly, appears to consider that, where infringements are of such a kind that they must be regarded as being very serious, it is not necessary to assess the impact of the cartel on the market.

47 With regard to whether the plea is admissible, pursuant to Article 104(3) and Article 44(1) of the Rules of Procedure, an application initiating proceedings must contain a summary of the pleas in law on which the application is based. That information must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to decide the case, if appropriate, without other information in

support. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided that the statement is coherent and comprehensible (order in Case T-171/05 R II *Nijs* v *Court of Auditors*, not published in the ECR, paragraph 23).

48 In the present case, the defendant does not claim that it was not able to prepare its defence on account of the fact that the interlocutory application was insufficiently clear or comprehensible. As the applicant pointed out, the Commission submitted observations which addressed the plea in law in question in detail.

49 It must therefore be concluded that the application states the subject matter of the proceedings and contains a summary of the arguments relied on by applicant which make it possible for a ruling to be given on the application.

50 The Commission's plea of inadmissibility must therefore be dismissed.

51 Moreover, it follows from the foregoing and from the considerations set out at paragraphs 16 to 20 above, that the application is, of itself, admissible.

52 As regards the examination of the merits of that plea in law, the applicant relies on the case-law of the Court of First Instance that, where the seriousness of the infringement is to be determined, in the case of price agreements, there must be a finding by the Commission that such agreements have in fact enabled the

undertakings concerned to achieve a higher level of transaction price than that which would have prevailed had there been no cartel (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 151).

53 The Commission, on the other hand, relies on the case-law of the Court of First Instance that the indicative description in the Guidelines of the types of infringement liable to be considered as very serious makes no mention of a requirement that there be an impact or that there be effects in a particular geographic area (see, to that effect, Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 150). Moreover, the Commission justifies the fact that the impact of the cartel was not taken into account in calculating the amount of the fine by referring to the Guidelines, which provide that the Commission is obliged to take account of the impact of the infringement only where that impact can be measured. In the present case, the Commission claims that it did not have information to enable it to measure that impact and, consequently, it could not be measured.

54 According to the Guidelines, (the first paragraph of point 1 A), '[i]n assessing the gravity of the infringement, account must be taken of ... its actual impact on the market, where this can be measured, ...'.

55 Similarly, according to the case-law, the Commission is required to carry out such a review where it appears that that impact can be measured (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission,* paragraphs 45 and 143, and Case T-241/01 *Scandinavian Airlines System AB* v *Commission* [2005] ECR II-2917, paragraph 122).

56 Clearly, it is not possible at this stage for the judge hearing the application for interim measures to conclude prima facie, firstly, that it is for the undertaking concerned to prove in the administrative procedure that the impact of the infringement can be measured and that the Commission is therefore required to take account of it and, secondly, whether or not, in the present case, it was possible to measure the impact.

57 It follows from the foregoing that this plea is not without substance and warrants detailed examination by the Court in the main action.

— The second plea in law alleging breach of the principle of equal treatment

58 The applicant disputes the criterion for calculating market share used by the Commission in determining the amount of the fine.

59 According to the applicant, where there has been interrupted participation in an infringement, the market share to be used as a criterion for determining the fine should not be the share for the last complete year of the infringement. Rather, the figure to be used should be an average, taking into account all the variations in market share during the years of participation in the cartel and also the interruptions in participation in the infringement that have been established.

60 In the present case, the applicant considers that, for the purposes of setting the basic amount of the fine according to the gravity of the infringement, the Commission should have had regard to its average market share for the period 1997-2001 and not its share for 2001 alone, taking into account the interruption during 1999-2000. Since a similar method of calculation should have been used for the applicant as for all the other participants in the cartel, whose participation was not, moreover, interrupted, the Decision is vitiated as a result of a difference in treatment and the illogicality of its reasoning with regard to the party concerned.

61 Given that the pleas of inadmissibility put forward by the Commission in relation to this plea in law are the same as those it relies on in connection with the first plea, it must be dismissed on the grounds set out at paragraphs 47 to 50 above.

62 Moreover, with regard to whether that plea is well-founded, it is clear that the Commission does not dispute that argument in its observations on the application for interim measures. The Commission addresses that issue only in its observations of 29 March 2006. In those observations, it simply states that the applicant has failed to adduce evidence that the average market share for the years during which the infringement took place is appreciably lower than the applicant's market share for 2001.

63 It therefore follows that the Commission has not expressed a view on whether the Decision breaches the principle of equal treatment in so far as it considered it appropriate to use a similar method of calculation for the applicant and for the other participants in the cartel, whose participation was not interrupted.

64 Moreover, in the interests of transparency and in order to increase legal certainty for the undertakings concerned, the Commission published Guidelines in which it sets out the method of calculation that it is bound by in each case. The Court of Justice has held that, in adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. Furthermore, although the Guidelines do not constitute the legal basis of the decision, 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 (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* v *Commission* [2005] ECR I-5425, paragraphs 211 and 213).

65 Point 1 A of the Guidelines provides that it is necessary to take account of the effective economic capacity of the offenders to cause significant damage to other operators, in particular consumers, and to set the amount of the fine at a level which ensures that it has a sufficiently deterrent effect.

66 In those circumstances, the judge hearing the application for interim measures cannot disregard the applicant's argument that effective economic capacity to cause damage may be more properly assessed by having regard to the average market share of the undertaking concerned throughout the period of the infringement, account being taken of any interruptions, rather than by taking account of that undertaking's market share during the last year of infringement alone.

67 It follows from the foregoing that this plea is not without substance.

68 The foregoing considerations are sufficient for it to be concluded that at least some of the pleas put forward by the applicants are relevant prima facie and are, in any event, not entirely without merit. In those circumstances, in the present proceedings it must be recognised that a prima facie case exists (see, to that effect, *FNSEA and Others* v *Commission*, paragraph 55).

Urgency

Arguments of the parties

69 The applicant considers that the condition as regards urgency is met in the present case.

70 As a preliminary point, the applicant states that it does not form part of a large group but belongs to two natural person, Mrs Marina D'Ottavi and Mr Paolo Baiani ('the Baiani spouses') and that it is not a large concern, having assets of only EUR 1.1 million and a turnover of only approximately EUR 20 million in 2004.

71 Firstly, the applicant claims that it applied for a bank guarantee to two banks, namely UniCredit Banca d'Impresa SpA and Sanpaolo IMI SpA, which refused their applications.

72 The reasons for the refusal are easy to ascertain, on account of the fact that, firstly, since the fine was approximately double the applicant's assets, the entry of the fine in the company's accounts alone would have been sufficient to put it into liquidation and, secondly, the banks concerned were aware of the fact that the applicant had for a number of years been experiencing financial difficulties as a result of a 33% net reduction in its market share in only two financial years (from 12.15% in 2002 to 8.1% in 2004). Those difficulties explain why the results for the last three complete financial years were negative and gave rise to a loss of EUR 361 642 in 2004, a loss of EUR 93 030 in 2003 and a loss of EUR 66 709 in 2002.

73 Secondly, the applicant observes that the Baiani spouses, as shareholders in the applicant, applied individually to the same banks for a similar guarantee. Once again, the banks refused to grant the guarantee sought.

74 Thirdly and finally, according to the applicant, the immediate recovery of the fine would cause it serious and irreparable damage. In particular, such a recovery would entail its disappearance from the market.

75 For its part, the Commission points out that it is settled case-law that an application for an exemption from the obligation to provide a bank guarantee as a condition for the fine not being recovered immediately will only be granted in exceptional circumstances. According to the Commission, the existence of such exceptional circumstances may, in principle, be regarded as established where the party seeking exemption from providing the requisite bank guarantee adduces evidence, firstly, that it is objectively impossible for it to provide such guarantee or, secondly, that such provision would imperil its existence.

76 With regard to the second condition, the applicant has provided neither argument nor evidence in support of its claims.

77 As for the first condition, the Commission considers that the applicant has failed to demonstrate that it was objectively impossible for it to provide that guarantee.

78 Firstly, concerning the letters from the two banks, on the one hand, the applicant has failed to explain why it approached only two banks. On the other hand, it omitted to mention whether it was a regular client of either of those banks. Furthermore, it did not provide suitable guarantees. Lastly, it failed to produce documents setting out its economic and financial situation.

79 Secondly, the same observations could be made with regard to the letters concerning the applicant's two shareholders. In particular, firstly, it is unclear whether they are regular clients of the two banks and, secondly, no document setting out their economic and financial situation has been provided.

80 Thirdly, the Commission states that the applicant has failed to substantiate in any way its claim that the fine is double its assets. The Commission maintains that the applicant did not incur heavy losses in relation to its turnover, especially in 2002 and 2003.

81 Fourthly, the applicant has not adduced any evidence to support its claim that the entry of the fine into the company's accounts would put it into liquidation.

82 Fifthly and finally, the Commission observes that, up to December 2005, the applicant was part of a Netherlands international group, which sold its 80% shareholding in the applicant to the Baiani spouses just after notification of the decision.

83 In its observations of 3 March 2006, the appellant challenges the Commission's arguments.

84 Firstly, the applicant states that, according to the case-law of the Court of First Instance, a refusal by two credit institutions to provide a bank guarantee is sufficient to demonstrate that it is not possible to obtain such a guarantee. Moreover, it provides extracts from its accounts with the two banks approached, which show that the applicant opened an account with Sanpaolo IMI in 1991 and an account with UniCredit Banca D'Impresa in 1995, and the applicant should accordingly be regarded as a regular client of both banks.

85 Secondly, the applicant explains that both banks were well aware of the applicant's economic and financial situation and had already withdrawn their credit lines on account of the deterioration in its situation.

86 Thirdly, the applicant has produced documents which, it explains, were not yet available when it lodged its application, including, in particular, its balance sheet as at 31 December 2005 ('the 2005 balance sheet'), an auditors' report dated 10 January 2006 and the minutes of an ordinary shareholders' meeting on 20 January 2006.

87 The 2005 balance sheet shows that the negative result of EUR 962 870 takes account of a reserve in the sum of EUR 1 000 000 provided for against the risk of payment of the fine. Nevertheless, in spite of the fact that, if that reserve was not taken into account, that result would have been positive to the extent of EUR 37 130, the applicant regards it as important to point out that, in order to obtain that result, it was obliged to sell a factory in Cerratina (Italy), with the effect that the value of its real assets did thereafter not exceed EUR 563 874, a sum that is lower than the fine. Similarly, the sums owed to the applicant by its creditors, amounting to EUR 4 534 558, were less than its debts, amounting to EUR 11 569 438. Lastly, the applicant's turnover fell from EUR 20 568 101 in 2004 to EUR 14 674 014 in 2005.

88 With regard to the entry of the fine in the applicant's accounts, the applicant states that Article 2447 and the fourth paragraph of Article 2484 of the Italian Civil Code provide that the effect of the entry in the balance sheet of a liability equivalent to double a company's share capital — as is the case here — is to reduce that capital to nothing. A reduction in capital to a level below the statutory minimum, in a case not involving recapitalisation, would, in turn require a general meeting to be called to decide whether the company is to be put into liquidation and, as a result, would point to insolvency proceedings being initiated.

89 With regard to the relations of the applicant's shareholders with the banks which refused to provide them with a bank guarantee, the applicant claims that the shareholders had had accounts with UniCredit Banca d'Impresa at least since 1999 and should therefore be regarded as regular clients.

90 As regards the withdrawal of the applicant's interest in the Netherlands group which had a controlling interest in it until December 2005, the applicant explains that the Netherlands company Nicotiana Holding BV had purchased from the Baiani spouses their shareholding in the applicant in 2002. After notification of the decision, the Baiani spouses decided to buy back the shares at the same price at which they had sold them three years previously since they considered it very likely that there would be a dispute with Nicotiana Holding, which was an important business partner of theirs.

91 In its observations of 29 March 2006, the Commission, firstly, questions the value attributed to the Cerratina factory, as it appears in the 2005 balance sheet. Next, it observes that the applicant, notwithstanding its obligation to pay the fine, opted to pay other debts, even though they were not yet due. Lastly, the Commission points out that the applicant has never put forward a proposal to pay the fine in instalments.

92 Moreover, as regards the Baiani spouses' repurchase of the shares, the Commission observes that the applicant, firstly, has failed to produce the share purchase contract which was signed in 2002. Next, during the legal audit which took place before the signing of the contract, it informed the purchaser that there was a risk of a fine. Lastly, it omits to explain either why the repurchase had to take place immediately following notification of the Decision or why the outcome of any dispute with Nicotiana Holding would have been as risky as the applicant considers it to be.

93 After the hearing, at the request of the President of the Court, the applicant produced, firstly, the 2002 contract for the sale of shares by which the Baiani spouses transferred their shareholding in the applicant to Nicotiana Holding and, secondly, some additional information from which it was possible to ascertain the economic and financial position of the applicant's shareholders.

94 According to the applicant, those documents show that the financial position of its shareholders does not enable it either to pay the whole of the fine or to provide the bank guarantee sought by the Commission.

95 The Commission considers, firstly, that the documents produced by the applicant do not adequately establish the financial position of its shareholders and, secondly, that in any event, that situation, as it appears from those documents, would, at the very least, permit the Baiani spouses to improve their proposal for partial payment.

96 The Commission concludes that the applicant has failed to prove that it was objectively impossible for it to provide a bank guarantee or that such a guarantee would imperil its existence.

Assessment by the President

97 It is settled case-law that an application for an exemption from the obligation to provide a bank guarantee as a condition for a fine not being recovered immediately will only be granted in exceptional circumstances (order in Case 107/82 R *AEG* v *Commission* [1982] ECR 1549, paragraph 6). The possibility of requiring the provision of a financial guarantee is expressly provided for with regard to applications for interim relief by the Rules of Procedure of the Court of Justice and of the Court of First Instance and is a general and reasonable way for the Commission to act (orders in Case T-79/03 R *IRO* v *Commission* [2003] ECR II-3027, paragraph 25, and in *FNSEA and Others* v *Commission*, paragraph 77).

98 The existence of such exceptional circumstances may, in principle, be regarded as established where the party seeking exemption from providing the requisite bank guarantee adduces evidence that it is objectively impossible for it to provide such guarantee (*FNSEA and Others* v *Commission*, paragraph 78) or that such provision would imperil its existence (order in *IRO* v *Commission*, paragraph 26).

99 In the present case, the applicant does not claim that the provision of a bank guarantee is likely to imperil its existence. On the other hand, it submits that it is objectively impossible for it to provide such a guarantee.

100 In those circumstances, it is necessary to examine whether the applicant has established to the requisite legal standard that it was objectively impossible for it to provide a bank guarantee.

101 The main argument put forward by the applicant is that no bank has said that it is willing to guarantee the debt it owes the Commission since its financial situation would not enable it to pay the debt.

102 Firstly, with regard to the Commission's arguments concerning the relationship between the applicant and the credit institutions approached, it is to be observed, on the one hand, as the applicant rightly points out, that the relevance of the letters refusing to provide a bank guarantee must be assessed in the light of the applicant's economic situation considered objectively (see order in Case T-191/98 R II *Cho Yang Shipping* v *Commission* [2000] ECR II-2551, paragraph 43). Consequently, it cannot be said that those letters are irrelevant, as such, simply because they are few in number.

103 Accordingly, the Commission's argument that the fact that two letters of refusal have been produced is not alone sufficient to establish that it was impossible to provide a bank guarantee cannot be accepted.

104 In its second argument, the Commission maintains that the applicant has failed, firstly, to establish clearly that it was a regular customer of the two banks approached and, secondly, to provide any documents setting out its economic and financial situation.

105 Firstly, it is clear that the applicant has produced extracts of the current accounts it opened with the two banks concerned, which date back a number of years. The applicant must therefore be regarded as a regular customer of both of the banks to which it applied for a bank guarantee.

106 Secondly, the applicant produced its annual accounts for 2005 once these had been approved by its auditors.

107 In this instance, it is to be noted, firstly, that the 2005 balance sheet shows a negative result of EUR 962 870, which, whilst including a reserve of EUR 1 000 000, takes account of only half of the amount of the fine imposed on the applicant. Next, the positive trend of the applicant's result by comparison with the previous year needs to be assessed in the light of the fact that it is due, at least in part, to the sale of an immovable asset rather than to an increase in turnover and that, in any event, that result does not cover the whole amount of the fine. Moreover, the value of the applicant's immovable assets is only EUR 563 874, that is, an amount lower than the total amount of the fine. Lastly, the applicant's total debt is still significant, as is the fall in its turnover, when compared with 2004.

108 In the present case, by letters of 28 December 2005 and 9 January 2006 drafted in the same terms, the applicant applied for a bank guarantee to UniCredit Banca d'Impresa and Sanpaolo IMI. As regards the first bank, its refusal was based expressly on a negative assessment of the applicant's economic and financial situation. As for the second bank, whilst it did not refer expressly to those conditions, there is nothing in the case-file to leave any doubt that that was also the basis of that refusal.

109 In the light of the foregoing, having regard to the assessment of the applicant's economic and financial situation, the two banks must be regarded as having refused to grant the guarantee sought by the Commission.

110 It must therefore be accepted that the applicant has demonstrated to the requisite legal standard that it was unable to obtain, by itself, the bank guarantee required by the Commission.

111 However, in order to assess the applicant's ability to provide the guarantee in question, according to established case-law, account should also be taken of the group of undertakings to which it belongs directly or indirectly, particularly with regard to the possibility of providing the security which the banks might require. Such a requirement arises, firstly, from the public interest in implementing Commission decisions and in safeguarding the financial interests of the Community and, secondly, from the benefits that may be derived by its shareholders from any anti-competitive conduct a company may engage in. The fact that the situation of the group to which a company belongs is taken into consideration does not at all signify that the fine or liability for the infringement may be attributed to third parties (see the order in Case T-191/98 R *DSR-Senator Lines* v *Commission* [1999] ECR II-2531, paragraph 64 and the case-law cited).

112 It is not disputed that, at the time when the applicant took steps to obtain a bank guarantee, the applicant's only shareholders were the Baiani spouses, who jointly held all the shares in the applicant. The Baiani spouses are still today the applicant's only shareholders. The applicant states that it was impossible for it to obtain a bank guarantee.

113 It is to be noted, as a preliminary point, that the fact that Nicotiana Holding transferred its shares just after notification of the decision is not decisive in this case.

114 As it was no longer a shareholder in the applicant, on the one hand, it could not be required to provide any support and, on the other hand, it would be under an obligation to pay the fine imposed on the applicant only if it had incurred liability for the infringement (see, to that effect, Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78).

115 On the latter point, it is clear, firstly, that Nicotiana Holding acquired its shareholding in the applicant in August 2002, that is, at a time when the applicant no longer participated in the cartel, as the Commission stated.

116 Secondly, the Commission calculated the limit of 10% provided for in Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1) on the basis of the applicant's turnover alone and not on the basis of the turnover of the Nicotiana Holding group.

117 Lastly, the decision was not addressed to Nicotiana Holding.

118 In the light of the foregoing, it is necessary to determine whether the economic and financial situation of the applicant's current shareholders is such that it is objectively impossible for them to provide a bank guarantee.

119 Firstly, the applicant produces the letters of 28 December 2005 and 9 January 2006 with which its shareholders applied to UniCredit Banca d'Impresa and Sanpaolo IMI for a bank guarantee for payment of the fine. It is clear from those letters that the shareholders were prepared to provide the banks in question with a guarantee in respect of any personal or real property they owned.

120 Next, the applicant produced extracts of bank statements of both its shareholders which showed that they had been customers at least of UniCredit Private Banking SpA since September 2005.

121 Lastly, the applicant produced extracts of its shareholders' declarations of income for 2004, which show that the assets of the Baiani spouses were insufficient to pay all of the fine.

122 On the basis of those factors, it must be accepted that the applicant has provided sufficient evidence that, from an objective point of view, its shareholders were unable to provide the bank guarantee required by the Commission.

123 As regards, secondly, the applicant's arguments that it is at risk of serious and irreparable harm if the obligation to provide a bank guarantee as a condition for the fine not being recovered immediately is not suspended, it is to be noted, firstly, that the total amount of the fine is greater than the applicant's assets, which, as the 2005 balance sheet shows, is only EUR 1.1 million, a fact which is not disputed by the

Commission. Next, the Italian Civil Code provides that, except in a case involving recapitalisation, a reduction in share capital to a level below the statutory minimum results in a company being wound up and put into liquidation. Lastly, it is clear from the foregoing that it is not possible for the applicant's current shareholders to provide a bank guarantee for the whole amount of the fine and that neither, therefore, can they make a sufficient contribution to the company's capital either in order to prevent it from being put into liquidation.

124 It follows from the foregoing that the applicant has proved to the requisite legal standard that exceptional circumstances exist in that it is at risk of serious and irreparable harm if it is obliged to provide now the requisite bank guarantee.

Balance of interests

Arguments of the parties

125 According to the applicant, the balance of interests leans in favour of suspension of the operation of the Decision.

126 The applicant states that its disappearance from the market before the Court has been able to rule on the merits would be extremely damaging to the competitive structure of the Italian raw tobacco market and to industry in the Community in general. Enforcement of the decision, in so far as it requires immediate recovery of the fine, would cause the applicant to disappear and would lead to a significant reduction in exports of Italian tobacco to many countries in Eastern Europe, the Middle East and South America.

127 Moreover, the Commission's financial interests would not be best served by the enforcement of the Decision, which, as that would lead to the immediate liquidation of the applicant, would make it more difficult, if not impossible, to recover the whole amount of the fine, given that the Commission would then have to enter its claim on the list of creditors in the insolvency proceedings, in which it would not enjoy any privileged status.

128 On the other hand, if the applicant were released from the obligation to provide a guarantee, it could, at least temporarily, prevent its disappearance. According to the applicant, if the present application for interim relief were granted, the fine would effectively not be due in its entirety until the Court has reached a decision on the merits. An order granting the application could provide a legal basis authorising the applicant's sole director, in the exercise of his prudent discretion and with the agreement of the board of auditors, to provide an amount lower than the fine, which would enable the applicant to keep the undertaking in business until the Court has reached a decision on the merits.

129 The Commission contends, on the other hand, that the balance of interests in question tilts in its favour, especially in view, firstly, of its financial interest in recovering the fine and, secondly, of the public interest in the effectiveness of Community competition rules being preserved and fines being paid in order to maintain their deterrent effect.

130 With regard, in particular, to its financial interest, the Commission considers that there is a risk that the applicant's assets may no longer be sufficient at a time when the action in the main proceedings may be dismissed to enable the fine to be paid or, at least, that risk cannot be ruled out with certainty. Consequently, the possibility of the fine being recovered, even in part, at the conclusion of the main proceedings is even more remote than the possibility of that amount being recovered by immediate enforcement of the Decision.

131 Moreover, the Commission submits that the interests relied on by the applicant in support of its application would appear to be without substance or, in any event, of less account than the abovementioned interests of the Commission.

132 Firstly, as regards the applicant's argument that its disappearance would affect the competitive structure of the raw tobacco market in Italy, the Commission considers that the purpose of competition law is not to protect undertakings which cannot remain on the market and that, as a consequence, any disappearance of a trader from the market is not, of itself, contrary to the interests of competition.

133 Secondly, with regard to the applicant's argument that its disappearance would bring about a significant reduction in exports of Italian tobacco to many countries in Eastern Europe, the Middle East and South America, the Commission contends that the interests of non-Member countries should not take precedence over the financial interests of the Community or, more generally, over the public interest in preserving the effectiveness of Community competition rules.

134 Thirdly, as regards the applicant's argument that its disappearance would have serious repercussions for the Italian brown tobacco market, the Commission considers that such an argument is belied, firstly, by the nature of the activity in question, which is accessible to third parties, and, secondly, by the fact that if the applicant were to be put into liquidation as a result of its insolvency, that would not necessarily entail the loss of its business. In reality, it would be for the receivers or the liquidators to ensure that the applicant's business was preserved by having recourse to the means available under Italian law.

Assessment by the President

135 It is necessary to weigh, on the one hand, the applicant's interest in avoiding — in the event that it is unable to arrange a bank guarantee — immediate recovery of the fine against, on the other hand, the Community's financial interest in being able to recover that sum and, more generally, against the public interest in preserving the effectiveness of Community competition rules and the deterrent effect of fines imposed by the Commission (see, to that effect, the orders in Case 56/89 R *Publishers Association* v *Commission* [1989] ECR 1693, paragraph 35, and in *FNSEA and Others* v *Commission*, paragraph 119).

136 As regards the financial interests of the Community, it must be observed that, as noted above, the applicant's assets are not sufficient for it to pay the entire amount of the fine or to provide the requisite bank guarantee. It is therefore highly likely that if the Commission enforced collection of the fine on the applicant, it would not obtain the full amount of the fine imposed. Furthermore, it is common ground that in the event of the applicant's bankruptcy the Commission would not have any privileged status in respect of its debt vis-à-vis other creditors. In these circumstances, it appears that the financial interests of the Commission would not be best served by immediately initiating enforcement proceedings rather than by permitting the applicant to continue its business and to generate profit which could then be used to pay the fine.

137 With regard to the effects of the applicant's disappearance on the competitive structure of the market, even though competition law is not intended to protect undertakings that are incapable of remaining on the market, the purpose of interim measures is, none the less, to prevent serious and irreparable damage to the party seeking such measures pending judgment in the main proceedings (orders in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 18, and

in Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153, paragraph 96).

138 It is to be observed, moreover, that already in its observations of 29 March 2006 and especially at the hearing, the Commission indicated that it was, at least in principle, willing to contemplate alternatives to immediate payment of the fine if it were not possible for a bank guarantee to be provided.

139 In its letter of 8 May 2006, the applicant put forward an initial proposal for staggered payments, which was rejected by the Commission.

140 At the hearing the parties undertook to examine the possibility of an agreed staggered payment of the fine. In that regard, in view of the provision previously made for reserves in the 2003 and 2005 balance sheets, amounting to EUR 25 000 and EUR 1 million respectively, the applicant has acknowledged that a payment greater than that it had proposed in its letter of 8 May 2006 may be contemplated.

141 In its letter of 26 May 2006, the applicant therefore subsequently proposed to the defendant payment of the fine in stages. In particular, it proposed to the Commission a staggered payment in the following terms:

— the provision, no later than 30 June 2006, of an 'upon first demand' bank guarantee of EUR 400 000 against the amount of the principal sum of the fine and interest owing thereon;

— an initial part payment, to be made on 1 July 2006, of EUR 200 000;

— subsequent half-yearly payments, each of a minimum of EUR 100 000, from 1 July 2006 until judgment is given in the main proceedings;

— payment to the Commission, as soon as it available to the applicant, of the sum to be realised upon the sale to third parties of equipment at the factory in Cerratina, estimated to be in the region of EUR 330 000.

142 On the basis of its assessment of the applicant's economic and financial capacity, the Commission simply rejected its proposal.

143 It is to be noted, firstly, that the Commission's financial interests would also be protected by the applicant's undertaking to provide a bank guarantee covering a not inconsiderable part of the fine.

144 Secondly, with regard to the public interest in preserving the effectiveness of Community competition rules and the deterrent effect of fines imposed by the Commission, it must be held that the Commission has failed to demonstrate how a partial suspension, as proposed by the applicant, would undermine that interest in the present case.

145 However, as the Commission rightly pointed out in its letter of 6 June 2006, firstly, although the funds at the disposal of the Baiani spouses are insufficient to pay all of the fine, they would at least enable the applicant to pay higher instalments than it has proposed. Secondly, since the applicant's negative economic and financial situation tends to be improving, it is foreseeable that the latter will be able to generate some profit in the coming months and that, whilst it cannot be established that that profit will enable it to pay the fine in full, it should none the less enable the applicant to pay a part of it.

146 In the light of the foregoing, and in particular of the applicant's latest proposal and the fact that the Commission has not made a proposal for staged payments that the applicant considers to be acceptable, the applicant must be granted the exemption sought, on condition that:

— within a period of two weeks from notification of this order:

— it provides a bank guarantee of EUR 400 000;

— it pays EUR 200 000 to the Commission;

— within a period of three months from notification of this order, it pays EUR 330 000 to the Commission;

— with effect from 1 January 2007, it pays to the Commission the sum of EUR 100 000 every three months until the first of the following two events occurs:

— payment of the balance of the fine remaining due, together with the interest set out by the Commission in its letter of notification of the decision, dated 9 November 2005;

— judgment in the main proceedings.

147 It should be pointed out, furthermore, that, under Article 108 of the Rules of Procedure, the judge hearing an application for interim measures may at any time vary or cancel an interim order on account of a change in circumstances (order in *Technische Glaswerke Ilmenau* v *Commission*, paragraph 123, confirmed upon appeal by the order in Case C-232/02 P(R) *Commission* v *Technische Glaswerke Ilmenau* [2002] ECR I-8977). It follows from that case-law that, by a change in circumstances, what are especially envisaged are factual circumstances capable of altering the assessment made in each particular case of the criterion of urgency. Furthermore, according to the Court of Justice, that possibility reflects the fundamentally precarious nature in Community law of measures granted in interim relief proceedings (orders in Case C-440/01 P(R) *Commission* v *Artegodan* [2002] ECR I-1489, and in *FNSEA and Others* v *Commission*, paragraph 129).

148 If appropriate, it will therefore be for the parties to petition the Court of First Instance if a change in circumstances likely to alter the present decision should arise, in particular in the light of the applicant's next certified accounts.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders that:

1. **The obligation on Romana Tabacchi SpA to provide the Commission with a bank guarantee in order to avoid immediate recovery of the fine imposed on it by Article 2 of the Commission Decision of 20 October 2005 relating to a proceeding under Article 81(1) of the EC Treaty (Case COMP/C.38.281/B.2 — Raw tobacco — Italy) is suspended on the following terms:**

   (a) within a period of two weeks of notification of this order, the applicant shall:

   — provide a bank guarantee of EUR 400 000;

   — pay to the Commission the sum of EUR 200 000;

(b) within a period of three months of notification of this order, the applicant shall pay to the Commission the sum of EUR 330 000;

(c) with effect from 1 January 2007, the applicant shall pay to the Commission the sum of EUR 100 000 every three months until the first of the following two events occurs:

— payment of the balance of the fine remaining due, together with the interest set out by the Commission in its letter of notification of the decision to impose the fine, dated 9 November 2005;

— judgment in the main proceedings.

2. The costs are reserved.

Luxembourg, 13 July 2006.

E. Coulon — B. Vesterdorf

Registrar — President