

**COMMISSION DECISION**

**of 20.X.2004**

**relating to a proceeding under Article 81(1) of the EC Treaty**

**(Case COMP/C.38.238/B.2) – Raw Tobacco Spain**



1.5.5.3.	<a href="#">Negotiations between producers' representatives and processors regarding price brackets and additional conditions</a>	47
1.5.5.4.	<a href="#">Approval of the "standard" contract and signing of the cultivation contracts</a>	49
1.5.6.	<a href="#">2000 crop</a>	50
1.5.6.1.	<a href="#">Extension of processors' "framework" agreement on (maximum) average delivery prices and quantities, and agreement on price brackets and additional conditions</a>	51
1.5.6.2.	<a href="#">Contacts between producers' representatives regarding price brackets and the additional conditions</a>	53
1.5.6.3.	<a href="#">Negotiations between representatives of the two sectors regarding price brackets and additional conditions</a>	53
1.5.6.4.	<a href="#">Non-approval of the "standard" contract and signing of the cultivation contracts</a>	56
1.5.6.5.	<a href="#">Resumption of negotiations between representatives of the two sectors during the selling period for raw tobacco</a>	57
1.5.7.	<a href="#">2001 crop</a>	57
1.5.7.1.	<a href="#">Extension of processors' "framework" agreement on maximum average delivery prices and quantities and the agreement on price brackets and the additional conditions</a>	58
1.5.7.2.	<a href="#">Contacts between producer representatives regarding price brackets and the additional conditions</a>	60
1.5.7.3.	<a href="#">Negotiations between representatives of the two sectors regarding price brackets and the additional conditions</a>	60
1.5.7.4.	<a href="#">Non-approval of the "standard" contract and signing of the cultivation contracts</a>	61
<b>2.</b>	<b><a href="#">LEGAL ASSESSMENT</a></b>	<b>63</b>
2.1.	<a href="#">Infringements of Article 81(1) of the Treaty</a>	63
2.1.1.	<a href="#">Undertakings and associations of undertakings</a>	63
2.1.2.	<a href="#">Agreements between undertakings, decisions by associations of undertakings and concerted practices</a>	63
2.1.3.	<a href="#">Summary of the infringements in the case at issue</a>	65
2.1.4.	<a href="#">Conduct of processors restraining competition</a>	66
2.1.4.1.	<a href="#">Nature of the conduct in question</a>	66
2.1.4.2.	<a href="#">Restriction of competition</a>	70
2.1.4.3.	<a href="#">Appreciable effect on trade between Member States</a>	72
2.1.5.	<a href="#">Conduct of producer representatives restraining competition</a>	73
2.1.5.1.	<a href="#">Nature of the conduct concerned</a>	73
2.1.5.2.	<a href="#">Restriction of competition</a>	75
2.1.5.3.	<a href="#">Appreciable effect on trade between Member States</a>	76
2.2.	<a href="#">Council Regulation No 26 and Council Regulation (EEC) No 2077/92</a>	76
2.2.1.	<a href="#">Council Regulation No 26</a>	76
2.2.2.	<a href="#">Council Regulation (EEC) No 2077/92</a>	79
2.3.	<a href="#">Intervention of the Spanish State: national regulatory framework</a>	79
2.4.	<a href="#">Addressees of the Decision</a>	81
2.4.1.	<a href="#">Principles applicable</a>	83
2.4.2.	<a href="#">Case at issue</a>	84
2.4.2.1.	<a href="#">Agroexpansión/Dimon Group</a>	85
2.4.2.2.	<a href="#">(b) WWTE/Standard Group</a>	86
2.5.	<a href="#">Application of Article 7 of Regulation (EC) No 1/2003</a>	90
2.6.	<a href="#">Application of Article 23(2) and (3) of Regulation (EC) No 1/2003 (Article 15(2) of Regulation 17)</a>	90
2.6.1.	<a href="#">General considerations</a>	90
2.6.2.	<a href="#">Gravity of the infringement</a>	91
2.6.3.	<a href="#">Individual weight and deterrence</a>	92
2.6.4.	<a href="#">Duration of the infringement</a>	94
2.6.5.	<a href="#">Basic amount</a>	94
2.6.6.	<a href="#">Aggravating and mitigating circumstances</a>	95
2.6.6.1.	<a href="#">Aggravating circumstances</a>	95
2.6.6.2.	<a href="#">Mitigating circumstances</a>	95
2.6.7.	<a href="#">Fines excluding the upper limit to the fine</a>	95
2.6.8.	<a href="#">Fines including the upper limit to the fine</a>	96

2.6.9. <a href="#">Application of the 1996 Leniency Notice</a> .....	97
<b>3. <a href="#">CONCLUSIONS</a></b> .....	<b>100</b>

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(Case COMP/C.38.238/B.2) – Raw tobacco Spain

**Only the Spanish, English, and Italian texts are authentic**

THE COMMISSION OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation 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<sup>1</sup>, and in particular Article 7 and Article 23(2) thereof.

Having regard to Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products<sup>2</sup>, and in particular Article 2 thereof.

Having regard to the Commission Decision of 11 December 2003 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19(1) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82 of the Treaty<sup>3</sup> and Article 2 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty<sup>4</sup>,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case,

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<sup>1</sup> OJ L1, 4.1.2003, p. 1; Regulation as amended by Regulation (EC) No 411/2004 (OJ L68, 6.3.2004, p. 1).

<sup>2</sup> OJ 30, 20.4.1962, p. 993/62; Regulation as amended by Regulation No 49 (OJ 53, 1.7.1962, p. 1571/62)

<sup>3</sup> OJ 13, 21.2.1962, p. 204/62; this Regulation was repealed by Council Regulation (EC) No 1/2003 with effect from 1 May 2004.

<sup>4</sup> OJ L354, 30.12.1998, p. 18; this Regulation was repealed by Regulation (EC) No 773/2004 with effect from 1 May 2004 (OJ L 123, 27.4.2004).

Whereas:

## 1. FACTS

### 1.1. Subject of the case and procedure

- (1) This Decision concerns agreements and/or concerted practices between the four undertakings engaged in the first processing of raw tobacco in Spain (hereinafter referred to collectively as "the processors") and Deltafina, either directly or, from 1999 onwards, through the association ANETAB, the object of which was to fix each year, between 1996 and 2001, the (maximum) average delivery price for each variety of raw tobacco (all qualities) and to share out the quantities of each variety of raw tobacco that were to be bought. During the last three years the processors have also agreed among themselves the price brackets per quality grade of each raw tobacco variety that are given in the schedules annexed to the "cultivation contracts" and the additional conditions applicable (namely the average minimum price per producer and per producer group) .
- (2) This Decision also concerns agreements and/or concerted practices between the three agricultural unions in Spain and the Confederation of Agricultural Cooperatives CCAE (hereinafter referred to collectively as "the producer representatives") the object of which was to fix each year, between no later than 1996 and no earlier than 2001, the price brackets per quality grade of each raw tobacco variety that are given in the schedules annexed to the "cultivation contracts" and the additional conditions applicable (namely the average minimum price per producer and per producer group).
- (3) On the basis of information to the effect that the Spanish raw tobacco processors and producers had infringed Article 81 of the Treaty, the Commission carried out the following inspections under Article 14(3) of Regulation No 17:
  - on 3 and 4 October 2001 at the premises of the three main processors in Spain, namely Compañía española de tabaco en rama, S.A. ("Cetarsa") Agroexpansión, S.A. ("Agroexpansión") and World Wide Tobacco España, S.A. ("WWTE"), and at the premises of their national association (Asociación nacional de empresas transformadoras de tabaco – "ANETAB") in Madrid;
  - on 3 October 2001 at the premises of the Tobacco House AISBL and the European Federation of Tobacco Processors ("FETRATAB"), a European economic interest grouping in Brussels<sup>5</sup>;
  - on 5 October 2001 at the premises of the National Federation of Tobacco Producers (Federación nacional de cultivadores de tabaco — "FNCT") in Madrid.
- (4) By letter of 16 January 2002, the four Spanish processors (the fourth processing firm in Spain is Tabacos españoles, S.L. - "Taes") and their association ANETAB announced that they were committed to cooperating with the Commission in the

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<sup>5</sup> The Tobacco House and FETRATAB are not addressees of this Decision.

proceedings. They referred to the 1996 Commission notice on the non-imposition or reduction of fines in cartel cases ("the 1996 leniency notice")<sup>6</sup>. They also informed the Commission that, as from 3 October 2001, they had put an end to the practices concerned by this Decision.

- (5) By letter of 21 January 2002, the processors and ANETAB sent a note to the Commission describing the main facts relating to the negotiations between the processors, on the one hand, and the producer representatives on the other, for determining the selling/buying conditions for raw tobacco, and in particular the price and quantities.
- (6) By fax of 15 February 2002, Universal Leaf Tobacco Company Inc. ("Universal Leaf"), the parent company of Taes, informed the Commission that it supported its subsidiary's initiative of cooperating with the Commission within the framework of the 1996 leniency notice. It also pointed out that its subsidiary in Italy, Deltafina Spa ("Deltafina"), was cooperating with Taes in drafting the memorandum that the latter was expecting to send to the Commission in the days ahead as part of the announced cooperation and that it hoped that Deltafina could thus also benefit from the advantages flowing from the 1996 leniency notice.
- (7) On 18 February 2002 the Commission sent to Cetarsa, Agroexpansión, WWTE, Taes, ANETAB and FNCT a letter requesting information pursuant to Article 11 of Regulation No 17.
- (8) On the same day the Commission received by fax from each of the processors a statement dated 15 February (18 February in the case of Taes) and explaining developments in the raw tobacco sector in Spain between 1996 and 2001. The explanation referred among other things to (i) the discussions and/or agreements between the processors concerning the economic conditions for purchasing raw tobacco in Spain and (ii) the course of the negotiations between the processors and the producer representatives concerning the business conditions for buying/selling raw tobacco. The statements were submitted for the purposes of the 1996 leniency notice (hereinafter "the processors' statements").
- (9) By letters dated 15, 16 and 18 March 2002, WWTE, Cetarsa, Taes, Agroexpansión, ANETAB and FNCT replied to the Commission's request for information.
- (10) On 12 November 2002, at the premises of FNCT, the Commission listened to and transcribed some of the cassettes that had been identified at FNCT's premises during the inspection on 5 October 2001 and that had been sealed and deposited with the Spanish competition authority.
- (11) On 13 December 2002 the Commission sent a request for information to the Spanish Ministry for Agriculture, Fisheries and Food (the "Agriculture Ministry") regarding the Spanish rules governing agricultural products.

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<sup>6</sup> OJ C 207, 18.7.1996, p. 4. The notice was replaced in February 2002 by the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002, p. 3). However, the 1996 leniency notice is still applicable to the case at issue.

- (12) By letter of 7 March 2003, the Agriculture Ministry replied to the Commission's request for information.
- (13) On 22 April 2003 the Commission sent to WWTE, Agroexpansión and Taes another letter requesting information pursuant to Article 11 of Regulation No 17. By letters of 12, 15 and 16 May 2003, these firms replied to the request for information. At the Commission's request, they provided further information by fax and letters dated 22 and 23 May 2003.
- (14) On 11 December 2003, the Commission initiated proceedings in this case and adopted a Statement of Objections (hereinafter also referred to as "SO") to the addressees of this Decision and to Intabex, Universal Corporation, Universal Leaf Tobacco company Inc., ANETAB, FNCT, ACOTAB et TABARES.
- (15) The companies had access to the Commission's investigation file by means of a CD ROM which contained all accessible material in the file. The Hearing Officer extended the deadline for replies to the SO until 19 March 2004 for the producers' representatives.
- (16) Having replied in writing to the SO, all the addressees of the SO attended the oral hearing on the case (with the exception of Anetab, Intabex, Dimon Inc, Standard Commercial Corporation, Standard Commercial Tobacco Co Inc, Trans-Continental Leaf Tobacco Corporation LTD), which was held on 29 March 2004.
- (17) The essential elements of the parties' replies are taken up one by one, in specific recitals of this Decision.
- (18) Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, the Commission has decided to close the proceedings against Universal Corporation, Universal Leaf, Intabex, ANETAB, FNCT, ACOTAB et TABARES. For Universal Corporation, Universal Leaf and Intabex, the Commission considered that it did not have enough evidence of their exercising decisive influence on Deltafina and Taes (as far as Universal Corporation and Universal Leaf are concerned) and on Agroexpansión (as far as Intabex is concerned). For ANETAB, the Commission considered that it did not have enough evidence that ANETAB's behaviour was distinct from the behaviour of its four member companies and that therefore a decision should only be addressed to the latter companies. For FNCT, ACOTAB and TABARES, the Commission considered that they acted as sectoral branches of ASAJA (as far as FNCT is concerned) and UPA (as far as ACOTAB and TABARES are concerned) and that a decision should only be addressed to ASAJA and UPA, acting both directly and through their sectoral branches.

## **1.2. The parties**

### *1.2.1. Undertakings engaged in the first processing of raw tobacco*

- (19) Cetarsa, Agroexpansión, WWTE and Taes are the only raw tobacco processors in Spain. Until 1990 the public undertaking Cetarsa held a legal monopoly in the processing of raw tobacco in Spain. At the beginning of the 1990s, the other three firms had access to the Spanish first-processing market.

- (20) Cetarsa is a public undertaking set up in 1987, with SEPI<sup>7</sup> holding 79.18% of its capital and Altadis, S.A. (previously known as Tabacalera) holding the remaining 20.82%. Until the mid-1990s Cetarsa sold virtually all the tobacco it processed to Tabacalera, the public enterprise which, until 1998, held the monopoly for the manufacture, wholesale distribution and importation of cigarettes in Spain<sup>8</sup>. It sold the balance for export. At present, Cetarsa sells its tobacco primarily to [another processor] but also to [company] and [international dealer] ("[international dealer]", a US multinational that is the parent company of [another processor])<sup>9</sup>. Cetarsa has surplus processing capacity since it utilises around half of its capacity for processing the raw tobacco it purchases direct from Spanish producers as well as some of the raw tobacco that [another processor] and [another processor] buy from producers [see recital [...] and [...] below]. In 2001 Cetarsa bought 28.530 tonnes of raw tobacco, namely some 67.6% of the raw tobacco bought in Spain that year<sup>10</sup>.
- (21) Agroexpansión<sup>11</sup> was set up in 1988 by its chairman as a family-run enterprise. Its activity consists in buying raw tobacco and processing it for marketing. Between 1994 and 1997 its capital was held 50/50 by the Spanish firm WW Marpetrol S.A. and a natural person. During that period [another processor] was Agroexpansión's main customer, buying between 64% and 84% of its tobacco. In the first half of 1997 the firm Intabex Netherlands BV ("Intabex"), a wholly owned subsidiary of the Dimon group, acquired all the capital. [confidential].
- (22) Agroexpansión does not possess all the equipment needed to process tobacco and, as a result, it has had to conclude tobacco processing contracts (specifically for the threshing, fermentation or processing proper of tobacco) with [another processor] and occasionally with [another processor].
- (23) In 2001 Agroexpansión bought 6.586 tonnes of raw tobacco, namely around 15% of the raw tobacco bought in Spain that year<sup>12</sup>, and its total sales were worth EUR11.7 million. Overall, 90% of its sales are exported.
- (24) Since May 1998 WWTE<sup>13</sup> has been some 90%-controlled by the US multinational Standard Commercial Corporation ("SCC") through two wholly owned subsidiaries:

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<sup>7</sup> Sociedad estatal de participaciones industriales.

<sup>8</sup> Ley 13/1998, de 4 de mayo, de Ordenación del Mercado de Tabacos y Normativa tributaria (Official Gazette No 107, 5.5.1998). Tabacalera was privatised on 28 April 1998.

<sup>9</sup> See the reply by Cetarsa of 15 March 2002, Question 1 [doc. 38.238/5050].

<sup>10</sup> Source: COAG report of May 2001 (see the statement by Agroexpansión of 15 February 2002 [doc. 38.238/3948]).

<sup>11</sup> For the information contained in this paragraph, see the statement by Agroexpansión of 15 February 2002 [doc. 38.238/3936-3972] and its replies of 15 March 2002 [doc. 38.238/4863-4903], 15 May 2003 [doc. 38.238/9869-10134] and 2 May 2003 [doc. 38.238/10311-10345].

<sup>12</sup> Source: COAG report of May 2001 (see the statement by Agroexpansión of 15 February 2002 [doc. 38.238/3948]).

Standard Commercial Tobacco Co. Inc. ("SCTC") and Trans-Continental Leaf Tobacco Corporation Ltd. ("TCLT"). From 1995 to May 1998, SCC, through TCLT, held only two thirds of WWTE's capital<sup>14</sup>.

- (25) WWTE carries out all processing operations on the tobacco it buys from Spanish producers. In 2001 WWTE bought 6 620 tonnes, namely around 15.7% of the raw tobacco bought in Spain that year<sup>15</sup>.
- (26) Taes<sup>16</sup> is a subsidiary of the Universal Corporation Group. Until December 2002 Universal Leaf Tobacco Company Inc. ("Universal Leaf"), a wholly owned subsidiary of Universal Corporation, held 90% of Taes's shares. The remaining 10% was held by the managing director of Taes. Since December 2002, Taes is a wholly owned subsidiary of Universal Leaf. The chairman and a board member of Taes are respectively the purchasing and sales directors of Deltafina, the company responsible for the activities of the Universal group in Europe<sup>17</sup>. Three of the four members of Taes's board of directors are also board members or chairmen of other firms in the Universal Corporation Group.
- (27) Taes sells virtually all the tobacco it processes to Deltafina (95% for export). Since it has virtually none of the equipment needed to process raw tobacco, it has been obliged to conclude tobacco processing contracts (specifically for the threshing and processing proper of tobacco) with [another processor] and [another processor].
- (28) In 2001, Taes bought some 680 tonnes, namely around 1.6% of the raw tobacco bought in Spain that year.
- (29) Deltafina is the wholly owned subsidiary of Universal Corporation in Italy and hence the sister company of Taes. Its main activities are the processing of raw tobacco and the marketing of processed tobacco. It is responsible for the activities of the Universal group in Europe. It purchases most of the tobacco bought by Taes in Spain. It also purchases processed tobacco from [another processor] and [another processor]. It has signed with [another processor] contracts for treating and threshing some of Taes' and [another processor]'s tobacco. [confidential].

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<sup>13</sup> For the information given in this paragraph, see the statement by WWTE of 15 February 2002 [doc. 38.238/4326-4339] and the replies of 15 March 2002 [doc. 38.238/5285-5317], 9 May 2003 [doc. 38.238/9650-9655] and 23 May 2003 [doc. 38.238/9817-9868].

<sup>14</sup> Of the remaining capital, 23% was held at the time by the managing director and the rest by natural persons related to him.

<sup>15</sup> Source: COAG report of May 2001 (see the statement by Agroexpansión of 15 February 2002 [doc. 38.238/3948]).

<sup>16</sup> For the information given in this paragraph, see the statement by Taes of 18 February 2002 [doc. 38.238/4556-4585] and the replies of 15 March 2003 [doc. 38.238/5396-5404], 16 May 2003 [doc. 38.238/10387-10424] and 23 May 2003 [doc. 38.238/10587-10594].

<sup>17</sup> See Taes's annual report dated 31 March 2001 and contained in Annex 2 to the statement by Taes of 18 February 2002 [doc. 38.238/4593-4605].

(30) ANETAB is the Spanish association of raw tobacco processors. It has only four members, namely the four Spanish processors to whom this Decision is addressed. It was set up in 1998 with a view to securing the viability of the tobacco sector in Spain and the coordination, representation, management, promotion and defence of the interests of processors in Spain.

(a) Commercial relations between the processing firms

(31) It follows that the four processing firms in Spain and Deltafina have concluded among themselves: (i) agreements on the processing of the raw tobacco they buy from Spanish producers and (ii) sales agreements for tobacco already processed.

(32) The economic conditions laid down in these two types of agreement are closely linked to the conditions on which the processors buy raw tobacco from the producers. Generally speaking, an increase in the price of raw tobacco leads to a reduction in the profit margin either for the firm processing the tobacco for subsequent sale<sup>18</sup> or for the firm buying the processed tobacco<sup>19</sup>.

#### *1.2.2. Raw tobacco producers*

(33) In Spain most raw tobacco producers are members of one of the ten tobacco producer groups (the "agrupaciones de productores de tabaco", hereinafter "APAs" or the "groups"). In addition, most tobacco producers are linked to three agricultural branch or union organisations (the "organizaciones profesionales agrarias", hereinafter the "OPAs"): ASAJA<sup>20</sup> (more specifically, its sectoral branch responsible for raw tobacco, FNCT), UPA<sup>21</sup> (more specifically, its sectoral branches responsible for raw tobacco, TABARES and ACOTAB) and COAG<sup>22</sup>, or are linked to the confederation of agricultural cooperatives, CCAE<sup>23</sup>. The members of both APAs and OPAs are individual producers. However, members of each APA are also normally members of a same OPA (see Table 1 below).

(34) In 2001 there were 5 737 raw tobacco producers in Spain, of which 5 724 were members of an APA (in 2000 6 002 of the 6 018 producers were members of an APA)<sup>24</sup>.

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<sup>18</sup> This is the case when, in the sales contract for processed tobacco, its price is fixed and does not take account of the price at which the raw tobacco was bought.

<sup>19</sup> This is the case when, in the sale contract for processed tobacco, its price corresponds to the purchase price of the raw tobacco plus processing costs.

<sup>20</sup> Asociación de jóvenes agricultores.

<sup>21</sup> Unión de pequeños agricultores (UPA).

<sup>22</sup> Coordinadora de organizaciones de agricultores y ganaderos (COAG).

<sup>23</sup> Confederación de cooperativas agrarias de España (CCAЕ)..

<sup>24</sup> See Annex 4 to FNCT's reply of 18 March 2002 [doc. 38.238/5757].

**Table 1 - Raw tobacco production sector in Spain in 2001**

APA FEDERATIONS AND APAs	MEMBERS		OPAs
	Number	%	
<b>FNCT</b>			ASAJA
1. Asociaciones Agrupadas TAB	1 875		
2. Tabacos de Granada	1 176		
3. Tabachabana	79		
4. Tabacos del Bierzo	81		
<b>Total FNCT</b>	<b>3 214</b>	<b>56.2</b>	
<b>ACOTAB</b>			UPA
5. Tabacos de Cáceres	484		
6. Cotabaco	246		
<b>Total ACOTAB</b>	<b>730</b>	<b>12.72</b>	
<b>TABARES</b>			COAG
7. Tabacos de Talayuela	114		
8. Grutaba	285		
<b>Total TABARES</b>	<b>399</b>	<b>6.95</b>	
<b>APAs non-federate</b>			
9. Ibertabaco	1 072	18.69	
10. Couaga	309	5.39	
<b>Total APAs non-federate</b>	<b>1 381</b>	<b>24.08</b>	
<b>Total associated producers</b>	<b>5 724</b>	<b>99.77</b>	
<b>Independents</b>	<b>NON-MEMBERS</b>		
<b>Non-members producers</b>	<b>13</b>	<b>0.23</b>	
<b>TOTAL SECTOR</b>	<b>5 737</b>	<b>100</b>	

Source: Spanish Ministry for Agriculture, Fisheries and Food<sup>25</sup>.

### 1.3. Raw tobacco sector in Spain

- (35) Within the European Union the production quota for tobacco is some 330 000 tonnes (347 475 tonnes in respect of the harvest year 2000), namely between 4% and 5% of world production<sup>26</sup>. This overall quota is broken down into national quotas according to tobacco varieties. The tobacco production quota allocated to Spain is some 42 000 tonnes (41 616 tonnes were produced in 2000). Accounting for 12% of Community production, Spain is the third-largest producer in the European Union after Italy and Greece. The area under cultivation in Spain is 14 571 hectares located primarily in the Autonomous Communities of Extremadura (84%), Andalucía (11.5%) and Castilla-León (3%). Production in 2000 was worth some ESP 22 278 million. In 2001 the value of tobacco bought in Spain was around EUR25 million.
- (36) Five varieties of raw tobacco are grown in Spain. Virginia (flue-cured), is the most important, with production totalling some 29 000 tonnes in 2001, while, for Burley E

<sup>25</sup> See Annex 4 to FNCT's reply of 18 March 2002 [doc. 38.238/5757].

<sup>26</sup> Some 8 million tonnes of tobacco are produced in the world each year. The main producer countries are China, the United States, Brazil and India.

(light air-cured), production totalled some 6 500 tonnes in 2001. Both varieties are used in the manufacture of blond cigarettes. The variety Burley Fermentado (dark air-cured, hereinafter "Burley F"), of which some 6 500 tonnes were produced in 2001, is used in manufacturing dark cigarettes. The varieties Havana (dark air-cured), which is used in manufacturing cigars, and Kentucky (fire-cured), which is used in the manufacture of pipe and chewing tobacco, are the two least important varieties.

- (37) The tobacco seeds are sown between February and May in a nursery or in seed beds using float systems. On reaching 10-15 cm, the seedlings are replanted outdoors. In May the land is fertilised. During May and June the plants are treated in a variety of ways. They are harvested mainly between August and December but the harvest may continue into the first few months of the following year. During the harvest, the producers sell the raw tobacco and deliver it to the processors. For each tobacco variety, there are different qualities that depend, among other things, on the plant's exposure to sunlight, ground humidity and temperature. The exact quality of the tobacco sold must be assessed when the tobacco is delivered to the processor. The tobacco is sold in bales weighing some 35-40 kg. Each bale contains a single variety of raw tobacco, albeit of differing quality.
- (38) The average prices (in ESP per kilogram) paid to the producers by the tobacco processors in the period 1993-2001 are given in the following table:

**Table 2** Average prices paid to raw tobacco producers in Spain between 1993 and 2001 (ESP/kg)

Crop	Virginia	Burley E	Burley F	Havana and other
1993/1994	42.39	31.58	33.55	61.92
1994/1995	26.53	35.89	34.03	85.77
1995/1996	31.68	52.28	45.17	60.90
1996/1997	62.19	69.85	59.26	89.95
1997/1998	91.73	84.09	73.46	128.00
1998/19 99	86.18	81.05	68.86	123.00
1999/2000	89.62	79.11	66.75	122.00
2000/2001	95.97	80.16	65.99	123.00

Source: Agriculture Ministry<sup>27</sup>.

#### 1.4. The Community and national regulatory frameworks for the raw tobacco sector

##### 1.4.1. Common organisation of the market in raw tobacco

- (39) The common organisation of the market in raw tobacco ("CMO for raw tobacco") was established in 1970<sup>28</sup>. It was replaced in 1992 by a new regulation<sup>29</sup> that was substantially amended in 1998<sup>30</sup>.

<sup>27</sup> See Annex 9 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4053-4056].

<sup>28</sup> Council Regulation (EEC) No 727/70 of 21 April 1970 on the common organisation of the market in raw tobacco, hereinafter "Regulation 727/70" (OJ L 94, 28.4.1970, p. 1).

(40) On 29 April 2004, the Council of Ministers adopted the final decision on the reform of the common organisation of the market in raw tobacco. Under the new system, which is to enter into effect as from 2006, during a transition period of four years, a significant part of the current production-linked payments will be replaced by a system of de-coupled (namely non-production linked) payments to producers. As from 2010, tobacco aid will be completely de-linked from production: half of the sector support will be transferred to de-coupled payments and the other half will be used for restructuring programmes under the rural development policy. As this reform does not apply to the facts which are the subject-matter of this Decision, it will not be considered any further, while details will be given of the system which was applicable at the time of the facts.

(a) Quota and premium scheme

(41) Since 1992 the CMO for raw tobacco has included measures for controlling production. At the outset, it imposed quotas for the processing of raw tobacco. The Member States were required to allocate these quotas to processors established on their territory. Since 1995 these quotas have become production quotas. It is the raw tobacco producers<sup>31</sup> and, since 1999, their groups (APAs) or the producers that are not members of a group that are subject to a quota scheme.

(42) The CMO also provides for a producer premium scheme. The scheme has been in existence since 1970. Prior to the 1994 harvest Member States were required to pay premiums to raw tobacco processors. Since 1995 they have had the option of paying the premiums direct to the producers<sup>32</sup> or of continuing to pay them to raw tobacco processors (choice made by Spain). The processors undertook in the cultivation contracts concluded by them with the producer groups [for an explanation of these contracts, see recital (50)] to pay to the producers at the time of delivery of the tobacco — in addition to the purchase price — an amount equal to the premium. The premiums were fixed premiums determined by the Council for each harvest year and for each variety group of raw tobacco.

(43) In 1998 the Council introduced two new features. First, as from 1999 Member States would pay the premiums no longer to the processors but direct to the producer groups (APAs) or to individual producers that were not members of a group. For the 1999 and 2000 harvests however, Member States could pay the premium to producers through

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<sup>29</sup> Council Regulation (EEC) No 2075/92 of 30 June 1992 on the common organisation of the market in raw tobacco, hereinafter "Regulation 2075/92" (OJ L 215, 30.7.1992, p. 70), as last amended by Council Regulation (EC) No 864/2004 of 29 April 2004 (OJ L 161, 30.4.2004, p. 48).

<sup>30</sup> Council Regulation (EC) No 1636/98, of 20 July 1998 amending Regulation 2075/92, hereinafter "Regulation 1636/98" (OJ L 210, 28.7.1998, p. 23) and Commission Regulation (EC) No 2848/98 of 22 December 1998 laying down detailed rules for the application of Council Regulation 2075/92 as regards the premium scheme, production quotas and the specific aid to be granted to producer groups in the raw tobacco sector, hereinafter "Regulation 2848/98" (OJ L 358, 31.12.1998, p. 17), as last amended by Commission Regulation (EC) No 1983/2002 of 7 November 2002 (OJ L 306, 8.11.2002, p. 8).

<sup>31</sup> Article 9(3) of Regulation 2075/92, as amended by Council Regulation (EC) No 711/95 of 27 March 1995 (OJ L 73, 1.4.1995, p. 13).

<sup>32</sup> Council Regulation (EC) No 711/95 of 27 March 1995 (L 73, 1.4.1995, pp. 13 and 14).

the first processors. Second, part of the total premium per kg would vary according to the quality of the raw tobacco produced and would be paid solely to the producer groups for redistribution among their members.

- (44) More precisely, the total premium now has four components:
- specific aid not exceeding 2% of the premium<sup>33</sup>;
  - an amount withheld for financing the Community Tobacco Fund, equal to 2% of the total premium for the 1999-2002 crops and 3% for the 2003-2005 crops;
  - a variable component accounting for between 30% and 45% of the total premium;
  - a fixed component that makes up the remainder of the total premium and varies depending on the size of the variable component<sup>34</sup>.
- (45) The Commission determines the exact percentage of the variable component of the premium for each year, for each tobacco variety group and for each country<sup>35</sup>. As indicated in recital (43), the producer groups allocate this variable component among their members. Individual producers that are not members of a producer group do not qualify for the variable component. By contrast, the fixed component is paid either to the producer group that redistributes it to each of its members according to the weight of tobacco sold or to each individual producer which is not a member of a group.
- (46) The producer groups must comply with certain rules when allocating the variable component of the premium among their members<sup>36</sup>. The basic principle is that each producer is entitled to a sum that will depend on the ratio of its "individual receipts" to the "overall receipts" (generated by all the producers which are members of the group). However, there is one important qualification, namely that sales of tobacco for which the producer receives a price that does not exceed a certain level are excluded from individual receipts.
- (47) In order to determine this amount, each group must first identify the price per kg of the batch that attracted the lowest price within the group. The group must then increase

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<sup>33</sup> See Article 4a(5) of Regulation 2075/92, as amended by Regulation 1636/98.

<sup>34</sup> Article 4a(3) of Regulation 2075/92, as amended by Regulation 1636/98 and Annex V(A)(1) of Regulation 2848/98.

<sup>35</sup> See Article 4a(2) of Regulation 2075/92, as amended by Regulation 1636/98 and Annex V(A)(1) of Regulation 2848/98. The exact percentage for each year, variety and country is given in Annex V(B) to Regulation 2848/98, as amended by Commission Regulation (EC) No 2162/1999 of 12 October 1999 (OJ L 265, 13.10.1999, p. 20).

<sup>36</sup> Annex V(C) to Regulation 2848/98 contains the mathematical formula for calculating the amount of the variable component to be allocated to each individual producer: "(...) the producer group must divide the total available amount of the variable premium for the group of varieties concerned by the sum of the quantities delivered by batch, multiplied by its purchase price. The result of this division must be multiplied by the product of the quantity of each batch multiplied by its purchase price. A variable premium equal to zero should be attributed to batches sold for a price between the minimum price and the minimum price plus 40% for each group of varieties grown by the producer group."

that price by 40%<sup>37</sup>. Only the individual receipts accruing to a producer as a result of selling raw tobacco at a price per kg higher than the minimum price plus 40% will be taken into account when allocating the variable component of the premium.

- (48) In principle, no premium is granted for quantities of tobacco exceeding the producer's quota. However, a producer may, for each group of varieties, deliver his surplus production to the extent of not more than 10% of his quota provided that the surpluses are deducted from the quota for the following harvest. Subject to these limits, such surplus production qualifies for the premium, which is paid together with the payments for the following harvest<sup>38</sup>.
- (49) Lastly, the Community rules provide that "Member States shall apply a system of advances on premiums for producers"<sup>39</sup>. From 16 October of the crop year, the advance can be paid on application direct to the producer or producer group<sup>40</sup>. For the 1999 and 2000 crops, the rules stipulated that the advances would be paid to the producers via the processors. At the outset, when Regulation 2848/98 was adopted, the maximum amount of the advance was equal to 50% of the premium payable. Following an amendment in 2000<sup>41</sup>, the maximum amount of the advance is equal to the fixed component of the premium payable.

(b) Cultivation contracts

- (50) The 1998 reform also developed further the rules on cultivation contracts that had been drawn up in 1995<sup>42</sup>. Such contracts are concluded each year between a processor and a producer group or an individual producer which does not belong to a group and concern the sale of raw tobacco. If there is no cultivation contract, the producers cannot obtain the Community premium. Cultivation contracts must include, among other things, "the purchase price according to quality grade (...)". They must, in principle, be concluded by 30 May each year, namely well before the harvest and the actual sale of the tobacco<sup>43</sup>. The obligation to conclude cultivation contracts in advance guarantees greater stability of revenue for producers, enabling them to step up their efforts or investments aimed at delivering better-quality tobacco. In Spain cultivation contracts are concluded between each processor and each producer group.

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<sup>37</sup> Since 1999 each Member State has been able to fix before 30 July each year a percentage greater than 40% by which to increase the "minimum price" (see Annex V(C) to Regulation 2848/98). According to the processors, this percentage is currently 50% in Spain.

<sup>38</sup> Article 10(2) of Regulation 2075/92, as amended by Regulation 1636/98.

<sup>39</sup> Article 19 of Regulation 2848/98, as amended by Regulation (EC) No 531/2000.

<sup>40</sup> For the 2000 crop, the processors may also submit applications.

<sup>41</sup> Amendment introduced by Commission Regulation (EC) No 531/2000 of 10 March 2000 (OJ L 64, 11.3.2000, p. 13).

<sup>42</sup> See Articles 9 to 12 of Regulation 2848/98.

<sup>43</sup> Except for a number of years when the deadline was 30 June.

(c) Inter-branch organisations<sup>44</sup>

- (51) The inter-branch organisations in the tobacco sector are governed by Council Regulation (EEC) No 2077/92 of 30 June 1992 concerning inter-branch organisations and agreements in the tobacco sector ("Regulation 2077/92")<sup>45</sup>. They bring together representatives of the tobacco production, processing and marketing sectors and must, in order to be recognised by Member States, pursue a number of activities described in the Community rules including "preparing standard contracts compatible with Community rules". Pursuant to Regulation 2077/92, Article 81(1) of the EC Treaty does not apply to agreements and concerted practices of recognised inter-branch organisations that have been notified to the Commission. However, this exemption does not apply to agreements and concerted practices which "may create distortions of competition which are not essential in achieving the objectives of the common agricultural policy pursued by the inter-branch organisation measure" or which "entail the fixing of prices or quotas, without prejudice to measures taken by inter-branch organisations in the application of specific provisions of Community rules"<sup>46</sup>.

1.4.2. *"Standard" contracts and their price clause in the context of the Spanish rules governing agricultural products*

- (52) The following paragraphs set out the Spanish rules applicable to the raw tobacco sector (other than those designed simply to implement the Community regulations on the common market organisation) but also the ministerial practice that was followed as far as it went beyond the scope of the legislation.

1.4.2.1. National regulatory framework between 1982 and 2000

- (53) In the period 1982-2000 contractual relations in the agricultural sector (all products taken together) were governed by (i) Law 19/1982 of 26 May 1982 on the *purchase* of agricultural products (the "1982 Law")<sup>47</sup>, (ii) the Royal Decree of 1983 approving the regulation developing that Law further (the "1983 Decree")<sup>48</sup> and, lastly, (iii) Royal Decree 2556/85 (the "1985 Decree")<sup>49</sup>. The purpose of this overall regulatory

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<sup>44</sup> In Spain the inter-branch organisations in the agricultural sector are governed by Law 38/1994 [*Ley 38/1994 de 30 de diciembre sobre las organizaciones interprofesionales agroalimentarias*, Official Gazette No 313/1994, 31.12.1994]. However, this law does not refer to Community Regulation 2077/92. In Spain OITAB is the inter-branch organisation in the raw tobacco sector.

<sup>45</sup> OJ L 215, 30.7.1992, p. 80.

<sup>46</sup> See Article 7(3) of Regulation 2077/92.

<sup>47</sup> *Ley 19/1982 de 26 de mayo, sobre contratación de productos agrarios* (Official Gazette 137/1982, 9.6.1982).

<sup>48</sup> *Real Decreto 2707/1983 de 7 de septiembre, por el que se aprueba el reglamento de la ley 19/1982 de 26 de mayo sobre contratación de productos agrarios* (Official Gazette 255/1983, 25.10.1983).

<sup>49</sup> *Real Decreto 2556/1985 de 27 de diciembre que regula los contratos de compraventa de productos agrarios* (Official Gazette 7/1986, 8.1.1986), as amended by Royal Decree 1468/1990 of 16 November 1990 (the "Decree 1468/1990") (Official Gazette 279/1990, 21.11.1990).

framework was to encourage joint negotiations between producers and buyers on the sales conditions for agricultural products<sup>50</sup>.

- (54) The 1982 Law provides for three kinds of "contracts" between producers and buyers: inter-branch contracts, collective contracts concluded in the absence of inter-branch contracts and, lastly, buying and selling contracts. In the raw tobacco sector only buying and selling contracts have been used. The relevant rules are set out in the 1985 Decree.
- (55) The 1985 Decree stipulates that a "standard" buying and selling contract can be approved for each marketing year by the Agriculture Ministry subject to certain conditions. This "standard" contract is simply a model for the individual cultivation contracts subsequently concluded between each processor and each producer group or each producer that is not a member of a group with a view to selling tobacco [see recital (50)].
- (56) Approval of the "standard" buying and selling contract may be sought both by the agricultural trade organisations (OPAs) or producer cooperatives and by the processors. They may submit a joint or unilateral application<sup>51</sup>. Once the "standard" contract has been approved, it is published in the Spanish Official Gazette (Boletín oficial del Estado, "BOE"). In securing approval for this "standard" contract, the parties are eligible for certain specific agricultural loans and insurance<sup>52</sup>.
- (57) The 1985 Decree stipulates that "standard" contracts must contain a set of specific clauses in order to be approved by the Agriculture Ministry. These clauses relate, among other things, to the "*precio mínimo garantizado por el comprador para toda la campaña de comercialización*" ["the minimum price guaranteed by the buyer for the entire marketing year"] and "*el precio a percibir por el productor por la materia prima*" ["the price that the producer must receive for the raw material"]. The 1985 Decree also provides for a clause on "*los anticipos previstos*" ["the planned advances"]<sup>53</sup>.

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<sup>50</sup> See the reply by the Agriculture Ministry of 7 March 2003 to the request for information [doc. 38.238/6836-6844].

<sup>51</sup> Single Article of Royal Decree 1468/1990.

<sup>52</sup> In particular:

- The processors qualify for a loan of up to 35%-40% of the quantities of tobacco they undertake to buy in the cultivation contracts. They are required to use this loan to pay advances to producers on the basis of the value of the products sold by each of them under the cultivation contract signed. They also qualify for the concessions laid down in Article 4 of Law 52/1963 on improving and expanding installations necessary to perform the contract.
- The producers may take out "joint agricultural insurance" and be eligible for the resulting concessions. They will be granted priority as regards measures under the Spanish Agricultural Guarantee Fund ("FEGA"), the national equivalent of the European Agricultural Guidance and Guarantee Fund ("EAGGF").

<sup>53</sup> Article 2 of the 1985 Decree.

- (58) When the Decree was adopted, the concept of "guaranteed minimum price" referred to the intervention price fixed by Community rules<sup>54</sup>. Since 1992, when intervention prices were abolished, the "guaranteed minimum price" has corresponded, in practice, to the minimum purchase price, with each grade having its own price or price bracket [see Table 3]. Moreover, this "guaranteed minimum price" is not to be confused with the "minimum price" to be taken into consideration in granting the variable component of the premium under the CMO [see recital (47)].

**Table 3 Price per quality grade for the Virginia variety (1996)**

Quality	ESP/kg	% spread (Commission's estimates)
Orange mature	250-140	78.6
Orange semi-mature	120-50	140
Orange immature	48-10	380
Lemon mature	90-60	50
Lemon semi-mature	50-20	150
Lemon immature	18-5	260
Other	1 <sup>55</sup>	0

- (59) The "price that the producer must receive for the raw material" is the final price that the producer receives and depends on the quality of the tobacco specifically sold. The Agriculture Ministry explained in its reply to the request for information that "the [final] price that the producer must receive" is fixed individually between the producer and the processor concerned by the cultivation contract at the time the tobacco is delivered and in the light of the quality of the raw material specifically sold.
- (60) The 1985 Decree in no way obliges the parties negotiating the "standard" contract to insert actual figures into the price clauses of the "standard" contract that they submit to the Agriculture Ministry for approval<sup>56</sup>. However, generally speaking, the Agriculture Ministry has acknowledged that the spirit of the rules and the ministerial practice were aimed at authorising and encouraging the parties to negotiate jointly the buying and selling conditions for tobacco, including prices<sup>57</sup>.
- (61) Since 1992 the Agriculture Ministry has approved all "standard" contracts except that for the marketing years 1994/95 and 2000/2001, when the sector's representatives did not reach an agreement on the "standard" contract and so did not apply for approval to

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<sup>54</sup> See the replies by the Agriculture Ministry of 7 March 2003 to the request for information [doc. 38.238/6836-6844]. It should be recalled that, at the time the 1982 Law and the 1985 Decree were adopted, the CMO for the raw tobacco sector that was applicable dated from 1970.

<sup>55</sup> This is the "minimum guaranteed price".

<sup>56</sup> Indeed, the Agriculture Ministry has approved "standard" contracts whose price clause remained "blank" for a number of years.

<sup>57</sup> It makes the point that the objectives of the 1982 Law and the 1985 Decree as well as the ministerial practice that developed were "to encourage and foster joint negotiation of the buying and selling conditions for agricultural products between two groups of economic agents: the producer representatives and their associations, on the one hand, and the industrial or commercial firms and their associations, on the other".

the Ministry. The price clause of the “standard” contract approved by the Ministry during those years stipulated that the three agricultural unions and the CCAE would collectively negotiate with each processor the price schedules and the additional conditions.

#### 1.4.2.2. Regulatory framework as from 2000

- (62) In 2000 a new law and an implementing regulation for the "standard" contracts for agri-food products (the "2000 Law")<sup>58</sup> repealed the previous rules except with regard to inter-branch organisations [see footnote 44].
- (63) In order to be approved, the "standard" contracts must now include, among other things, a clause containing "*los precios y condiciones de pago, siendo el precio a percibir libremente fijado por las partes signatarias del contrato*" ["the prices and the conditions of payment, with the price to be charged being freely fixed by the signatories to the contract"].
- (64) The 2000 Law explicitly states that the validity of "standard" contracts is subject to compliance with the Spanish and Community rules in the field of competition law. According to the Agriculture Ministry, it rendered unlawful the joint negotiations between sellers and buyers on the sales conditions for agricultural products, including prices.
- (65) This did not, however, prevent all the producer representatives and all the processors from continuing to negotiate jointly in 2001 both the wording of the "standard" contract and prices. As in the previous year, they failed to reach agreement and did not submit the "standard" contract to the Agriculture Ministry for approval. The Ministry was aware of their negotiations and, acting on its own initiative, even invited the representatives of the two sectors to meet. Ministry representatives attended those meetings.

### 1.5. Facts objected to

#### 1.5.1. Introduction

##### 1.5.1.1. Annual cycle

- (66) The present case concerns the years 1996-2001. The practices covered by this Decision follow a cyclical pattern on account of the cyclical nature of the cultivation and harvesting of raw tobacco. The annual cycle is described below.

##### 1.5.1.1.1. The "contacts between the processors and Deltafina"

- (67) In the first four months of the year the four Spanish processors of raw tobacco met to agree primarily on the (maximum) average delivery price for each variety of tobacco

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<sup>58</sup> *Ley 2/2000 de 7 de enero, reguladora de los contratos tipo de productos agroalimentarios* (Official Gazette 8/2000, 10.10.2000) and *Real Decreto 684/2002 de 12 de julio sobre regulación del sector del tabaco crudo* (Official Gazette 169/2002, 16.7.2002, p. 25759).

and on the quantities of each variety that each of them would then undertake to purchase from the producer groups. As from 1999, they also discussed the price brackets per quality grade for each variety of tobacco (the price schedules) and the additional conditions that they would subsequently negotiate with the producer representatives. Deltafina, responsible for the activities of the Universal group in Europe and Taes' sister company, also attended some of their meetings.

#### 1.5.1.1.2. The "contacts between the producer representatives"

- (68) During that same period the three agricultural unions (OPAs) and CCAE met to agree on the price brackets per quality grade for each variety of tobacco (the price schedules) and the additional conditions such as the average minimum price per producer and the average minimum price per producer group that they would then negotiate with the processors.

#### 1.5.1.1.3. The "contacts between the representatives of the two sectors" and the approval of the "standard" contract

- (69) In April and May the representatives of the two sectors met to negotiate, on the one hand, the price brackets per quality grade to be given in the price schedules and the additional conditions and, on the other hand, the wording of the "standard" buying and selling contract for the marketing year, which was, in principle, to be submitted to the Agriculture Ministry for approval. Between 1996 and 1998 the three agricultural unions and CCAE met each of the processors separately for this purpose. After 1999 their meetings were with ANETAB, the association representing the four processors. The application for approval of the "standard" contract by the Agriculture Ministry was always submitted jointly by the representatives of the two sectors. The "standard" contract was approved before the end of May or June depending on the year.

#### 1.5.1.1.4. The signing of the cultivation contracts

- (70) By 31 May or 30 June at the latest depending on the year, each processor concluded a cultivation contract with each producer group (or each individual producer that was not a member of a group) from which it bought the tobacco and informed the Agriculture Ministry accordingly. This cultivation contract was based on the "standard" contract approved by the Agriculture Ministry and had annexed to it the price schedule and additional conditions that had been negotiated in advance [see section 1.5.1.1.3]. The producers needed a (signed) cultivation contract in order to obtain the Community premium.

#### 1.5.1.1.5. The resumption of contacts between the processors and Deltafina

- (71) Shortly after the cultivation contracts were signed and subsequently during the period when the actual buying of the raw tobacco took place, the processors and Deltafina resumed their contacts at meetings or by letter. The initial contacts were for exchanging information on the quantities of tobacco they had undertaken to buy under

the contracts signed with the producer groups. Subsequently, namely during the buying period, information on the average price paid by each processor to the producers at the time the tobacco was actually bought and on the quantities bought was exchanged. All these contacts were designed to implement the agreements concluded at the beginning of the year and to ensure that they were complied with.

#### 1.5.1.1.6. The sales transactions

- (72) The sales transactions for raw tobacco took place as of the end of August once the harvest had begun and they continued into the first few months of the following year. On the basis of the quality of the tobacco, each processor and each producer discussed and decided on the exact price for each bale of tobacco (namely "the delivery price"). As a rule, they did this within the framework provided by the price brackets and additional conditions annexed to the cultivation contract previously signed between the group representing the producer and the processor.

#### 1.5.1.2. Purpose of the contacts between the parties

- (73) Details should also be given of the purpose of the contacts between the different parties concerned.

##### 1.5.1.2.1. The (maximum) average delivery price of each variety and the quantities of raw tobacco

- (74) The contacts between the processors in the period 1996-2001 primarily concerned the (maximum) average delivery price for each variety of raw tobacco (all qualities, recitals (96), (119), (151), (157), and (209)). The average delivery price is, in fact, the average of the "price that the producer must receive for the raw material", namely the average of the final selling (also called "delivery") prices paid by the processor to the producer for all of the latter's tobacco of the same variety (all qualities). In coordinating their conduct on a (maximum) average delivery price, the processors wanted to ensure that prices did not surge beyond certain maximum levels, which were agreed in terms of either common average prices or common percentage variations on prices paid the previous year.
- (75) In this Decision, the concept "(maximum) average delivery price" is used to clarify the concept of "average price" as used in the SO (see recital 90 and 343 therein). The use of the word "maximum" takes into account the comments by Agroexpansión and WWTE in their replies to the SO<sup>59</sup> that by agreeing on "average prices", processors and Deltafina aimed at capping the average prices to be paid to producers and were not imposing the application of identical prices, as the SO, according to Agroexpansión, may have suggested. As for the word "delivery", this is equivalent to the word "final" (as indicated in the previous paragraph).

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<sup>59</sup> See Agroexpansión's reply to the Statement of Objections, pages 22-23 and WWTE's reply to the Statement of Objections, page 13. In the same sense, see also statement by Cetarsa of 15 February 2002, page 10 [doc. 38.238/4234].

- (76) The object of the processors' agreement on a (maximum) average delivery price should be distinguished from the object of collective bilateral negotiations and (for 1999) from the object of the agreement on an average minimum price per producer group. The latter related in fact to a minimum level of revenue to be ensured to producers as explained below. The contacts between the processors also concerned the quantities of each tobacco variety that each of them could buy from producers.

#### 1.5.1.2.2. The price brackets given in the price schedules for each quality grade

- (77) Both the contacts between the three agricultural unions and CCAE between 1996 and 2001 and, as from 1999, the contacts between the four processors as well as, subsequently, the negotiations between producers and processors concerned primarily the price brackets (minimum and maximum prices) per quality grade of a particular variety of raw tobacco that are given in the price schedules.
- (78) Price brackets per quality grade provided a general framework for determining the "price that the producer must receive for the raw material", which takes place at the time of the sales transactions. The final price of a bale of raw tobacco of a given variety would, in principle, correspond to the average of the prices assigned to each quality of raw tobacco that the bale contained. The price assigned to each quality is calculated on the basis of the price brackets given in the price schedule for the quality in question.

#### 1.5.1.2.3. The additional conditions

- (79) The contacts between the three agricultural unions and CCAE between 1996 and 2001, as well as the negotiations between them and the processors' representatives in 1999 until 2001, also concerned the "additional conditions", namely, the average minimum price per producer and the average minimum price per group.
- (80) The "average minimum price per producer" (also known as the "minimum average price per producer") is the minimum threshold for the average price that each producer obtains for the sale of all of its tobacco of the same variety (all qualities). This price is, therefore, higher than the "guaranteed minimum price" (provided for by the 1985 Decree and corresponding to that for the worst quality of tobacco) and lower than the average price actually paid. The calculation of an average minimum price per producer indicates to the producer what its minimum income threshold would be.
- (81) The "average minimum price per group" (also known as "minimum average price per group") is the minimum threshold for the average price obtained by the group for the sale of all of its producers' tobacco of the same variety (all qualities). The guarantee of an average minimum price per group could limit the tendency for producers to move from one group to another in search of a higher average minimum price. The setting of a minimum average price per group (something on which the representatives of the two sides managed to agree between them only in 1999) was clearly meant to play to the benefit of producers as, on the one hand, it guaranteed a minimum average revenue for each producer group while, on the other hand, it still left open the possibility for

further price negotiation at the time of delivery, when final prices were to be determined.

- (82) Average minimum prices per group were negotiated in the context of bilateral negotiations for the 1999/2000 campaign. The terms “minimum average price per group” and “average price” were used indistinctly. As from the 2000/2001 campaign, the representatives of both parties make reference, in the context of their bilateral negotiations, to average price tout-court. It is clear however that the object of this average price was the same of the minimum average price per producer group negotiated in the previous years<sup>60</sup>. In other words, by engaging in negotiations on average prices the producers representatives were seeking to ensure a common minimum level of revenue which, in their intention, was still open to improvement following individual negotiations at delivery.
- (83) As from 2000, negotiations on price brackets indicate a clear link with the corresponding average price claimed by producers. In practice, based on the experience of the previous years, producers were trying to negotiate price brackets which would reflect an expected (minimum) average price.

#### 1.5.1.3. Situation preceding and summary of the facts objected to

- (84) Until the 1994/95 marketing year Cetarsa was virtually the only processor genuinely active on the processing tobacco market. It negotiated the average buying price for each variety of raw tobacco with all the producer representatives. Given Cetarsa's position on the market at the time (market share of some 90%), the three private Spanish processors that subsequently gained access to the market aligned themselves initially on the prices negotiated by Cetarsa with the producer representatives. As from 1996 the competition between the four processors increased, triggering a rise in the average buying prices offered to the producers [see the table in recital (38)<sup>61</sup>]. However, this increase made Spanish tobacco less competitive on export markets.
- (85) In order to stabilise the market and “to avoid price escalation”<sup>62</sup>, the processors and Deltafina began discussions aimed at agreeing on the (maximum) average delivery price and quantities. In 1996 and 1997 they reached agreements at the beginning of each year on the (maximum) average delivery prices for each variety of raw tobacco and on the share-out of the quantities of raw tobacco to be bought. These agreements were not, however, observed by any of the processors when the final sales transactions took place at the end of the year, as the steady increase in prices in 1997 shows [see the table in recital (38)]. In 1998 the processors’ cartel became more sophisticated, concluding a "framework" agreement on the (maximum) average delivery price and quantities that was accompanied by specific measures for implementing the agreement and ensuring compliance with it. The agreement concluded for the 1998/99 marketing year was extended each year (with adjustments) until October 2001. As from 1999

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<sup>60</sup> See in the same sense the comments in WWTE’s reply to the Statement of Objections pages 14-16 and comments in Agroexpansión’s reply to the Statement of Objections page 34

<sup>61</sup> Between 1995 and 1996 the average price of Virginia tobacco rose by some 96%, that of Burley E by 33%, that of Burley F by 31% and, lastly, that of Havana (and other varieties), by 48%.

<sup>62</sup> See the statement by Taes of 18 February 2002, pages 13-14 (doc. 38.238/4568-4569).

until 2001 the agreements between the processors were also concerned with fixing the price brackets per quality grade of each variety of tobacco and the additional conditions that they intended to propose to the producer representatives.

- (86) As regards the producers, since at least 1996 until at least October 2001, the three agricultural unions (OPAs) and CCAE concluded agreements and/or participated in a concerted practice involving the price brackets per quality grade given in the price schedules for each variety of raw tobacco and the additional conditions (the average minimum price per producer and the average minimum price per group). These agreements and/or concerted practice took place either at meetings between the producer representatives themselves or at meetings that the producer representatives subsequently held with the processors.
- (87) Sections 1.5.2 and 1.5.7 below examine in detail these contractual relationships and how they evolved between 1996 and 2001.

#### *1.5.2. 1996 crop*

- (88) At a meeting in March 1996 the processors and Deltafina reached agreement on the (maximum) average delivery price of at least three varieties of raw tobacco and their negotiating position with producer representatives. They also took part in a concerted practice involving the quantities of tobacco that each of them could buy from the producers. Deltafina also attended this meeting [recitals (91)-(99)]. The processors also resumed contact during the signing of the cultivation contracts and during the subsequent buying period in order to exchange information on the prices and quantities negotiated by each of them in the cultivation contracts. During the buying period they did not, however, observe the agreements concluded between them at the beginning of the year [recitals (109)-(111)].
- (89) The producer representatives, namely the three agricultural unions and CCAE, took part in meetings at which they agreed on the price brackets per quality grade of each tobacco variety and on the average minimum price per producer. They also agreed on the average minimum price per APA and minimum prices per producer they would negotiate with processors in the context of collective negotiations. These contacts took practical shape during the negotiations which the producer representatives held with each processor and which resulted in agreements on the price brackets and the average minimum price per producer with three of the four processors [recitals (100)-(105)].
- (90) The representatives of the two sectors also agreed on the wording of the "standard" contract and the Agriculture Ministry approved it. Each processor and each producer then concluded the cultivation contracts [recitals (106)-(108)].

#### 1.5.2.1. Contacts between the processors regarding the (maximum) average delivery price and quantities

- (91) In 1996 the processors started discussions among themselves in a bid to stabilise the raw tobacco market and prices<sup>63 64</sup>.
- (92) According to the statements by Taes, WWTE and Agroexpansión, the processors and Deltafina held an initial meeting on 13 March 1996 at the Hotel Intercontinental in Madrid.<sup>65</sup> They discussed prices and quantities for the marketing year 1996/97.
- (93) As regards prices, the handwritten note drafted at that meeting states<sup>66</sup>: "The signatories also decided [...] to consult together at another meeting on the joint position to be adopted vis-à-vis the OPAs and the APAs in order that the buying of the 96 crop can tolerate an increase in prices for producers not exceeding 10% relative to the 95 crop".<sup>67</sup>
- (94) The minutes of WWTE's board meeting on 25 and 26 March 1996 discussed the Madrid meeting of 13 March 1996 in the following terms: "A few weeks ago a meeting took place in Madrid attended by all the buying firms in an attempt to reach a number of agreements on the '*contratación*' strategy for the 96 marketing year. In a very tense atmosphere, the only verbal agreements reached were: 1- minimum price for FCV [flue cured Virginia] of ESP 3 per kg; 2- Average price objectives for each firm." <sup>68</sup>
- (95) A fax of 10 April 1996 sent by WWTE to Deltafina confirmed that agreements on prices were reached<sup>69</sup>.
- (96) According to Agroexpansión<sup>70</sup>, at the Madrid meeting the processors agreed on the maximum level of the average prices for the Virginia, Burley E and Burley F varieties. As regards Virginia, the price would be ESP [25-35] per kg.

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<sup>63</sup> Statement by WWTE of 15 February 2002, page 4 (doc. 38.238/4330).

<sup>64</sup> Statement by Taes of 18 February 2002, pages 13 and 14 [doc. 38.238/4568-4569].

<sup>65</sup> Statement by Taes of 18 February 2002, page 14 [doc. 38.238/4569], statement by WWTE of 15 February 2002, page 6 [doc. 38.238/4332] and statement by Agroexpansión of 15 February 2002, pages 19 and 20 [doc. 38.238/3956-3957].

<sup>66</sup> Statement by Taes of 18 February 2002, Annex 3 [doc. 38.238/4607].

<sup>67</sup> Statement by Taes of 18 February 2002, page 14 [doc. 38.238/4569].

<sup>68</sup> Doc. WWTE Benavente, page 401 [doc. 38.238/2555-2562]. This document does not state what these "average price targets" are.

<sup>69</sup> Fax sent by WWTE to Deltafina on 10 April 1996 (Annex 12 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4070] and Annex 4 to the statement by Taes of 18 February 2002 [doc. 38.238/4609]. See also the fax from Agroexpansión to Deltafina of 22 April 1996 (Annex 6 to the statement by Taes of 18 February 2002) [doc. 38.238/4613-4614].

<sup>70</sup> Statement by Agroexpansión of 15 February 2002, page 20 [doc. 38.238/3957].

- (97) As regards the quantities to be bought, the Commission possesses a copy of a handwritten note which was drafted at the Madrid meeting on 13 March 1996 and supplied by Taes together with its statement, containing the agreement between Cetarsa, Agroexpansión, WWT and Taes to observe the forecast for the purchase of quantities to be contracted for the 96 crop for Virginia E and Burley tobacco.

	<i>Virginia E</i>	<i>Burley</i>
<i>Cetarsa</i>	18.8	9.8
<i>Agroexpansión</i>	4.9	0.9
<i>WWT</i>	3.8	2.1
<i>Taes</i>	1.6	—

(...)

*CETARSA*                      *AGROEXPANSION*                      *WWT*                      *Taes*

- (98) However, the minutes of WWTE's board meeting mentioned above [see recital (94)] states that, at the Madrid meeting on 13 March 1996 "no agreement on sharing out Spanish tobacco between the four buying firms was reached"<sup>71</sup>.
- (99) Lastly, according to the statement by Taes, the processors held another meeting at the beginning of April with a view to agreeing on the quantities that each of them would undertake to buy from the producers<sup>72</sup>.

#### 1.5.2.2. Contacts between the producer representatives regarding the price brackets and the additional conditions.

- (100) The producers, represented by the three agricultural unions (ASAJA, UPA and COAG-UCE<sup>73</sup>) and by CCAE, joined forces for the first time and submitted to the processors a single price proposal. In that connection, they met in February and decided to propose to all the processors in the sector the same price brackets and to request a minimum average price per producer and a minimum average price per APA<sup>74</sup>.
- (101) Once their sales strategy had been agreed, the three agricultural unions and CCAE invited each of the processors separately to start negotiations<sup>75</sup>.

<sup>71</sup> Doc. WWTE Benavente, page 401 [doc. 38.238/2555-2562].

<sup>72</sup> Statement by Taes of 18 February 2002, page 15 [doc. 38.238/4570].

<sup>73</sup> UCE (*Unión de campesinos extremeños*) was an agricultural union that subsequently merged with UPA.

<sup>74</sup> Review "Tierra abierta" published by the agricultural union UPA, doc. WWTE Benavente, page 10 [doc. 38.238/2166].

<sup>75</sup> See the following examples of invitations issued to the processors: Cetarsa invitation, doc. Cetarsa MAP 41 [doc. 38.238/756]; WWTE invitation: faxes of 25 March 1996 and 1 April 1996 sent by the OPAs and CCAE to WWTE in Annex 9 to the statement by WWTE [doc. 38.238/4407]; Agroexpansión's invitation: fax of 6 March 1996 from the OPAs and CCAE to Agroexpansión in Annex 6 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4033]. The dates of the meetings between the OPAs and

- (102) The producer representatives reached an agreement first with Cetarsa. The agreement is dated 18 April 1996<sup>76</sup>. They agreed on the price brackets per quality grade given in the price schedules drawn up for each of the five varieties of tobacco grown in Spain and a minimum average price per producer. As for additional conditions, Cetarsa agreed: (i) to pay a certain minimum average price per producer (which varied according to the variety: ESP 25 per kg for Virginia, ESP 45 per kg for Burley E, Burley F and Havana, and ESP 55 per kg for Kentucky); (ii) to pay in addition ESP 3 per kg of contracted tobacco to the producer groups with which it signed a cultivation contract; and (iii) to pay in advance the minimum average price (in the case of Virginia) or ESP 25 per kg (in the case of the other varieties) to producer groups or to producers that were not members of a group which signed with it a cultivation contract during the first two weeks in May.
- (103) On 25 April 1996 the producer representatives reached an agreement with WWTE on the price brackets per quality grade for all tobacco varieties except Kentucky. As regards additional conditions, WWTE agreed: (i) to pay a minimum average price per producer of ESP 45 per kg for all varieties; (ii) to pay in addition ESP 3 per kg of contracted tobacco to producer groups with which it signed a cultivation contract; and (iii) to pay in advance ESP 25 per kg to producer groups or producers that were not members of a group which signed with it a cultivation contract within the first two weeks in May<sup>77</sup>.
- (104) According to the specialist review “Tabaco”, the producer representatives also reached an agreement with Agroexpansión on the price brackets per quality grade for Virginia, Burley E and Burley F (but not on additional conditions)<sup>78</sup>. Against this, an FNCT document mentioned that Agroexpansión had not concluded an agreement with the producer representatives<sup>79</sup>.
- (105) Lastly, Taes did not conclude any agreement with the producer representatives but its offer was communicated to members of the producer groups<sup>80</sup>.

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each processor were published in the specialist review *Extremadura* (see statement by Agroexpansión of 15 February 2002, Annex 5) [doc. 38.238/4029].

<sup>76</sup> See a copy of the agreement concluded between Cetarsa and the OPAs in doc. Federación MPM I-37 [doc. 38.238/3321-3331]. A number of other documents describe or comment on the terms of this agreement, and in particular docs. Federación MPM I-39 [doc. 38.238/3335], WWTE Benavente, pages 10 to 15 [doc. 38.238/2166-2171] and Anetab CS 6 [doc. 38.238/2651-2656]. Extracts from specialist reviews also refer to this agreement; see Annex 7 to the statement by WWTE of 15 February 2002 [doc. 38.238/4387-4402 and doc. Cetarsa MAP 38 [doc. 38.238/748-751].

<sup>77</sup> See a copy of the agreement concluded between WWTE and the OPAs in doc. Federación MPM I-37 [doc. 38.238/3321-3331]. A number of other documents describe or reproduce the wording of this agreement, and in particular docs. WWTE Cáceres, AGB 73 [doc. 38.238/2046-2055] and Anetab CS 6 [doc. 38.238/2651-2656].

<sup>78</sup> See docs. 38.238/3335 and 38.238/2059.

<sup>79</sup> Doc. 38.238/2656.

<sup>80</sup> See in particular Annex 7 to the statement by WWTE of 15 February 2002, page 12 [doc. 38.238/4690]. See also doc. 38.238/2656.

### 1.5.2.3. Approval of the "standard" contract and signing of the cultivation contracts

- (106) In the negotiations on the "standard" contract, the three agricultural unions and CCAE, together with the four processors, agreed on the contract's wording for the marketing year 1996/97<sup>81</sup>. The main item for discussion was whether or not to include in the eighth clause "Prices" the concept of "average minimum price per producer"<sup>82</sup>. In the end, the processors agreed to include this concept provided that it was optional, namely it could be or could not be included, depending on the wishes of each processor, in the specific cultivation contract that each processor subsequently signed with each producer group<sup>83</sup>.
- (107) On 30 April 1996, in accordance with Spanish legislation, the representatives of the two sectors submitted a joint application for approval of the "standard" contract to the Agriculture Ministry<sup>84</sup>. The "standard" contract was approved and published in the Official Gazette of 31 May 1996<sup>85</sup>. As mentioned above in recital (61), the price clause of the "standard" contract stipulated that the three agricultural unions and the CCAE would collectively negotiate with each processor the price schedules and the additional conditions.
- (108) Subsequently, each processor and each producer group concluded cultivation contracts, annexed to which were the price schedules agreed beforehand between the producer representatives and the processor party to the cultivation contract.

### 1.5.2.4. Resumption of contacts between processors

- (109) During the negotiations that each processor held separately with the producer groups with a view to signing the cultivation contracts, the processors exchanged information in order to "inform the other processors of the prices that each of them (...) applied during the tobacco buying year"<sup>86</sup>. WWTE also explained that "This exchange of information took place in 1996 as part of the Spanish processors' attempts to secure agreements which, on the one hand, would avoid the price war that existed in the sector and, on the other, would permit a joint reply to the joint price proposals of the

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<sup>81</sup> Docs. FNCT CRF II-17, page 4 [doc. 38.238/3135] and Cetarsa MAP 35 [doc. 38.238/731-740].

<sup>82</sup> The "price" clause in the "standard" contract concerned the purchase prices per quality grade for each tobacco variety. During the marketing years 1996/97, 1997/98 and 1998/99 this clause also contained, among other things, the "average minimum price per producer".

<sup>83</sup> Reply by the FNCT of 18 March 2002, Question 31 [doc. 38.238/5716-5717].

<sup>84</sup> Doc. Cetarsa MAP 35 [doc. 38.238/731-740].

<sup>85</sup> *Orden de 21 de mayo de 1996 por la que se homologa el contrato-tipo de compraventa de tabaco que regirá durante la campaña 1996/1997*, Official Gazette No 132 of 31 May 1996, page 18366 (Annex 13 to FNCT's reply of 18 March 2002) [doc. 38.238/5844-5845].

<sup>86</sup> Docs. Anetab AGB 74 [doc. 38.238/2056] and AGB 76 [doc. 38.238/2059] and WWTE's reply of 15 March 2002, Question 9 [doc. 38.238/5305]. Even though WWTE refers in its reply to "prices (...) during the buying year", the documents to which it refers give the tobacco prices as negotiated in the cultivation contracts.

production sector"<sup>87</sup>. WWTE states that it used this information to determine the final prices that it was going to propose to the producers<sup>88</sup>.

- (110) In October Agroexpansión, WWTE and Taes exchanged information on the quantities of Virginia and Burley tobacco bought during the period 1986-95<sup>89</sup>.
- (111) According to the statements by the processors, the agreement on the (maximum) average delivery prices concluded at the beginning of the year was in the end not observed when the final selling transactions took place<sup>90</sup>.

### *1.5.3. 1997 crop*

- (112) During the early months of 1997 the processors and Deltafina got in contact once again in a fresh bid to agree on (maximum) average delivery prices and quantities. They actually reached an agreement on the (maximum) average delivery price for each tobacco variety (as in the previous year) but also on tobacco quantities. They discussed other economic aspects such as transport costs and advances [recitals (116) to (122)]. Deltafina was present at several of their meetings. However, the prices that each processor subsequently negotiated with the producer representatives show that none of them complied with the agreements concluded at the beginning of the year. The processors kept Deltafina regularly informed of their complaints and of the failure to abide by the agreements. In order to resolve matters, they contacted one another again during the buying period to exchange information on the average prices paid to producers and on the quantities bought. Nevertheless, when buying the tobacco, they had not always complied with the agreements reached at the beginning of the year [recitals (133) to(143)].
- (113) The three agricultural unions and CCAE resumed their discussions on price brackets and minimum average price per producer and per producer group by negotiating - once again jointly - on these matters with each processor. However, unlike the previous year, they failed to come to any substantial agreement with any of the processors. Each producer group then negotiated with the processors directly [recitals (123) to (130)].
- (114) The three agricultural unions, CCAE and the four processors did, however, come to an understanding on the wording of the "standard" buying and selling contract, which the Agriculture Ministry then approved [recital (131)].

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<sup>87</sup> Reply by WWTE of 15 March 2002, Question 9 [doc. 38.238/5305]. For other examples of the exchange of information on prices in 1996, see docs. WWTE AGB 74 [doc. 38.238/2056], AGB 75 [doc. 38.238/2057-2058] and AGB 76 [doc. 38.238/2059]. See also the reply by WWTE of 15 March 2002, Questions 10, 11 and 14 [docs. 38.238/5305-5306, 38.238/5306-5307 and 38.238/5311-5312 respectively].

<sup>88</sup> Reply by WWTE of 15 March 2002, Questions 9, 10 and 11 [doc. 38.238/5305-5307].

<sup>89</sup> Annex 5 to the statement by WWTE of 15 February 2002 [doc. 38.238/4372-4374].

<sup>90</sup> Statement by WWTE of 15 February 2002, page 7 [doc. 38.238/4333]; statement by Agroexpansión of 15 February 2002, page 21 [doc. 38.238/3958]; statement by Cetarsa of 15 February 2002, page 10 [doc. 38.238/4234]; and statement by Taes of 18 February 2002, page 16 [doc. 38.238/4571].

(115) The producer groups then concluded cultivation contracts with each of the processors. The price brackets and the additional measures annexed to them, such as the minimum average price per producer were the result not of the negotiations at union level but of those conducted by the producer groups themselves [recital (132)].

1.5.3.1. Contacts between the processors and Deltafina regarding the (maximum) average delivery price and quantities

- (116) In the last quarter on 1996 the processors arranged two meetings to discuss the buying conditions for tobacco during the marketing year 1997/98.
- (117) According to the statement by WWTE, a meeting took place on 9 September 1996 at the Hotel Intercontinental in Madrid<sup>91</sup>. Another meeting was scheduled for 17 December 1996, with the chairman of Deltafina to attend.<sup>92</sup>
- (118) During the first quarter of 1997 the processors met on four occasions to discuss the (maximum) average delivery price, the volumes to be bought and certain other economic aspects concerning the purchase of raw tobacco during the marketing year 1997/98. According to Taes, WWTE and Cetarsa, an initial meeting took place on 30 January in Rome that was attended by the chairman and sales director of Deltafina<sup>93</sup>. Two other meetings took place at the Hotel Intercontinental in Madrid on 3 February and 5 March<sup>94</sup>. According to WWTE, the processors also met in Brussels on 19 April<sup>95</sup>.
- (119) In their statements<sup>96</sup> the processors mentioned that, at those meetings, they had agreed on the average purchase price for raw tobacco for the marketing year 1997/98. According to Cetarsa, the processors agreed on the maximum level of the average price for all the varieties except Kentucky. According to Taes and WWTE, the

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<sup>91</sup> See the statement by WWTE of 15 February 2002, page 6 [doc. 38.238/4332]. Taes also acknowledged that this meeting took place but did not specify the date (statement by Taes of 18 February 2002, page 16 [doc. 38.238/4571]). See also the faxes exchanged between Cetarsa, Agroexpansión, WWTE and Taes on the setting of the date for that meeting in Annex 4 to the statement by WWTE of 15 February 2002 [doc. 38.238/4361].

<sup>92</sup> Statement by WWTE of 15 February 2002, page 7 [doc. 38.238/4333] and statement by Taes of 18 February 2002, page 16 [doc. 38.238/4571].

<sup>93</sup> See the statement by Taes of 18 February 2002, page 18 [doc. 38.238/4573] and the statement by WWTE of 15 February 2002, page 7 [doc. 38.238/4333] as well as the faxes in Annex 10 [doc. 38.238/4644-4646] and the statement by Cetarsa, page 10 [doc. 38.238/4234].

<sup>94</sup> See the faxes exchanged between the four processors in Annex 11 to the statement by WWTE of 15 February 2002 [doc. 38.238/4419-4424].

<sup>95</sup> See the statement by WWTE of 15 February 2002, page 7 [doc. 38.238/4333] and the faxes in Annex 12 [doc. 38.238/4425/4431]. Agroexpansión acknowledges in its statement to the Commission that the processors met during the first quarter of 1997 but does not give the dates or places of those meetings (see the statement by Agroexpansión of 15 February 2002, page 22 [doc. 38.238/3959]).

<sup>96</sup> Statement by Cetarsa of 15 February 2002, page 10 [doc. 38.238/4234]; statement by WWTE of 15 February 2002, pages 7 and 8 [doc. 38.238/4333-4334]; statement by Agroexpansión of 15 February 2002, pages 22 and 23 [doc. 38.238/3959-3960]; and statement by Taes, pages 18 and 19 [doc. 38.238/4573-4574].

processors agreed on an average price of ESP 50-60 per kg for Virginia and Burley (ESP [30-40] per kg, according to Agroexpansión). Lastly, all the processors except Cetarsa said that they agreed to dispense in the "standard" contract with the concept of "minimum average price per producer" that the producers had demanded the previous year<sup>97</sup> (however, to go by the "standard" contract that was approved in 1997, this concept was eventually included).

- (120) The processors also agreed on the quantities of tobacco they would buy from the producers. They agreed, among other things, to buy the same quantities in the marketing year 1997/98 as in the previous year.
- (121) Agroexpansión and Cetarsa stated that the processors agreed not to pay the producers' transport costs. According to WWTE and Cetarsa, they also agreed not to pay advances to the producers<sup>98</sup>.
- (122) According to Cetarsa, Taes and Agroexpansión<sup>99</sup>, the representatives of the four processors drafted and signed at one of those meetings<sup>100</sup> a memo setting out the details of the agreements they reached. According to Taes, this memo was entrusted to Deltafina's chairman and none of the Spanish processors kept a copy. Subsequently, on discovering that the agreements reached at those meetings had not been observed, the Spanish processors are said to have asked Deltafina's chairman to destroy the memo<sup>101</sup>.

#### 1.5.3.2. Contacts between producer representatives regarding the price brackets and the additional conditions.

- (123) As for the previous marketing year, the three agricultural unions (ASAJA, UPA, COAG) and CCAE together invited each processor to negotiate the raw tobacco prices<sup>102</sup>. According to FNCT, the strategy was similar to that of the previous year, namely "to negotiate for each variety with all the processing firms and to continue to fix an [average] minimum price per variety and per producer"<sup>103</sup>.

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<sup>97</sup> In 1996 Cetarsa and WWTE each agreed separately with the agricultural unions and CCAE to observe an average minimum price per producer and to include this concept and the actual figure in the cultivation contracts that they would subsequently sign with each producer group.

<sup>98</sup> See the statements by WWTE [doc. 38.238/4334], Cetarsa [doc. 38.238/4234] and Agroexpansión [doc. 38.238/3960].

<sup>99</sup> Statement by Cetarsa of 15 February 2002, page 10 [doc. 38.238/4234], statement by Taes of 18 February 2002, page 18 [doc. 38.238/4573] and statement by Agroexpansión of 15 February 2002, page 22 [doc. 38.238/3959].

<sup>100</sup> According to Taes and Cetarsa, at the meeting in Rome.

<sup>101</sup> Statement by Taes of 18 February 2002, page 18 [doc. 38.238/4573].

<sup>102</sup> Invitation to WWTE (doc. Federación MPM I-17 [doc. 38.238/3250]); invitation to Agroexpansión (doc. Federación MPM I-18 [doc. 38.238/3251]) and invitation to Cetarsa (doc. Federación MPM I-19 [doc. 38.238/3252]).

<sup>103</sup> Minutes of FNCT's Executive Committee meeting on 6 May 1997, item 5(a) (doc. Federación MLFE III-26 [doc. 38.238/3497-3504]). The "minimum price per variety and per producer" means the "average minimum

- (124) On 29 April 1997<sup>104</sup> Cetarsa issued an announcement setting out the terms of its offer to the producer representatives, namely, guaranteed (average) minimum prices of ESP 35 per kg for Virginia and ESP 48 per kg for Burley E, Burley F, Havana and Kentucky, an increase in the prices per quality grade of each tobacco variety and the promise to pay advances<sup>105</sup>.
- (125) That same day WWTE sent a fax to all the agricultural unions and to the producer groups informing them of its own buying conditions for tobacco for the marketing year 1997/98<sup>106</sup>. Among other things, it offered an average minimum price per producer of ESP 35 per kg for Virginia and ESP 48 per kg for Burley E and Burley F, interest-free advance financing of ESP 35 and compliance with the same price brackets per quality grade as those in the previous marketing year, with a 15% increase for Virginia.
- (126) During the negotiations the producer representatives asked each processor to agree also to set an (average) minimum price per producer group, but the processors refused. At the end of the negotiations, the producer representatives failed to agree on the price brackets and the additional conditions with any of the processors<sup>107</sup>.
- (127) As a result, the processors negotiated the price brackets and the additional conditions directly with the producer groups.
- (128) On 29 April 1997 Cetarsa thus concluded agreements with most of the producer groups and three producer cooperatives<sup>108</sup>. The agreements contained all the selling conditions, namely, a price schedule per quality grade for each tobacco variety and the average minimum price per producer.
- (129) The other three processors also concluded agreements on the price brackets and additional conditions with all the producer groups belonging to FNCT<sup>109</sup>.

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price per producer" for each variety mentioned in the price clause of the "standard" contracts approved between 1996 and 1998.

<sup>104</sup> See doc. WWTE Benavente, page 16 [doc. 38.238/2172] and the date indicated on doc. WWTE Benavente, page 18 [doc. 38.238/2174].

<sup>105</sup> Doc. WWTE Benavente, page 18 [doc. 38.238/2174].

<sup>106</sup> Doc. WWTE Benavente page 21 [doc. 38.238/2177].

<sup>107</sup> Minutes of FNCT's Executive Committee meeting on 6 May 1997, item 5(a) (doc. Federación MLFE III-26 [doc. 38.238/3497-3504]), minutes of FNCT's Standing Committee meeting on 14 July 1997, item 4(a) (doc. Federación PB 6 [doc. 38.238/2857-2866]) and report by FNCT's management of 12 December 1997 on the situation of the tobacco sector in the world, the European Union and Spain in 1996, page 29, par. 1 (doc. Anetab CS 7 [doc. 38.238/2657-2662]).

<sup>108</sup> See the copy of these agreements in doc. 38.238/3238-3243 and in Annex H to Cetarsa's reply of 15 March 2002 [doc. 38.238/5220-5255].

<sup>109</sup> See FNCT's report of 12 December 1997 on the situation of the tobacco sector in the world, the European Union and Spain in 1996 [doc. 38.238/2657-2662]. This report describes in turn the agreements reached between all the producer groups belonging to FNCT and each of the processors.

- (130) In 1997, therefore, the three agricultural unions and CCAE did not manage to give practical shape to the matters discussed in the negotiations with the processors. The producer groups subsequently negotiated the selling conditions for tobacco with the processors. The four groups that were members of FNCT obtained the same selling conditions from each processor.

#### 1.5.3.3. Approval of the "standard" contract and signing of the cultivation contracts

- (131) As regards the discussions on the "standard" contract for the marketing year 1997/98, the three agricultural unions, CCAE and the processors attended several meetings at COSETA (the body bringing together the representatives of the producer and processor sectors) and at the Agriculture Ministry. The definitive agreement was reached at a meeting at the Agriculture Ministry on 17 April 1997. The concept of "average minimum price per producer" was included in the "standard" contract<sup>110</sup>. The "standard" contract was approved and published in the Official Gazette on 29 April 1997<sup>111</sup>. Like the year before, the price clause of the "standard" contract stipulated that the three agricultural unions and the CCAE would collectively negotiate with each processor the price schedules and the additional conditions.
- (132) Each processor then signed the respective cultivation contracts with the producer groups. The examples of the cultivation contracts concluded by WWTE show that the price schedules attached to them and the additional conditions were the same as those negotiated previously with those groups<sup>112</sup>.

#### 1.5.3.4. Resumption of contacts between processors

- (133) When the processors and Deltafina became aware during the negotiations with the producer representatives of the price brackets that each had proposed [see in particular recitals (124) and (125)], they realised that the agreements concluded at the beginning of the year had not been observed. Several letters to Deltafina refer to the complaints that followed.
- (134) In a fax sent to Deltafina on 29 April 1997, WWTE pointed out that the (average) minimum price which Cetarsa had undertaken to pay to the producers infringed the agreement concluded between the processors at the end of April<sup>113</sup>. WWTE stated that it would therefore be impossible to keep the promise made by the processors to pay an average price of ESP 50/60 per kg<sup>114</sup>. Deltafina replied to WWTE that: "(...) pagar

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<sup>110</sup> Minutes of FNCT's Executive Committee meeting on 6 May 1997, item 4(d) [doc. 38.238/3497-3504].

<sup>111</sup> *Orden de 25 de abril de 1997 por la que se homologa el contrato-tipo de compraventa de tabaco que regirá durante la campaña 1997/98*, official Gazette No 102, 29 April 1997, page 13690 (Annex 14 to FNCT's reply of 18 March 2002 [doc. 38.238/5846/5848]).

<sup>112</sup> Copies of the cultivation contracts signed by WWTE with the APAs are among the documents copied during the inspection, and in particular doc. WWTE AGB 50 to 53 [doc. 38.238/1980-2006].

<sup>113</sup> Annex 10 to the statement by Taes of 18 February 2002 [doc. 38.238/4643-4646].

<sup>114</sup> Doc. WWTE Benavente, page 276 [doc. 38.238/2432]: "*The average price of ESP 50/60 will be practically impossible given the average minimum prices accepted*". The fax went on to say: "*we have received calls from our producers and others who were going to join us renouncing our contract because they had*

*siempre más no sirve a nadie (...)* ["always paying more helps no one"] and called on it to keep calm<sup>115</sup>.

- (135) The following day Agroexpansión in turn informed Deltafina of the situation in Spain: "Once again the agreements and meetings with the other processors are pointless and ridiculous. Agroexpansión has abided by the compromise and will buy 5 million kg but will pay ESP 30 more than last year (...) our refusal to attend any other meetings together with the other firms that are ridiculous and false"<sup>116</sup>.
- (136) A fax dated 9 July 1997 from WWTE to Deltafina describes the "*contratación*" period in the following terms: "I believe that it is not necessary to recall the premeditated and well-organised attack that Cetarsa made against WWTE during the last few hours of the "*contratación*" period [29 April] when we were able miraculously to react and actually survive and to obtain a level of "*contratación*" higher than we could have hoped. And now everyone wants PEACE. Standard wants peace, World Wide wants peace, Tabacalera wants peace, and I also think that you want peace. I think and firmly believe that it is absolutely necessary to obtain peace in the sector (...). The purchases of tobacco, the "*contratación*" war have, in my opinion, raised prices from 60 pesetas to 80/90 pesetas [...]. I think it is very serious at Community level if we pass on the message (...) that we are able to grow and market tobacco without the help of the Community premium (...) An agreement without agreement is needed (...). As you have said on many occasions, an agreement on prices is not possible without an agreement on quantities. The agreement on quantities cannot be for one year only (...) we should agree on a solution and a future structure towards which Spain will inevitably move (...) and conclude selective agreements year in year out with the final objective definitively agreed (underlined added)".<sup>117</sup>
- (137) WWTE, Cetarsa and Agroexpansión attended a meeting on 29 September 1997 at which the three processors agreed to exchange regularly information on their respective purchasing levels and the average prices paid. The documents in the Commission's possession show that Taes also participated in the exchange of information even though it had not attended the meeting.

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*received firm offers of average prices between ESP 85 and ESP 90 per kg, regardless of quality (...) this is unilateral action on the part of Cetarsa, if it continues in this way this afternoon, we will have to take the appropriate measures to ensure that WWTE keeps quantities significantly below those of the previous marketing year. I denounce before you the infringement of each of the points in the contract signed in front of you by Cetarsa [this is a reference to the agreement concluded at one of the meetings of the processors at which the Deltafina chairman was also present] and I would point out to you that Taes, Agroexpansión and WWTE have abided by the agreement in full".*

<sup>115</sup> Annex 10 to the statement by Taes of 18 February 2002 [doc. 38.238/4644] and Annex 15 to the statement by WWTE of 15 February 2002 [doc. 38.238/4476].

<sup>116</sup> Annex 10 to the statement by Taes of 18 February 2002 [doc. 38.238/4646].

<sup>117</sup> Annex 9 to the statement by Taes of 18 February 2002 [doc. 38.238/4640-4642].

- (138) WWTE, Cetarsa and Agroexpansión agreed on informing each other of the average prices on a weekly basis.<sup>118</sup>
- (139) Lastly, a document copied during the inspections at WWTE reveals that a number of processors undertook in the cultivation contracts signed with the producer groups to buy quantities of tobacco exceeding the production quotas that Spain had allocated to its producers that year [see recital (35)]. The document states: "*This year, the fact that some companies have bought « over-quota » at very high prices (and which are not entitled to claim for Premium), we expect the purchasing to be delicate unless an agreement would be reached between the 4 buying companies in Spain. We will definitely push for such a meeting. On the other side, we can only follow the price levels established by our bigger competitor (Cetarsa) in order to enable to contract enough volumes for next crop (98)*"<sup>119</sup>.
- (140) In spite of the exchange of information, a fax sent by Agroexpansión to Deltafina at the beginning of October noted its dissatisfaction with WWTE, which was accused of paying prices higher than had been agreed<sup>120</sup>. Agroexpansión and WWTE were constantly urging Deltafina's chairman to intervene as mediator<sup>121</sup>.
- (141) As regards prices, WWTE explained to Deltafina in a fax dated 2 October 1997: "(...) We have undertaken to observe the average, which, at most, may reach ESP 90 (...) Tomorrow Friday we will send to Taes, Agroexpansión and Cetarsa all the information concerning our purchases to date, average prices and the level of unusable World Wide tobacco. We expect corresponding information from you (...) "<sup>122</sup>.
- (142) As regards the agreement on quantities between processors and Deltafina, there are several documents confirming its existence<sup>123</sup>.
- (143) In a fax to Deltafina in November, WWTE states: "I am trying everything possible to secure an agreement on quantities. On the 20th we [logically, the processors] will hold a meeting where I will finally propose the lodging of surety for our agreements with

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<sup>118</sup> See the fax from Agroexpansión's chairman to Deltafina's chairman of 1 October 1997 in Annex 12 to the statement by Taes [doc. 38.238/4654].

<sup>119</sup> Doc. WWTE Benavente page 342 [doc. 38.238/2498].

<sup>120</sup> See the fax from Agroexpansión's chairman to Deltafina's chairman of 1 October 1997 in Annex 12 to the statement by Taes of 18 February 2002 [doc. 38.238/4654]: ["(...) *en estos momentos me informan que la media que va pagando [WWTE] es 79,97 Ptas. (...) a los cultivadores de [confidential] (...) lleva una media de más de 100 Ptas*" ["(...) at the moment I am informed that the average price that [WWTE] is paying is PTA 79.97 (...) to [confidential] producers (...) the average is over PTA 100"].

<sup>121</sup> See all the faxes in Annex 12 to the statement by Taes of 18 February 2002 [doc. 38.238/4651-4664].

<sup>122</sup> See the fax from WWTE's chairman to Deltafina's chairman of 2 October 1997 in Annex 12 to the statement by Taes of 18 February 2002 [doc. 38.238/4660-4661].

<sup>123</sup> See the fax from WWTE's chairman to Deltafina's chairman of 2 October 1997 in Annex 12 to the statement by Taes of 18 February 2002 [doc. 38.238/4660].

the deposit of large amounts of money that will provide some certainty in the execution of the agreements."<sup>124</sup>

#### 1.5.4. 1998 crop

- (144) The contacts between the processors and Deltafina in the two previous years had not achieved their objective. Although, at the beginning of the year, they managed to agree on the maximum average (delivery) prices and quantities to be bought<sup>125</sup>, the agreements were not observed at the end of the year when the tobacco was actually purchased.
- (145) The contacts between the processors and Deltafina at the beginning of 1998 eventually resulted in a more structured "framework" agreement. As in previous years, this agreement concerned the (maximum) average delivery price for each tobacco variety and the volumes of tobacco to be sold. It also included a set of implementing measures including the exchange of information and a mechanism for transferring tobacco or providing compensation for purchases exceeding the quantities agreed [recitals (149) to (167)]. Deltafina was immediately informed of the content of the agreement. The agreement itself was properly implemented and complied with when the raw tobacco was actually bought. The information exchange mechanism and the transfer and compensation mechanism for tobacco were applied [recitals (168) to (173)].
- (146) As for the producers, their contacts once again concerned the price brackets and additional conditions. They negotiated with each processor separately, with the exception of the negotiations on Virginia tobacco, which, for the first time, took place with all four processors. However, no agreement was reached. As in the previous year, each processor then negotiated direct with each producer group [recitals (174) to (176)].
- (147) However, the three agricultural unions, CCAE and the four processors agreed on the wording of the "standard" buying and selling contract, which the Agriculture Minister then approved [recital (177)].
- (148) The producer groups subsequently concluded with each of the processors the cultivation contracts, annexed to which were the price brackets and additional conditions they had negotiated directly with the processors [recitals (178) to (179)].

##### 1.5.4.1. "Framework" agreement between processors on the average price and quantities

###### (a) Preparation of the "framework" agreement

- (149) At a meeting in Madrid on 20 January 1998, the processors agreed on the basic principles of an agreement on the conditions for buying raw tobacco during the

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<sup>124</sup> See the fax from WWTE's chairman to Deltafina's chairman of 6 November 1997 in Annex 12 to the statement by Taes of 18 February 2002 [doc. 38.238/4663-4664]. This fax has annexed to it a schedule giving the (average) prices paid by each processor depending on the percentage of "*contratación*".

<sup>125</sup> Except in 1996, when the discussions on quantities did not result in a genuine agreement.

marketing year 1998/99<sup>126</sup>. A fax sent the following day by Taes to Deltafina set out the main elements of the agreement<sup>127</sup>, which, according to the fax, was “neither written nor signed”<sup>128</sup>.

- (150) Firstly, the processors agreed on the quantities of tobacco that each of them could commit to buying in the cultivation contracts they would sign with the producer groups. In view of the quantities specified, the agreement apparently consisted in committing to the same quantities as the previous year, subject to a number of adjustments.
- (151) Secondly, the processors that had paid the highest prices in 1997, namely Cetarsa and WWTE, agreed to reduce their buying prices in 1998.
- (152) Thirdly, the processors agreed on a compensation mechanism whereby a processor that bought less than agreed could buy - from a processor that bought more than agreed - the tobacco it needed at a price of ESP 50 per kg.
- (153) Lastly, the processors agreed to have "periodic contact between the firms to agree on action by producers and so as not to go to 'war' ".
- (154) The fax indicated that the duration of this agreement was one year renewable.
- (155) The processors attended other meetings, including a meeting on 4 February 1998 at the Hotel Intercontinental in Madrid<sup>129</sup> and on 5 March 1998<sup>130</sup>, which provided an opportunity to clarify the details of their price and quantity agreement for the marketing year 1998/99 and of the measures aimed at ensuring compliance with it.

(b) "Framework" agreement

- (156) The main features of this agreement were as follows<sup>131</sup>:
- (157) (i) Price agreement consisting in the setting of a (maximum) average delivery price per variety <sup>132</sup>that will be gradually increased each year. According to Agroexpansión, the processors also agreed that the average minimum prices per producer for the

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<sup>126</sup> Statement by Taes of 18 February 2002 [doc. 38.238/4576].

<sup>127</sup> The fax noted: "Se ha pactado el siguiente acuerdo para 1.998" ["We agreed on the following agreement for 1998"].

<sup>128</sup> Statement by Taes of 18 February 2002, Annex 16 [doc. 38.238/4677].

<sup>129</sup> See in Annex 23 to the statement by WWTE of 15 February 2002 a number of faxes exchanged between the processors with a view to deciding on the date and venue of the meeting [doc. 38.238/4515-4520].

<sup>130</sup> Statement by Taes of 18 February 2002, Annex 18 [doc. 38.238/4684].

<sup>131</sup> The four processors have described this agreement in their statements (Cetarsa on pages 10 and 11 of its statement [doc. 38.238/4234-4235], Agroexpansión on pages 24 to 28 of its statement [doc. 38.238/3961-3965], WWTE on pages 9 and 10 of its statement [doc. 38.238/4335-4336] and Taes on pages 22 to 24 of its statement [doc. 38.238/4577-4578]).

<sup>132</sup> ESP 80 per kg for Virginia, according to Taes

marketing year 1998/99 that would be negotiated with the producer representatives could in future not exceed certain levels.

- (158) (ii) agreement on quantities: The processors agreed on the quantity of tobacco that each of them could undertake to buy from the producer groups under the cultivation contracts.<sup>133</sup>
- (159) Each year, once the cultivation contracts had been signed, the initial reference tonnage was adjusted (to become the "*toneladas de referencia adaptadas*" or "adjusted reference tonnage") in the light of market developments, the quantities that each processor had undertaken to buy in the cultivation contracts and the transfer of production quotas between the different tobacco varieties applied for by the producers to the Agriculture Ministry<sup>134</sup>.
- (160) More specifically, the processors compared the maximum quantity of purchases of each tobacco variety authorised for the entire sector (the "*cantidad máxima garantizada*" or "guaranteed maximum quantity") with the aggregate total amount of tobacco that the processors had undertaken to buy in the cultivation contracts for each variety<sup>135</sup>. The difference was given as a percentage (positive or negative, as the case may be) that was subsequently applied to each initial reference tonnage to give the adjusted reference tonnage. For Burley E, a corrective factor was applied that increased the aggregate quota for this variety by 50 000 kg. These additional quantities were then shared out between the processors in proportion to their initial reference tonnage. If production quotas were transferred from one variety to another, the transfers were included in the initial reference tonnage before it was adjusted in accordance with the above rules.
- (161) Agroexpansión provided a table giving the details of the quantities allocated to each firm for the marketing year 1998/99.
- (162) (iii) Mechanism for transferring or providing compensation for purchases exceeding the agreed quantities of tobacco: A processor that exceeded the quantity of tobacco assigned to it ("surplus" processor) had to compensate a processor that had not achieved its target quantity ("deficit" processor) in one of the two following ways: either (i) by paying compensation (of ESP 50 per kg for Virginia and ESP 40 per kg for Burley) for the quantity of tobacco bought over and above the target quantity or (ii) by selling the quantities of tobacco bought over and above its target quantity at the

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<sup>133</sup> Doc. WWTE, page 223 [doc. 38.238/2379] contains two tables giving the quantities of tobacco bought by each processor during the marketing years 1994-1997. According to WWTE, the processors used this information to agree on the initial reference tonnage for each processor for the marketing year 1998/99 (see the reply by WWTE of 15 March 2002, Question 7 [doc. 38.238/5300-5302]).

<sup>134</sup> Agroexpansión provided in Annexes 17 and 18 to its statement of 15 February 2002 tables giving the adjustments made to each firm's quotas for the years 1999/2000 and 2001/02 and internal memos (drawn up in preparation for its statement to the Commission) explaining the machinery for adjusting the quotas [doc. 38.238/4100-4117].

<sup>135</sup> The processors knew the quantities that each of them had undertaken to buy in the cultivation contracts thanks to the information exchange mechanism (for further details of the mechanism, see recitals (163) to (166)).

average buying price agreed by the "deficit" processor with the groups in the relevant cultivation contracts<sup>136</sup>.

- (163) (iv) Information-exchange mechanism<sup>137</sup>: This operated twice a year as follows:
- (164) First, between June and September, following the signing of the cultivation contracts between each processor and each producer group and before the beginning of the harvest, the processors informed one another of the quantities that each had undertaken to buy from each group in the cultivation contracts<sup>138</sup>. It enabled each processor to monitor compliance with the agreements on prices and quantities concluded between them earlier in the year.
- (165) Subsequently, from September to around December, the processors informed one another of the quantity of tobacco actually bought from each producer group after the harvest and the average price finally paid to the producer<sup>139</sup>. Each firm's technical

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<sup>136</sup> For details of how the transfer and compensation mechanism operates, see Annexes 19 and 20 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4118-4121]: tables giving for the years 1999/2000 and 2001/02 the surplus quantities bought by each firm and the firms which, where appropriate, had to pay compensation. See also in Annexes 21 and 22 [doc. 38.238/4122-4125], the quantities that Agroexpansión bought over and above its target amount for those years.

See also Annex 14 to the statement by Cetarsa of 15 February 2002 [doc. 38.238/4309-4310]: an initial table for the reference tonnage calculated for each firm and a second table illustrating compensation paid during the marketing year 1999/2000.

See in Annex 24 to the statement by WWTE of 15 February 2002 a handwritten memo describing the control machinery applied during the marketing year 1998/99 [doc. 38.238/4521] and in Annexes 27 and 28 tables giving the reference tonnages and the adjustments made to them as well as the compensation paid between firms during that year [doc. 38.238/4525-4529].

Lastly, see in Annex 24 to the statement by Taes of 18 February 2002 the same tables concerning the reference tonnages, adjustments to them and compensation paid for the 1999 crop [doc. 38.238/4833-4839].

<sup>137</sup> For a description of the operation and purpose of the mechanism for exchanging information between the processors from the marketing year 1998/99 until 2001, see the replies by Cetarsa of 15 March 2002 to Questions 15, 17 and 18 [docs. 38.238/5064 and 5066-5068], by Agroexpansión of 18 March 2002 to Questions 9 and 10 [doc. 38.238/4890-4893], by Taes of 16 March 2002 to Question 4 [doc. 38.238/5403-5404] and by WWTE of 15 March 2002 to Questions 12(d) and 15 [docs. 38.238/5308-5309 and. 38.238/5313-5315].

<sup>138</sup> This information allowed the processors to calculate the adjusted reference tonnage.

<sup>139</sup> For examples of information exchanged during several marketing years, see the Cetarsa documents MAP 44 (2000) [doc. 38.238/763-768], MAP 45 (2000) [doc. 38.238/769-771], CS 12 (2000) [doc. 38.238/489-490] and CS 13 (2000) [doc. 38.238/491]. See also Annex 16 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/ 4096-4105] (exchanges of information on the sales volumes that each processor undertook to buy in the cultivation contracts for the marketing year 1999/2000). Lastly, see Annexes 19 and 23 to the statement by Taes of 18 February 2002 [doc. 38.238/ 4689-4768] (exchanges of information for the years 1998 and 1999).

experts also met after the buying period to analyse the results and to note any differences relative to the tobacco quantities agreed on<sup>140</sup>.

- (166) In 1998 in particular, after the cultivation contracts had been signed, the processors exchanged information on the quantity of tobacco that each had undertaken to buy<sup>141</sup>.
- (167) This "framework" agreement on the (maximum) average delivery price and quantities was applied for the first time during the marketing year 1998/99. It was then extended, with a number of amendments, for the marketing years 1999/2000 and 2000/01 until 3 October 2001, when the Commission carried out its inspections<sup>142</sup>.

(c) Implementation of, and compliance with, the "framework agreement"

- (168) In general, the agreement on the (maximum) average delivery price and quantities concluded between the processors at the beginning of the year was complied with<sup>143</sup>. In a letter from Agroexpansión to its parent company Dimon on 14 December 1998, its chairman explains that "As soon as I get the prices of the four companies I will let you know although I can anticipate you that the problems that seemed so serious while you were visiting us in Spain have vanished, as all the companies have been around the agreed 87 pts/kg (...), being these prices the official ones, although we suppose Cetarsa has made some other payments to the growers like ourselves"<sup>144</sup>.
- (169) It transpires from Agroexpansión's letter to its parent company [mentioned in recital (168)] that the processors paid additional amounts to the producers "*pagos fuera de la línea de compra*" ["payments outside the heading purchases"]. According to Taes, such payments were a traditional practice in the sector and allowed the processors to buy better-quality tobacco for a higher price (namely higher than that agreed)<sup>145</sup>. These additional payments could not be regarded as an infringement of the agreement between the processors.

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<sup>140</sup> For these meetings, see *inter alia* docs. WWTE Cáceres AGB 70 [doc. 38.238/2042-2043] and Cetarsa CS 11 [doc. 38.238/486-488]. See also the documents in Annexes 12 and 13 to the statement by Cetarsa of 15 February 2002 [doc. 38.238/4305-4308].

<sup>141</sup> For example, the information in doc WWTE JFM 3 [doc. 38.238/2235-2236].

<sup>142</sup> Statement by Cetarsa of 15 February 2002, page 10 [doc. 38.238/4234], statement by WWTE of 15 February 2002, page 9 [doc. 38.238/4335], statement by Agroexpansión of 15 February 2002, page 24 [doc. 38.238/3961] and statement by Taes of 18 February 2002, pages 26, 27 and 30 [doc. 38.238/4581-4582 and 4585].

<sup>143</sup> See statement by Taes of 18 February 2002, page 23 [doc. 38.238/4578], statement by WWTE of 15 February 2002, pages 9 and 10 [doc. 38.238/4335-4336], statement by Cetarsa of 15 February 2002, page 11 [doc. 38.238/4235] and statement by Agroexpansión of 15 February 2002, page 27 [doc. 38.238/3964].

<sup>144</sup> Doc. Agroexpansión RMR 104 [doc. 38.238/1748]. According to Taes, the "framework" agreement concluded between the processors at the beginning of the year provided for an average price for Virginia of ESP 80 per kg [see recital (157)].

<sup>145</sup> Taes provided copies of invoices relating to additional payments made to producers in 1998, 1999 and 2000 (statement by Taes of 18 February 2002, Annex 20 [doc. 38.238/4769-4772]).

- (170) Moreover, the processors applied the arrangements for monitoring compliance with the agreement on (maximum) average delivery prices and quantities (namely, the exchange of information and the transfer and compensation mechanism).
- (171) As the harvest progressed, the processors exchanged information on the quantities of tobacco bought from and the average prices paid to each producer group by each processor<sup>146</sup>. Their technical experts used this information at meetings where they analysed the purchases made and noted differences from the quantities of tobacco agreed on<sup>147</sup>.
- (172) In their statements to the Commission, WWTE and Agroexpansión provided some explanation of the transfer and compensation mechanism for tobacco<sup>148</sup>.
- (173) Lastly, in 1998 the price escalation experienced in previous years was halted and prices even fell. In this connection, Agroexpansión indicates in its statement to the Commission: "During the marketing year 1998/99 the Spanish processors generally abided by the compromises described above. For instance, we managed to bring to the market for the first time a measure of stability that slowed down the escalation in buying prices that was a feature of previous years and offset the combined negotiating power of the production sector".<sup>149</sup>

#### 1.5.4.2. Contacts between producer representatives regarding the price brackets and additional conditions

- (174) The producer representatives agreed their joint tobacco selling strategy for this marketing year at meetings in April and May that were attended by the processors. The producer representatives present at those meetings were, as every year, the three unions (ASAJA, UPA and COAG), CCAE and, for the first time, representatives of the producer groups<sup>150</sup>.
- (175) These negotiations took place on 23 and 28 April 1998 between the producer representatives acting as a body and, on the one hand, each individual processor as regards the price brackets for Burley F, Burley E and Havana and, on the other, the

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<sup>146</sup> See examples of information exchanged during the marketing year 1998/99 in Annexes 19 and 23 (in part) to the statement by Taes [doc. 38.238/4668-4773] and in Annex 12 to the statement by Cetarsa of 15 February 2002 [doc. 38.238/4305].

<sup>147</sup> See examples of meetings of technical experts during the marketing year 1998/99 in Annex 25 to the statement by WWTE [doc. 38.238/4522-4523].

<sup>148</sup> See statement by WWTE of 15 February 2002, pages 9 and 10 [doc. 38.238/4335-4336] and statement by Agroexpansión, pages 26 and 27 [doc. 38.238/3963-3964].

<sup>149</sup> Statement by Agroexpansión of 15 February 2002, page 27 [doc. 38.238/3964].

<sup>150</sup> See the reply by FNCT of 18 March 2002, Question 28 [doc. 38.238/5714-5715]. The FNCT mentions in vague terms that the "producer groups registered with the unions" took part in the negotiations [doc. 38.238/5714-5715].

four processors jointly as regards the price brackets for Virginia<sup>151</sup>. The parties to the negotiations did not, however, reach an agreement<sup>152</sup>.

- (176) As in the previous year, the processors thus negotiated directly with the producer groups the price brackets and additional conditions for that harvest's tobacco. A FNCT document shows that the conditions negotiated in 1998 by its member groups were the same as in 1997 both as regards the price schedules per quality grade and as regards the additional conditions<sup>153</sup>.

#### 1.5.4.3. Approval of the "standard" contract and signing of the cultivation contracts

- (177) The text of the "standard" contract was discussed and agreed between the processors, the three unions and CCAE at a meeting of COSETA's management committee on 2 April 1998<sup>154</sup>. The "standard" contract for the marketing year 1998/99 was approved by the Agriculture Ministry and published in the Official Gazette on 20 May 1998<sup>155</sup>. Like in the previous two years, the price clause of the "standard" contract stipulated that the three agricultural unions and the CCAE would collectively negotiate with each processor the price schedules and the additional conditions.
- (178) Each processor then signed the cultivation contracts with the producer groups<sup>156</sup>. The cultivation contracts concluded by WWTE have annexed to them the sales conditions previously negotiated with all the groups [see recital (176)].
- (179) In an Agroexpansión report of 5 May 1998 to its parent company, the period of negotiations with the producers' representatives and the signing of the cultivation contracts are described as follows<sup>157</sup>: "Agroexpansión has made a major contribution to the firms' reaching a number of agreements on avoiding the price war that characterised last year. The prices have been negotiated with the unions and the APAs and for the first time we have avoided war between the firms and each of them has

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<sup>151</sup> See examples of the invitations to WWTE (doc. Federación MPM I-32 [doc. 38.238/3316]), Agroexpansión (doc. Federación MPM I-33 [doc. 38.238/3317]) and Cetarsa (doc. Federación MPM I-34 [doc. 38.238/3318]). See also the record of the meeting of FNCT's Standing Committee on 30 July 1998 (doc. Federación PB 5 [doc. 38.238/2850-2856]).

<sup>152</sup> See the record of FNCT Standing Committee's meeting on 30 July 1998 (doc. Federación PB 5 [doc. 38.238/2850-2856]).

<sup>153</sup> See FNCT report on the price negotiations for the 1998 crop [doc. 38.238/2504-2509].

<sup>154</sup> Doc. WWTE Benavente MFS 10 [doc. 38.238/2210-1 to 2210-5].

<sup>155</sup> *Orden de 4 de mayo de 1998 por la que se homologa el contrato-tipo de compraventa de tabaco para la campaña 1998/99*, Official Gazette No 120, 20 May 1998, page 16755 (Annex 15 to FNCT's reply of 18 March 2002 [doc. 38.238/5849-5851]). See also the request for approval sent to the Agriculture Ministry on 21 April 1998 (doc. Cetarsa AFG 41 [doc. 38.238/1178-1189]).

<sup>156</sup> For examples of cultivation contracts concluded by WWTE, see docs. WWTE Cáceres MPM 8 (Virginia E) [doc. 38.238/2106-2112], MPM 9 (Burley E) [doc. 38.238/ 2113-2119], MPM 10 (Burley F) [doc. 38.238/2120-2126] and MPM 11 (Havana E) [doc. 38.238/ 2127-2132].

<sup>157</sup> Doc. Agroexpansión MN 6 [doc. 38.238/1810-1811].

been able to buy the quantities it wished (...) the negotiations with the APAs have been difficult but all the firms maintained their points of view in a serious manner and in a spirit of cooperation".

- (180) The report explained that Agroexpansión and WWTE agreed in the cultivation contracts to buy the same quantities as the previous year and that Taes delivered around [...] tonnes to Cetarsa. It also stated that the processors agreed to pay advances to the producer groups of ESP 35 per kg for Virginia and ESP 45 per kg for the Burley varieties<sup>158</sup>. Lastly, it stressed the desirability of other agreements between the processors in future.

#### 1.5.5. 1999 crop

- (181) The processors extended the "framework" agreement on (maximum) average prices and quantities, together with the information-exchange and transfer and compensation mechanisms, which they had concluded the previous year, subject to the changes needed to reflect the conditions of the new marketing year [recitals (185) to (192)].
- (182) For the first time in 1999 the negotiations between the processors and the producers' representatives ended with an agreement between the representatives of both sectors [recitals (194) to (201)], covering both the price brackets for each quality grade and additional conditions.
- (183) The "standard" contract was negotiated between the representatives of the two sectors at a meeting held at the Agriculture Ministry, which subsequently approved the contract. It was published in the Official Gazette, together with, for the first time, the price schedules per quality grade, including the actual figures on the price brackets agreed between the producers' representatives and the four processors [see recital (202)], although it did not contain the agreement on additional conditions.
- (184) The processors and the producer groups then signed the cultivation contracts, to which were annexed the price schedules given in the "standard" contract published in the Official Gazette [see recital (203)].

##### 1.5.5.1. Extension of processors' "framework" agreement on (maximum) average delivery prices and quantities, and agreement on price brackets and additional conditions

###### (a) The meetings held during the first quarter of 1999

- (185) The processors extended the previous year's agreement which dealt specifically with the (maximum) average delivery price of each raw tobacco variety and with quantities and was accompanied by implementation and compliance arrangements, namely tobacco compensation or deliveries and exchanges of information. The discussions between the processors took place at meetings of the Management Committee ("*Junta Directiva*") or at the General Meeting ("*asamblea general*") of their association ANETAB.

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<sup>158</sup> By contrast, it transpires from the description of the agreements with the producer groups given in the FCNT report mentioned in footnote 153 that, for Burley, the processors agreed to pay producers the same advance as for Virginia, namely ESP 35 per kg.

(186) However, the processors had to adapt the matters covered by the agreement, namely (maximum) average prices and quantities, to the new marketing year. This was not without its difficulties. They met at the beginning of the year<sup>159</sup> and decided to hold a further meeting in March (with also Deltafina attending) to discuss tobacco prices and the share-out of quantities for the marketing year 1999/2000. These initial discussions were not successful<sup>160</sup>. From an activity report of Agroexpansión it emerges<sup>161</sup> that:

- the part of the 1998 agreement dealing with quantities covered the period until 15 July 1999;
- Cetarsa agreed to negotiate the 1999 prices provided that the agreement on quantities was extended for 2000;
- Agroexpansión proposed to reach agreement on the 1999 prices before the end of the period during which the cultivation contracts had to be signed and only then to discuss the extension of the agreement on quantities for the following marketing year. In this case, expiry of the agreement on quantities would have to be postponed until 15 July 1999.

(187) In their statements, all the processors acknowledged that the agreement on (maximum) average delivery prices and quantities concluded between them in 1998, together with the tobacco delivery and compensation mechanism and the exchange of information, was extended for the marketing year 1999/2000<sup>162</sup>. Documents copied during the inspections and documents provided with their statements confirm this.

(b) Agreement on price brackets and additional conditions

(188) As indicated above, from 1999 onwards the processors also agreed on the price brackets and additional conditions that they intended to propose to all the producers' representatives. They did so at meetings of ANETAB's Management Committee and at its General Meeting. After adopting their proposal, they forwarded it to the producers' representatives and met with them until an agreement was reached [for the chronology of these negotiations, see recitals (194) to (201)].

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<sup>159</sup> Agroexpansión activity report dated February 1999 (doc. Agroexpansión BNL 58 [doc. 38.238/1556]).

<sup>160</sup> Agroexpansión activity report dated March 1999 (doc. Agroexpansión BNL 57 [doc. 38.238/1555]). The report stated that Deltafina's chairman attended the most recent meeting of ANETAB and that he announced that he would attend future meetings.

<sup>161</sup> Agroexpansión activity report dated April 1999 (doc. Agroexpansión BNL 56 [doc. 38.238/1552]).

<sup>162</sup> Statements by Cetarsa of 15 February 2002, page 10 [doc. 38.238/4234], by WWTE of 15 February 2002, pages 9 and 10 [doc. 38.238/4335-4336], by Agroexpansión of 15 February 2002, pages 24 and 33 [doc. 38.238/3961 and 3970] and by Taes of 18 February 2002, pages 26 and 27 [doc. 38.238/4581-4582].

(c) Implementation of, and compliance with, the "framework" agreement

- (189) The processors introduced the arrangements for monitoring compliance with the agreement on (maximum) average delivery prices and quantities reached the previous year<sup>163</sup>.
- (190) Firstly, after the cultivation contracts had been signed, the processors exchanged information on the quantities of tobacco that each of them undertook to buy under those contracts<sup>164</sup>. Then, at the start of the buying period, the secretary of ANETAB proposed that the members should meet on 12 August 1999 before the scheduled meeting with the producers<sup>165</sup> in order to "*exchange information on progress with the harvest and to align the criteria*"<sup>166</sup>.
- (191) Lastly, documents attached by the processors to their statements give the information that was exchanged between the processors in the course of the harvest, namely information concerning the quantities of tobacco bought by the processors and the average prices paid per kg<sup>167</sup>.
- (192) As for the tobacco transfer and compensation mechanism, documents provided by the processors give the transfers of raw tobacco and the compensation transactions<sup>168</sup>.

1.5.5.2. Contacts between producers' representatives regarding the price brackets and additional conditions

- (193) As from 1999, the agreement between the producers' representatives on the price brackets and additional conditions was reflected in the price schedule proposals for each variety's quality grades that had been drawn up jointly and then sent to the

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<sup>163</sup> See in particular recitals (156) and following and the references in the footnotes.

<sup>164</sup> See docs. Agroexpansión SP 33 to SP 35 [doc. 38.238/1675-1680] and SP 37 and SP 38 [doc. 38.238/1685-1691].

<sup>165</sup> The purpose of the meeting on 12 August 1999 between the producers and the processors was to agree on the starting date for the tobacco-selling period (doc. Agroexpansión SP 26 [doc. 38.238/1659]).

<sup>166</sup> See the fax sent by the secretary of ANETAB to its members on 29 July 1999 (doc. Agroexpansión SP 26 [doc. 38.238/1658]).

<sup>167</sup> See the documents in Annex 23 to the statement by Taes of 18 February 2002 [doc. 38.238/4755-4769] and the documents in Annex 16 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4096-4105].

<sup>168</sup> All the processors provided the same table giving details of the calculation of the adjusted reference tonnage and the differences between the latter and the initial reference tonnage (see in particular Annex 17 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4106-4111], Annex 24 to the statement by Taes of 18 February 2002 [doc. 38.238/4833-4839], Annex 14 to the statement by Cetarsa of 15 February 1992 [doc. 38.238/4309-4310] and Annex 27 to the statement by WWTE of 15 February 2002 [doc. 38.238/4525-4528]). In addition, WWTE and Agroexpansión supplied a table giving the quantities of tobacco sold/bought as transfers between processors (see Annex 27 to the statement by WWTE of 15 February 2002 [doc. 38.238/4525-4528] and Annex 19 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4119]). WWTE also provided a handwritten note giving the quantities of tobacco sold/bought as transfers between processors (see Annex 28 to its statement of 15 February 2002 [doc. 38.238/4529]).

processors. The proposals were also discussed at the meetings that were held with the processors and that eventually resulted in an agreement between the representatives of the two sectors [for the chronology of these negotiations, see recitals (194) to (201)]. As in the previous years, the producers were represented by the three agricultural unions (ASAJA, UPA and COAG) and CCAE and, for the first time, by the two producer group federations, TABARES and ACOTAB belonging to UPA.

#### 1.5.5.3. Negotiations between producers' representatives and processors regarding price brackets and additional conditions

- (194) The contacts between the producers' representatives continued to focus on the price brackets and additional conditions they intended to propose to the processors. They were aware that their contacts on these points had proved fruitless the two previous years. With the change in the CMO for raw tobacco in 1998 and the adjustment of the Community premium, the classification of each variety of raw tobacco into different qualities became more crucial. At a meeting of COSETA on 10 February 1999<sup>169</sup>, the representatives of the processors and the producers that were present discussed at length how to apply the adjusted Community premium and came to the conclusion that they should all use the same price schedule (namely the same classification of raw tobacco by quality grades and the same price brackets by quality grades). As a result, in 1999 the producers' and the processors' representatives reached an agreement on the price brackets and additional conditions which would apply for the different tobacco varieties (recitals (195) to (201)).
- (195) Processors were jointly represented by ANETAB.
- (196) Negotiations initially occurred through exchanges of proposals between the parties<sup>170</sup> and at COSETA meetings<sup>171</sup>.
- (197) An internal Cetarsa report dated 23 June 1999<sup>172</sup> mentioned two meetings that took place between all the producers' representatives and the four processors on 7<sup>173</sup> and

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<sup>169</sup> Minutes of the COSETA meeting on 10 February 1999 (doc. Agroexpansión BNL 20 [doc. 38.238/1470-1475]).

<sup>170</sup> See minutes of various ANETAB's Management Committee meetings and other documents including proposals which were exchanged in the context of the negotiations (doc. Anetab AGB 11 [doc. 38.238/1852]; doc. WWTE Benavente MFS 9, pages 47 to 54 [doc. 38.238/2203-2210]; doc. WWTE Cáceres AGB 10 [doc. 38.238/1851]; doc. WWTE Cáceres AGB 58 [doc. 38.238/2018]; doc. WWTE Benavente MFS 8, pages 44-46 [doc. 38.238/2200-2202]; doc. Federación MLFE III-31 [doc. 38.238/3526-3528] and doc. WWTE Benavente MFS 5, pages 23-26 [doc. 38.238/2179-2182]).

<sup>171</sup> Minutes of COSETA's Management Committee meeting on 25 May 1999, item 4 (doc. WWTE Cáceres AGB 55 [doc. 38.238/2008-2012]) and minutes of COSETA's meeting of 8 June 1999 (doc. Cetarsa MAP 31 [doc. 38.238/716-719].) In 1999 the COSETA members were: the four processors, the three unions (ASAJA, UPA and COAG) and the two producer group federations (TABARES and ACOTAB).

<sup>172</sup> Report by the chairman of the board dated 23 June 1999 (doc. Cetarsa AFG 23 [doc. 38.238/1005-1008]).

<sup>173</sup> The minutes of a meeting of FNCT's Standing Committee of 6 July 1999 mentioned a meeting held on 8 June and not 7 June (doc. Federación PB 4 [doc. 38.238/2849-5 to 2849-10]). Other documents confirmed that the COSETA meeting took place on 8 June [see recital 195 and two documents in Annex 29 to the Agroexpansión statement of 15 February 2002, and in particular a fax dated 28 May 1999 from COSETA's

16<sup>174</sup> June. It also stated that the Agriculture Ministry convened the two sectors to a meeting on 24 June in order to bring their positions closer together<sup>175</sup>. The meeting took place at the Agriculture Ministry in the presence of the producers' representatives, the four processors and the competent official in the Agriculture Ministry's "Contracts" Directorate<sup>176</sup>.

- (198) The participants at that meeting agreed on the terms of the "standard" contract, the quality grades and the price brackets for the different varieties of tobacco and other additional economic conditions such as the minimum price per producer and the minimum average price per producer group for the marketing year 1999/2000<sup>177</sup> [these conditions do not, however, appear in the schedules annexed to the "standard" contract approved that year; see recital (202)].
- (199) The FNCT chairman summarised the marketing year 1999/2000 at FNCT's general meeting on 10 December 1999<sup>178</sup>. Three of his observations should be mentioned here:
- The aim of the joint negotiations on the price schedules was to ensure that all the processors offered the same price per quality grade to all the producers in order that the latter's interests were not harmed by the processors' preference for one or other type or quality of tobacco, and this because a substantial proportion of the Community premium — the variable component — was paid on the basis of the final prices obtained.
  - FNCT obtained from the processors the assurance of a guaranteed minimum price per crop in order that each producer would, at the end of the harvest, receive at least "the Community premium and a little more".
  - The sales conditions agreed with the processors were, generally speaking, complied with when the tobacco was bought. At worst, the producers obtained the

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chairman at the time to the four processors and the producers' representatives and the agenda for the meeting of COSETA on 8 June 1999 [doc. 38.238/4155 and 4198].

<sup>174</sup> See a copy of the agenda for that meeting in Annex 29 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4204].

<sup>175</sup> See the fax sent by the Deputy Director-General at the Agriculture Ministry to Agroexpansión on 21 June 1999 in connection with the meeting of 24 June (see Annex 29 for a copy of the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4205]).

<sup>176</sup> See the list of participants at that meeting in Annex E to the reply by Cetarsa of 15 March 2002 [doc. 38.238/5207-5208].

<sup>177</sup> See the minutes of the meeting of FNCT's Standing Committee on 6 July 1999, fifth item, par. 4 (doc. Federación PB 4 [doc. 38.238/2849-10]). See also doc. Federación MLFE III-15 [doc. 38.238/3462-3464] (fax of 19 August 1999 from FNCT's chairman to EUGROTAB's chairman, which contained the following "(...) le adjunto las clasificaciones y precios de los tabacos, consensuados unánimemente por las Empresas transformadoras y las organizaciones de productores para la cosecha 1999" (underlining added) ["(...) please find attached the tobacco classifications and prices as agreed between the processors and the producer organisations for the 1999 crop"]). See also comments in WWTE's reply to the Statement of Objections pages 14-16 and comments in Agroexpansión's reply to the Statement of Objections page 34.

<sup>178</sup> Doc. 38.238/6745-6747.

same prices as the previous year. This shows, on the one hand, that each producer knows the tobacco it produces and the prices it wishes to obtain for it and, on the other, that, if the producers do not negotiate as a group, they are powerless.

- (200) As for the additional conditions, the specialist press announced that year the conclusion of a joint agreement on the minimum purchase price per tobacco variety, namely ESP 45 per kg for Virginia, ESP 36 per kg for Burley F and ESP 43 per kg for Burley E (given the actual figure, these amounts are, if anything, "average minimum prices per producer" as indicated above, this price does not appear in the schedules annexed to the "standard" contract approved that year)<sup>179</sup>.
- (201) The specialist press also announced the conclusion of an agreement between the two sides on an "*average price*" for Virginia which, for that year, would be 86 pesetas per Kg, namely the average price received by producers in respect of the Virginia crop 1998/1999<sup>180</sup>. According to WWTE and Agroexpansión this amount represented the agreed average minimum price per producer group in respect of the Virginia crop for the year 1999-2000<sup>181</sup>, as referred to in the minutes of the FNCT's Standing Committee of 6 July 1999<sup>182</sup>.

#### 1.5.5.4. Approval of the "standard" contract and signing of the cultivation contracts

- (202) The "standard" contract was negotiated at the meeting held at the Agriculture Ministry on 24 June [see recital (197)]. The Agriculture Ministry then approved the "standard" contract, which was published in the Official Gazette of 30 June 1999 together with, for the first time, the price schedules per quality grade "completed" for Virginia, Burley E, Burley F and Kentucky<sup>183</sup>. These price schedules were the result of the agreement reached that year by the producers and the processors' representatives (see for instance Table 4).

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<sup>179</sup> See Annex 12 to the reply by ANETAB of 18 March 2002 [doc. 38.238/5686].

<sup>180</sup> See Annex 12 to the reply by ANETAB of 18 March 2002 [doc. 38.238/5686] and Annex 25 to the statement of Agroexpansión of 15 February 2002 [doc. 38.238/4134]. See also table under recital (38).

<sup>181</sup> See comments in WWTE's reply to the Statement of Objections pages 14-16 and comments in Agroexpansión's reply to the Statement of Objections page 34. According to the data supplied by the Agriculture Ministry, the final average price paid to producers for the 1999/2000 Virginia crop was 89.62 Pst/Kg (see Table 2 above).

<sup>182</sup> See footnote 177.

<sup>183</sup> *Orden de 26 de junio de 1999 por la que se homologa el contrato-tipo de compraventa de tabaco que regirá durante la campaña 1999/2000*, Official Gazette No 155, 30 June 1999; page 24931 (Annex 16 to the reply by FNCT of 18 March 2002 [doc. 38.238/5852-5857]).

**Table 4 Prices per quality grade for the Virginia variety (1999)<sup>184</sup>**

Category	Sub-category	Qualitative characteristics				Bracket	% spread
		Maturity	Colour	Uniformity and selection	Other		
1	A	Mature	Intense orange	(...)	(...)	120-140	16.7
	B	Mature	Orange	(...)	(...)	90-120	33.3
	C	Mature	Intense lemon	(...)	(...)	80-100	25
	D	Mature	Citron	(...)	(...)	60-80	33.3
2	E	Semi-mature to mature	Orange	(...)	(...)	40-60	50
	F	semi-mature to mature	Lemon	(...)	(...)	20-40	100
3	G	Semi-mature to immature	Lemon or orange	(...)	(...)	10-20	100
	H	semi-mature to immature	Lemon or orange	(...)	(...)	5-10	100

(203) The Commission is in possession of copies of some of the cultivation contracts subsequently concluded between the processors and the producer groups for the different tobacco varieties. In each case, the contracts include an annex corresponding to the annex to the "standard" contract published in the Official Gazette<sup>185</sup>.

#### *1.5.6. 2000 crop*

(204) In 2000 the processors extended the "framework" agreement on (maximum) average delivery prices and quantities, together with the information-exchange and tobacco transfer and compensation mechanisms concluded by them in 1998, subject to the adjustments that were needed in the light of the conditions for the new marketing year [see recitals (208) to (214)]. They also continued to negotiate the price brackets and the additional conditions that they intended to propose to the producers' representatives and that they subsequently negotiated with them [see recital (215)].

(205) For their part, the producers' representatives also agreed on the price brackets and the additional conditions which they then negotiated with the processors [see recital (216)].

(206) The bilateral negotiations between the representatives of both sectors focused on the price brackets for the 2000 crop and the additional conditions [see recital (225) to (232)] and on the price brackets for surplus tobacco in 1999 <sup>186</sup> [see recital (217) to

<sup>184</sup> The schedule was approved by the Agriculture Ministry in 1999 and published in the Official Gazette. The percentage spreads have been added by the Commission for the purposes of these proceedings.

<sup>185</sup> For examples, see docs. WWTE Cáceres AGB 47 [doc. 38.238/1962-1967], AGB 48 [doc. 38.238/1968-1973] and AGB 49 [doc. 38.238/1974-1979].

<sup>186</sup> There was surplus production of raw tobacco during the previous marketing year 1999/2000. The question was very quickly asked as to how these surpluses could be disposed of. The producers also asked ANETAB to discuss the matter (see the minutes of meeting No 16 of ANETAB's Management Committee on 19 January 2000, doc. WWTE Cáceres AGB 1 [doc. 38.238/1839-1840]).

(224)]. Bilateral negotiations for the 2000 crop took place between the representatives of the two sectors and were encouraged by the Agriculture Ministry but failed to produce an agreement (unlike the previous year). Consequently, for the first time since 1994, the representatives of the two sectors did not submit to the Agriculture Ministry a "standard" contract for approval. However, the absence of approval did not prevent the parties concerned from signing the cultivation contracts. The price schedules attached to the examples of the cultivation contracts that are in the Commission's possession are all identical, irrespective of the processor or group concerned. On specific points, the contacts between the representatives of the two sectors resumed during the selling period for raw tobacco at the request of the producers, who demanded a price increase that, however, the processors refused.

- (207) The negotiations on the price brackets for surplus tobacco from the 1999 crop that took place between the representatives of the two sectors also failed to produce an agreement. The proposal by the processors which Deltafina's chairman attempted to influence was rejected by the producer groups.

1.5.6.1. Extension of processors' "framework" agreement on (maximum) average delivery prices and quantities, and agreement on price brackets and additional conditions

(a) Extension and implementation of the "framework" agreement

- (208) In their statements the processors acknowledged that they had extended for the marketing year 2000/2001 the "framework" agreement concluded in 1998<sup>187</sup>. As in the previous year, the processors had, however, to adapt the (maximum) average delivery prices and quantities set out in their agreement to the new marketing year.
- (209) The implementation of the "framework" agreement during the buying period for raw tobacco was not without difficulties. An internal Agroexpansión report dated September 2000 stated that: "*along this month, we held several meetings in ANETAB to reach an agreement on prices for the present campaign. A previous agreement was achieved to maintain the same price as last year and in any case to increase a 5% by far the price of Virginia [see recital (230)]. However, [another processor] fulfilling our contract informed us that the official average price for Virginia this year would be around the 95 Ptas, to which we have answered that this should be the maximum price and that in fact we should be under it*"<sup>188</sup>.
- (210) Another Agroexpansión internal report dated November 2000 referred of Cetarsa's and WWTE's being paying higher prices than agreed and breaching the general policy of rejecting lower grades tobacco.<sup>189</sup>

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<sup>187</sup> See the statements by Agroexpansión of 15 February 2002, page 33 [doc. 38.238/3970-3971], by Cetarsa of 15 February 2002, page 10 [doc. 38.238/4234], by WWTE of 15 February 2002, page 9 [doc. 38.238/4335] and by Taes of 18 February 2002, page 27 [doc. 38.238/4582].

<sup>188</sup> Doc. Agroexpansión RMR 6 [doc. 38.238/1762-1764].

<sup>189</sup> Doc. Agroexpansión RMR 100 [doc. 38.238/1728].

- (211) Documents copied during the inspections carried out by the Commission or attached by the processors to their statements show that the latter applied the information-exchange and tobacco transfer and compensation mechanisms that had been agreed for the first time during the marketing year 1998/99 and extended for the marketing year 2000/2001.
- (212) As regards the machinery for exchanging information<sup>190</sup>, in addition to the information normally communicated during the harvesting period, namely the average buying prices and the actual quantities bought from producers, the processors exchanged information on the actual prices paid to producers<sup>191</sup>. In this way, they were aware of the quantities of tobacco bought by each of them and the average price paid to each producer group<sup>192</sup>.
- (213) As regards the tobacco transfer and compensation mechanism, a schedule attached by WWTE to its statement reveals the details of the affected quantities<sup>193</sup>.
- (214) Accordingly, in spite of a number of difficulties, the "framework" agreement was implemented and complied with in 2000.

(b) Agreement on price brackets and additional conditions

- (215) The processors also agreed on the price brackets per quality grade for each variety of raw tobacco and the additional conditions, in the form of the corresponding minimum average prices per producer group<sup>194</sup>, that they intended to propose to the producers' representatives. On account of the surplus production of raw tobacco the previous year, they negotiated first the price brackets for the surplus 1999 tobacco and then those for raw tobacco from the current harvest. For this purpose, they drew up proposed price schedules which they sent to the producers and held a number of meetings with them [for the chronology of all these contacts and meetings, see recitals (217) to (232)].

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<sup>190</sup> For examples of information exchange, see footnote 139. See also document WWTE Cáceres MPM 12 [doc. 38.238/2133-2134], the Agroexpansión document SP 31 [doc. 38.238/1671] and the Cetarsa documents AFG 54 [doc. 38.238/1216], MAP 52 [doc. 38.238/796-797], CS 12 [doc. 38.238/489-490] and CS 13 [doc. 38.238/491] (for an explanation of these last two documents, see the reply from Cetarsa of 15 March 2002 to Question 15 [doc. 38.238/5064] and the schedules in Annex 12 to the statement by Cetarsa of 15 February 2002 [doc. 38.238/4305-4307]).

<sup>191</sup> See Cetarsa documents CS 12 [doc. 38.238/489-490] and CS 13 [doc. 38.238/491] and the reply by Cetarsa of 15 March 2002 to Question 18 [doc. 38.238/5067-5068].

<sup>192</sup> See the schedule in Annex 23 to the statement by Agroexpansión of 15 February 2002 regarding Virginia [doc. 38.238/4126-4128]. See also Cetarsa documents MAP 44 [doc. 38.238/763-768] and MAP 45 [doc. 38.238/769-771] (schedule giving for each processor and for each producer group the quantities bought and the prices paid during 2000). See also Agroexpansión document CRF 7 [doc. 38.238/1261-1262].

<sup>193</sup> Annex 30 to the statement by WWTE of 15 February 2002 [doc. 38.238/4535-4538]. Agroexpansión provided a schedule giving the quantities of tobacco per variety bought in excess of or below the initial reference tonnage agreed between the processors (see Annex 22 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4124-4125]).

<sup>194</sup> For an explanation of the meaning of "average price" in this context see section 1.5.1.2.3.

#### 1.5.6.2. Contacts between producers' representatives regarding price brackets and the additional conditions

- (216) The contacts between the producers' representatives concerning the price brackets resulted in proposals for price schedules and the additional conditions, in the form of the corresponding minimum average prices per producer group<sup>195</sup>, that were drawn up jointly and then sent to the processors or presented to them at the meetings that took place. As in the case of the processors, the contacts between the producers extended to price brackets for the surplus 1999 tobacco [for the chronology of these negotiations, see recitals (217) to (232)].

#### 1.5.6.3. Negotiations between representatives of the two sectors regarding price brackets and additional conditions

##### (a) Negotiations on the price brackets for the surplus 1999 tobacco

- (217) The negotiations between the representatives of the two sectors on the price brackets for the previous year's surplus raw tobacco began in January 2000 and continued until May.
- (218) The producers were represented by the producer groups themselves and not by the agricultural unions. The unions acted only at an initial stage to ensure that the sales conditions were generally favourable. Faced with the problem of surplus raw tobacco, the producer groups asked ANETAB to discuss the matter<sup>196</sup>.
- (219) An initial meeting between ANETAB and the producers' representatives on the price brackets for the surplus tobacco took place in January 2000. As the Agroexpansión activity report for January explained: "*An agreement has been reached at ANETAB for the purchase of the surplus tobacco. We held a meeting with all the APAs and presented a uniform proposal to buy this surplus tobacco to the same differential price paid to growers during this present campaign. This proposal was not accepted by the growers and it seems that their intention is to process the surplus and offer it for purchase to the holdings that work in Spain in first place*"<sup>197</sup>.
- (220) The second meeting took place on 1 February 2000<sup>198</sup>. Each sector put forward its point of view. However, the meeting closed without an agreement being reached. The participants agreed to meet again.

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<sup>195</sup> For an explanation of the meaning of "average price" in this context see section 1.5.1.2.3.

<sup>196</sup> See the minutes of meeting No 16 of ANETAB's Management Committee of 19 January 2000 (doc. WWTE Cáceres AGB 1 [38.238/1839-1840], which contained the following: "(...) *por parte de todas las Organizaciones de productores [...] se ha solicitado a ANETAB un encuentro con objeto de hablar sobre los excedentes de tabaco producidos en la campaña 99 y sus posibles salidas comerciales (...)*" ["(...) all the producer groups (...) proposed to ANETAB that it should meet to discuss the surplus tobacco produced during the marketing year 1999 and possible commercial outlets (...)].

<sup>197</sup> Doc. Agroexpansión BNL 52 [doc. 38.238/1540].

<sup>198</sup> See the report by Cetarsa's chairman of 17 February 2000. It mentioned this meeting, which was attended by "*la totalidad de las agrupaciones de productores*" ["all the producer groups"] (doc. Cetarsa AFG 26 [doc. 38.238/1018-1021]).

- (221) Ahead of an ANETAB meeting to be held at the end of February<sup>199</sup>, Deltafina's chairman sent a fax to Cetarsa, Agroexpansión and WWTE on 15 February, with copies to their parent companies Dimon and SCC with a view to advising them in the matter and even influencing the Spanish processors as to the way in which this surplus tobacco was to be sold<sup>200</sup>. He took the view that the processors should negotiate buying the surpluses at a price that was not "too high".
- (222) The processors reached an agreement on the buying price for the tobacco surpluses at the ANETAB meeting on 21 March 2000<sup>201</sup>. According to Taes, this agreement was also in the interests of Deltafina, which wanted to buy an additional amount of processed tobacco<sup>202</sup>.
- (223) An Agroexpansión internal report dated April 2000 described in greater detail the buying conditions for the surplus tobacco as agreed between the processors<sup>203</sup>.
- (224) On 28 March 2000 ANETAB and the producer groups held a final meeting to discuss the price schedules. However, the meeting closed without an agreement being reached. The processors indicated that they maintained their price proposal for those individual producers that would be interested<sup>204</sup>.
- (b) Negotiations on the price brackets and additional conditions from the current harvest
- (225) The negotiations between the representatives of the two sectors on the price brackets and the additional conditions for raw tobacco from the current crop took place during May.
- (226) By fax of 16 May 2000, the Agriculture Ministry invited the processors and producers to a meeting in its offices on 23 May 2000 to discuss the "standard" contract for the marketing year 2000/01<sup>205</sup>.

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<sup>199</sup> On 23 February 2000 (see the minutes of the meeting, doc. WWTE Cáceres AGB 31 [doc. 38.238/1884]).

<sup>200</sup> Doc. Agroexpansión MN 2 [doc. 38.238/1781-1783].

<sup>201</sup> See the minutes of meeting No 18 of ANETAB's Management Committee of 21 March 2000 (doc. WWTE Cáceres AGB 30 [doc. 38.238/1882-1883]).

<sup>202</sup> See page 28 of the statement by Taes of 18 February 2002 [doc. 38.238/4583]: "(...) *acuerdo en el que también estaba interesada DELTAFINA ya que le interesaba comprar una cuota extra de tabaco procesado*" ["agreement in which Deltafina was also interested since it wanted to buy an extra quota of processed tobacco"].

<sup>203</sup> Annex 33 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4221-4222].

<sup>204</sup> See the report by Cetarsa's chairman of 30 March 2000 (doc. Cetarsa AFG 27, par. 4 and 6 [doc. 38.238/1022-1026]). The report states that "*una representación de todas las APAs*" ["a representation of all the APAs"] attended that meeting.

<sup>205</sup> The Commission is in possession of the invitation sent by the Agriculture Ministry to Agroexpansión (see Annex 32 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4217]).

- (227) To prepare for that meeting, the processors met on 17 May 2000 to discuss the method of classifying the qualities of the different tobacco varieties and the prices. They also prepared draft price schedules per quality grade for each tobacco variety for the marketing year 2000/01<sup>206</sup>. On 23 May 2000, before the meeting to be held at the Agriculture Ministry in the afternoon, the processors met at the premises of ANETAB to prepare the "standard" contract and the price schedules for each quality grade<sup>207</sup>.
- (228) On the afternoon of 23 May 2000 the meeting organised by the Agriculture Ministry took place with the participation of the four processors, the three agricultural unions, CCAE and the two producer group federations TABARES and ACOTAB (belonging to UPA), as well as the Deputy Director-General for Inter-Trade and Contractual Relationships at the Ministry, who chaired the meeting<sup>208</sup>.
- (229) A report by Cetarsa's chairman dated 25 May 2000 described that meeting<sup>209</sup>. The participants discussed the wording of the "standard" contract and the annexes (namely the price schedules per quality grade). For want of an agreement between the participants on the annexes to the contract, they decided to meet again on 26 May.
- (230) The minutes of a meeting of FNCT's Executive Committee described this second meeting in the following terms<sup>210</sup>: a) an agreement was reached to maintain prices for Burley and Havana at the same level as the previous year; b) however, still according to those minutes, in the case of Virginia, an increase of 5% on the average price<sup>211</sup> obtained during the previous marketing year was proposed but the schedules for each quality grade prepared that very morning by ANETAB did not satisfy the agricultural

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<sup>206</sup> See a Cetarsa report dated 18 May 2000 and the attached price schedules (doc. Cetarsa MAP 46 [doc. 38.238/772-774]).

<sup>207</sup> Minutes of meeting No 20 of ANETAB's Management Committee on 23 May 2000 (doc. ANETAB AGB 28, par. 2 [doc. 38.238/1879-1880]): "*Ante la convocatoria realizada por el MAPA, con el objeto de consensuar entre el sector productor y el transformador un Contrato Tipo de Compra-Venta de Tabaco para la campaña 2000/2001, se procede a la elaboración de un borrador de dicho contrato además de sus correspondientes Tablas por Grado cualitativo, como propuesta del sector transformador para su posterior negociación*" ["In view of the invitation issued by the Agriculture Ministry so that the production sector and the processing sector could agree on a 'standard' contract for the marketing year 2000/2001, the meeting prepared a draft 'standard' contract and schedules per quality grade that would serve as the processing sector's proposal for its subsequent negotiations"].

<sup>208</sup> See a list of the participants in Annex 14 to ANETAB's reply of 18 March 2002 [doc. 38.238/5691-5692].

<sup>209</sup> Report by Cetarsa's chairman to the board dated 25 May 2000 (doc. Cetarsa AFG 28 [doc. 38.238/1027-1030]).

<sup>210</sup> See the minutes of the meeting of FNCT's Executive Committee on 5 June 2000 (doc. FNCT PB 2 [doc. 38.238/2849-1 to 2849-4]).

<sup>211</sup> namely the minimum average price per producer group, for an explanation of the meaning of "average price" in this context see recital 1.5.1.2.3.

unions or the producer groups and, at the beginning of the afternoon, the meeting closed without an agreement (...) without agreeing on the "standard" contract"<sup>212</sup>.

- (231) The Agroexpansión activity report dated May 2000<sup>213</sup> and the Agroexpansión internal report dated 7 June 2000 indicated, however, that the two sectors failed to reach an agreement on the prices for any variety of tobacco for the current marketing year. To be more precise, the latter report stated<sup>214</sup> that there was no agreement on approving the 'standard' contract for the marketing year 2000 or on prices. The report further explains that during the price negotiations, ANETAB offered a 5% increase for the best qualities of Flue-cured tobacco and the same prices as 1999 for Burley tobacco. However, the average prices sought for by representatives of producers were 110 pts/Kg for the Flue cured variety, 82 pts/kg for the Burley E variety and 69 pts/kg for the Burley F variety.
- (232) Despite the consensus that seemed to have been reached as to the price brackets for Burley and Havana, the representatives of the two sectors did not in the end agree on the price schedules per quality grade for any of the tobacco varieties.

#### 1.5.6.4. Non-approval of the "standard" contract and signing of the cultivation contracts

- (233) For want of agreement on the price brackets, the processors and the producers' representatives, for the first time since 1994, did not submit to the Agriculture Ministry a "standard" contract for approval<sup>215</sup>.
- (234) The producer groups subsequently concluded the specific cultivation contracts with each processor<sup>216</sup>. From the examples of cultivation contracts in the Commission's possession that, for a given variety of tobacco, the price brackets given in the schedules attached to the contracts were the same in all cases, regardless of the processor or the producer group that signed the contract.

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<sup>212</sup> The Agroexpansión internal report of 7 June 2000 confirmed that ANETAB proposed a 5% increase for the better qualities of flue-cured tobacco and the same prices as the previous year for Burley (doc. Agroexpansión BNL 47 [doc. 38.238/1532-1534]).

<sup>213</sup> Doc. Agroexpansión BNL 50 [doc. 38.238/1537-1538].

<sup>214</sup> Doc. Agroexpansión BNL 47 [doc. 38.238/1532-1534]. The document Federación PB 9 [doc. 38.238/2885-2886] also indicated that there was no agreement between the two sectors.

<sup>215</sup> See the following documents: doc. WWTE Cáceres AGB 22 [doc. 38.238/1868] and doc. Agroexpansión SP 30 [doc. 38.238/1670].

<sup>216</sup> For examples of cultivation contracts concluded by WWTE, see docs. 38.238/2096-2105, 38.238/2261-2269 and 38.238/3306-3315; for those concluded by Agroexpansión, see doc. 38.238/3277-3293; for those concluded by Cetarsa, see doc. 38.238/3294-3305 and for those concluded by Taes see doc. 38.238/3253-3276.

#### 1.5.6.5. Resumption of negotiations between representatives of the two sectors during the selling period for raw tobacco

(235) During the selling period for raw tobacco, the producers asked the processors for an increase in the tobacco price<sup>217</sup>. At the meeting on 25 October 2000 at Naval Moral de la Mata, which was attended by the representatives of the two sectors<sup>218</sup>, the processors turned down the producers' request<sup>219</sup>.

#### 1.5.7. 2001 crop

(236) In 2001 the processors extended the "framework" agreement on maximum average prices and quantities, together with the information-exchange and tobacco transfer and compensation mechanisms, which they had concluded in 1998, subject to the changes needed to reflect the conditions for the new marketing year [see recital (240) to (245)]. They also continued to discuss the price brackets per quality grade for each variety of raw tobacco and the additional conditions that they subsequently negotiated with the producers' representatives [see recitals (246) to (250)]. According to the processors, they put an end to their collusive conduct on 3 October 2001, the day when the Commission carried out its inspections.

(237) For their part, the producers' representatives also discussed the price brackets and the additional conditions which they then negotiated with the processors [see recital (251)].

(238) Representatives from the Agriculture Ministry took part in the negotiations between the processors and the producers' representatives on the price brackets. [recitals (252) to (256)].

(239) However, the negotiations on the price schedules between the representatives of the two sectors did not produce an agreement. Moreover, the parties concerned did not submit the "standard" contract to the Agriculture Ministry for approval. The processors and producer groups did, though, subsequently conclude the cultivation contracts [recitals (257) to (261)].

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<sup>217</sup> See the e-mail from the chairman of Agroexpansión to the Vice-President of Dimon responsible for the group's activities in Europe informing him of a meeting at ANETAB to discuss the increase in prices that the producers had asked for during the buying period and that the processors had finally turned down (doc. Agroexpansión BNL 31 [doc. 38.238/1499]).

<sup>218</sup> See in this connection the documents in Annex 32 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4219]. The following producer groups attended that meeting: COTABACO, GRUTABA, SAT Asociaciones agrupadas TAB, SAT Tabacos de Talayuela, IBERTABACO and Sociedad Cooperativa de tabaco de Cáceres.

<sup>219</sup> Report by Cetarsa's chairman to the board on 26 October 2000, par. 3 (doc. Cetarsa AFG 29 [doc. 38.238/1031-1034]). In the same connection, doc. Agroexpansión SP 7 [doc. 38.238/1588] stated: "*As informed we had a meeting pending in ANETAB to discuss the raise of prices for this campaign requested by the OPAs and APAs. On this matter, all the companies have agreed not to attend any price increase. During the meeting held with all the APAs and OPAs of the sector, the four companies maintained their position and informed them clearly that we did not accept the raise of 20% requested*" (underlining added). Lastly, see the documents in Annex 28 to the statement by Agroexpansión [doc. 38.238/4149-4152].

1.5.7.1. Extension of processors' "framework" agreement on maximum average delivery prices and quantities and the agreement on price brackets and the additional conditions

(a) Extension of the "framework" agreement

- (240) In their statements the processors admitted that they had extended the "framework" agreement concluded by them in 1998 for the marketing year 2001/02 until 3 October 2001, when the Commission carried out its inspections<sup>220</sup>.
- (241) In accordance with what had been agreed in 1998, once the cultivation contracts had been signed, the processors exchanged information on the quantities of tobacco that each of them had undertaken to buy from the groups<sup>221</sup>.
- (242) Documents copied during the inspection or attached by the processors to their statements show that the latter applied the tobacco transfer and compensation mechanisms agreed between them.
- (243) As regards tobacco transfers and compensation, WWTE and Agroexpansión provided tables calculating the initial reference tonnage and the adjusted reference tonnage of each of the processors on the basis of the tobacco quantities bought by each of them under the cultivation contracts<sup>222</sup>.
- (244) However, the Commission does not possess any examples of information being exchanged during the harvesting period.
- (245) At a meeting of the Market and Quality Group of the Maison du tabac in Brussels on 24 September 2001, the chairman stated: ["Brussels does not want there to be any agreement between the processors on prices. We handled the changes badly and will pay the consequences."] <sup>223</sup>.

(b) The agreement on price brackets and the additional conditions

- (246) The technical experts of the four processors met on 2 April 2001<sup>224</sup>. According to the statements by WWTE, the meetings of the technical experts that took place before the signing of the cultivation contracts were intended to prepare the meetings

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<sup>220</sup> See the statements by Agroexpansión of 15 February 2002, page 35 [doc. 38.238/3972], by Cetarsa of 15 February 2002, page 10 [doc. 38.238/4234], by WWTE of 15 February 2002, pages 9 and 13 [doc. 38.238/4335 and 4338-4339] and by Taes of 18 February 2002, page 30 [doc. 38.238/4585].

<sup>221</sup> See doc. Cetarsa AFG 56 [doc. 38.238/1218] and the reply by Agroexpansión of 18 March 2002 to Questions 9 and 10 [doc. 38.238/4869-4903].

<sup>222</sup> See the table in Annex 35 to the statement by WWTE of 15 February 2002 (analysis of the "*contratación*" for the marketing year 2001/02) [doc. 38.238/4552-4553] and the tables in Annex 18 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4112-4114].

<sup>223</sup> Doc. Federación MPM I-11 [doc. 38.238/3219-3225].

<sup>224</sup> See a memo from that meeting (doc. WWTE AGB 70 [doc. 38.238/2042-2043] and doc. Cetarsa CS 11 [doc. 38.238/486-488]).

of the processing firms' chairmen at which the price brackets and the quantities that each of them was able to undertake to buy from the producers would be agreed<sup>225</sup>.

- (247) A memo copied at WWTE's and Cetarsa's premises notes the following discussions that took place at the meeting of the technical experts on 2 April 2001<sup>226</sup>. Among other things, the memo clearly states that a) tables were not to be touched, as any change would be interpreted as a price increase; b) modulation should be comprised between plus and minus ESP 25 compared with the average price for Virginia and ESP 20 for Burley, in an effort to penalise lower-quality crops; c) volumes should be adjusted through the referral of processors between producers in order to comply with the agreed quantities and d) it would be ensured that producers wishing to change processing firm be refused to do so.
- (248) Representatives of each of the processors met on 18 April 2001 to decide on the strategy for negotiating the buying conditions for raw tobacco with the producer representatives<sup>227</sup>. They proposed a single meeting with the producers on 21 May. They deemed it necessary to prepare two price schedules for Virginia, the first proposing a 4% price increase compared with the previous crop and the second proposing an 8% increase. As regards Burley E and F, the processors decided to present the same schedules as for the previous year. Lastly, they discussed the possibility of exchanging information on the previous crop and, in particular, the prices, quotas and quantities<sup>228</sup>.
- (249) On 8 May 2001, at a meeting of ANETAB's Management Committee, the processors discussed the price brackets given in the price schedules per quality grade prepared by each member's team of technical experts<sup>229</sup>.
- (250) The processors subsequently met the producer representatives to discuss the price brackets and the additional conditions [see recitals (252) to (256)].

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<sup>225</sup> See the reply by WWTE of 15 February 2002, Question 4 [doc. 38.238/5292-5293].

<sup>226</sup> Doc. WWTE AGB 70 [doc. 38.238/2042-2043] and doc. Cetarsa CS 11 [doc. 38.238/486-488].

<sup>227</sup> See doc. Agroexpansión SP 24 [doc. 38.238/1639-1643].

<sup>228</sup> See memos concerning that meeting and price schedules per quality grade for each variety annexed to Agroexpansión SP 24 [doc. 38.238/1639-1643].

<sup>229</sup> See the minutes of meeting No 23 of ANETAB's Management Committee on 8 May 2001 (doc. ATB AGB 25 [doc. 38.238/1873-1874]). The Agroexpansión chairman informed the Vice-President of Dimon responsible for the group's activities in Europe of the meeting and of its purpose, namely, to prepare for the future discussions on price brackets with the producer representatives (doc. Agroexpansión SP 5 [doc. 38.238/1585]).

#### 1.5.7.2. Contacts between producer representatives regarding price brackets and the additional conditions

(251) The producer representatives discussed the "standard" contract and prices for the marketing year 2001/02 at a meeting on 23 April 2001<sup>230</sup>. As of April FNCT (ASAJA's sectoral branch) participated in the price negotiations with all the producer representatives.

#### 1.5.7.3. Negotiations between representatives of the two sectors regarding price brackets and the additional conditions.

(252) On 27 April and 16 and 17 May 2001 the processors and the producer representatives met to discuss the wording of the "standard" contract and prices for the current marketing year<sup>231</sup>. At the meeting on 16 May ANETAB proposed attaching to the "standard" contract a schedule of price brackets that would take account of the chlorine content of Burley tobacco but the producer representatives refused even to discuss it<sup>232</sup>. The meeting on 17 May was organised by the Agriculture Ministry and was held in its offices<sup>233</sup>. The participants agreed on the wording of the "standard" contract<sup>234</sup> but not on the price schedules<sup>235</sup>. They agreed to seek approval for the "standard" contract from the Agriculture Ministry provided that agreement was also reached on the price brackets specified in the schedules.

(253) The negotiations on the price brackets took place at a meeting on 21 May at the premises of Cetarsa in Navalmoral de la Mata. FNCT described this meeting in a letter to its members<sup>236</sup>. The processors first presented their offer which consisted in a price

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<sup>230</sup> See the list of FNCT activities since February 2001 in doc. Federación MPM I.2 [doc. 38.238/3145-3146], which mentions a meeting on 23 April: "*Reunión Representantes Productores para hacer Propuestas de Contrato-Tipo y Tabla de precios- Talayuela*" ["producer representatives meeting to make proposals on 'standard' contract and price schedules - Talayuela"].

<sup>231</sup> See the list of FNCT activities since February 2001 in doc. Federación MPM I.2 [doc. 38.238/3145-3146]. See also the report by Cetarsa's chairman to the board of 24 May 2001 in doc. Cetarsa AFG 35 [doc. 38.238/1062-1066].

<sup>232</sup> Doc. Federation MPM I-8 (doc. 38.238/3199).

<sup>233</sup> See the invitation sent by the Director-General of the Agriculture Ministry to Cetarsa's chairman on 11 May 2001 and the list of participants at that meeting in Annex G to the reply by Cetarsa of 15 March 2002 [doc. 38.238/5217-5219] (the four processors and the producer representatives that attended the meeting on 23 April [recital (251)]).

<sup>234</sup> Generally speaking, the contract conditions for the marketing year 2001/02 were the same as for the previous marketing year, except for a number of minor changes concerning the payment deadline and the "seeds and plants" clause (see the report by Agroexpansión's Fields and Purchases Department dated May 2001 (doc. Agroexpansión BNL 41 [doc. 38.238/1520-1523])).

<sup>235</sup> See the report by Cetarsa's chairman to the board of 24 May 2001, par. 4 [doc. 38.238/1065].

<sup>236</sup> See doc. Federación MPM I.4 [doc. 38.238/3149-3150].

increase for Virginia of 5%<sup>237</sup> for the four best qualities and in retention of the previous year's price for Burley.

- (254) In turn, the producer representatives proposed an average price of ESP 135 per kg for Virginia, ESP 115 per kg for Burley E, ESP 100 per kg for Burley F and Havana, and ESP 175 per kg for Kentucky and then suggested that, once the average price had been agreed<sup>238</sup>, the corresponding schedules could be drawn up<sup>239</sup>.
- (255) According to FNCT<sup>240</sup>, the processors replied that their (non-negotiable) offer was for an increase of 5% in the price of Virginia and for retention of the same price schedules for Burley, Havana and Kentucky tobacco. Under the circumstances, the meeting closed without agreement being reached. Nevertheless, the representatives of the two sectors set the date of 30 May for the signing of the cultivation contracts<sup>241</sup>.
- (256) By e-mail dated 29 May 2001, FNCT sent to the four processors and to certain producer groups the "standard" contract as negotiated between the two sectors and the price schedules.<sup>242</sup> Since the two sectors have not reached agreement on the prices for each quality grade, the attached schedule included (at the Agriculture Ministry's suggestion) price brackets that corresponded to the minimum price proposed by the processors and to the maximum price proposed by the producers. .

#### 1.5.7.4. Non-approval of the "standard" contract and signing of the cultivation contracts

- (257) As in the previous year, since no agreement had been reached on the price brackets, the representatives of the two sectors did not present a "standard" contract to the Agriculture Ministry for approval.
- (258) According to an internal Agroexpansión report<sup>243</sup>, the processors and producer groups did, however, sign the cultivation contracts on 30 and 31 May 2001. To these contracts were annexed the price schedules per quality grade as proposed by FNCT in its e-mail of 29 May [see recital (256)]<sup>244</sup>. The processors did though jointly sign a statement

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<sup>237</sup> FNCT mentions a 5% increase, whereas the processors intended to propose a 4% increase[see recital (248)].

<sup>238</sup> namely the minimum average price per producer group, for an explanation of the meaning of "average price" in this context see recital(82).

<sup>239</sup> The producers' proposal was for an increase of some 40% for flue-cured tobacco and 20% for Burley E and Burley F (see doc. Agroexpansión BNL 41[doc. 38.238/1520-1523]).

<sup>240</sup> See doc. Federación MPM I.8 [doc. 38.238/3199-3208]. This information is also confirmed by Cetarsa [see the report by Cetarsa's chairman to the board on 24 May 2001, par. 5, doc. 38.238/1065]

<sup>241</sup> For a more detailed description of the negotiations between the two sectors, see doc. Agroexpansión BNL 41 [doc. 38.238/1520-1523].

<sup>242</sup> Doc. Federación CRF II-5 [doc. 38.238/3082-3094].

<sup>243</sup> See doc. Agroexpansión BNL 41 [doc. 38.238/1520-1523].

<sup>244</sup> For a draft cultivation contract for the marketing year 2001/02, together with price schedules, see doc. Agroexpansión SP 26 [doc. 38.238/1645-1651] and doc. WWTE Cáceres MPM 1 [doc. 38.238/2691-2697].

dated 30 May 2001 to the effect that the signing of the cultivation contracts did not constitute agreement on the price schedules per quality grade annexed to them <sup>245</sup>.

- (259) In June a representative of the Grenada producer group met the Agriculture Minister and representatives of the local and regional authorities<sup>246</sup>. Cetarsa's chairman was also present. According to the description of the meeting given by the chairman of the Grenada producer group, the Minister declared that there was no alternative but imposing a price schedule.
- (260) On 10 August 2001 the representatives of the two sectors met to agree on the date for the start of the harvest<sup>247</sup>.
- (261) The harvest took place as normal, except for a number of problems with the producers belonging to the Ibertabaco group, who asked the processors (without success) for a fresh round of price negotiations<sup>248</sup>.

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For examples of cultivation contracts signed between WWTE and producer groups, see docs. WWTE Cáceres MPM 2 [38.238/2070-2076], MPM 3 [38.238/2077-2082], MPM 4 [38.238/2083-2889] and MPM 5 [38.238/2090-2095].

<sup>245</sup> Doc. WWTE Cáceres MPM 1 [doc. 38.238/2064-2069].

<sup>246</sup> This meeting was described at the meeting of FNCT's Executive Committee on 21 June 2001 [doc. 38.238/6750].

<sup>247</sup> See doc. Cetarsa MAP 22 [doc. 38.238/699-700].

<sup>248</sup> See the fields and buying report of Agroexpansión of October 2001 (Annex 26 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4142-4145]) and the press articles in Annex 1 to the statement by Taes of 18 February 2002 (published in *Región Digital* on 24 September 2001) [doc. 38.238/4589-4591] and in Annex 36 to the statement by WWTE of 15 February 2002 (published in *Campo* in October 2001) [doc. 38.238/4554].

## 2. LEGAL ASSESSMENT

### 2.1. Infringements of Article 81(1) of the Treaty

(262) Article 81(1) of the Treaty stipulates: "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market and in particular those which [...] directly or indirectly fix purchase or selling prices or any other trading conditions [...] limit or control production, markets, technical development, or investment; [...] share markets or sources of supply; [...]."

#### 2.1.1. *Undertakings and associations of undertakings*

(263) The four raw tobacco processors in Spain and Deltafina are undertakings within the meaning of Article 81(1) of the Treaty.

(264) The three agricultural unions (ASAJA, UPA and COAG) and the Confederation of Agricultural Cooperatives (CCAE) (acting directly or through their sectoral branches) are also associations of undertakings or associations of associations of undertakings within the meaning of Article 81(1) of the Treaty<sup>249</sup>.

#### 2.1.2. *Agreements between undertakings, decisions by associations of undertakings and concerted practices*

(265) An *agreement* restricting competition in the sense of Article 81(1) of the Treaty can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The agreement may be express or implicit in the behaviour of the parties. Furthermore, it is not necessary, in order for there to be an infringement of Article 81(1) of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of agreement in Article 81(1) of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.

(266) In its judgment of 20 April 1999 in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission (PVC II)*,<sup>250</sup> the Court of First Instance stated that "it is well established in the case law that for there to be an agreement within the meaning of Article [81(1) EC] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way".

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<sup>249</sup> See Case 71/74 *FRUBO* [1975] ECR, p.563. See also Opinion of Advocate-General Lenz in Case C-415/93, *URBSF v Bosman*, [1995] ECR I-4921, at par.256.

<sup>250</sup> [1999] ECR II 931 at par. 715.

- (267) The object of the Treaty in introducing in Article 81 (1) of the Treaty the concept of “*concerted practice*” alongside that of “*agreements between undertakings*”, is to bring within the prohibition of that Article a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitute practical cooperation between them for the risks of competition.<sup>251</sup>
- (268) The criteria of co-ordination and co-operation laid down by the case law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.<sup>252</sup>
- (269) Moreover, it is established case law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81(1) of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that Article.<sup>253</sup>
- (270) In the case of a complex infringement of long duration, it is not necessary for the Commission to characterise the conduct as exclusively one or other of those forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make any such distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while considered in isolation some of its manifestations could accurately be described as one rather than the other. It would, however, be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several discrete forms of infringement.
- (271) In its *PVC II* judgment<sup>254</sup>, the Court of First Instance stated that “[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify

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<sup>251</sup> Case 48/69, *Imperial Chemical Industries v Commission* [1972] ECR 619 at par.64.

<sup>252</sup> Joined Cases 40-48/73, etc. *Suiker Unie and others v Commission* [1975] ECR 1663 at 173.

<sup>253</sup> See, in this sense, the judgments of the Court of First Instance in Cases T-147/89, T-148/89 and T-151/89, *Société Métallurgique de Normandie v Commission*, *Trefilunion v Commission* and *Société des treillis et panneaux soudés v Commission*, respectively, [1995] ECR II-1057, at par.72.

<sup>254</sup> Cited above, at par. 696.

*the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81 EC] of the Treaty”.*

- (272) An agreement for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract under private law and is capable of extending to the continuous process of collusion in which undertakings may engage over time. Moreover, in the case of a complex cartel of long duration, the term “agreement” can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose.
- (273) As the Court of Justice, upholding the judgment of the Court of First Instance, has pointed out in Case C-49/92P *Commission v Anic Partecipazioni SpA*,<sup>255</sup> it follows from the express terms of Article 81(1) of the EC Treaty that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.

### *2.1.3. Summary of the infringements in the case at issue*

- (274) The undertakings, associations of undertakings or associations of associations of undertakings that took part in the infringement at issue here are the following:
- on the one hand, the four raw tobacco processing firms: Cetarsa, Agroexpansión, WWTE, Taes (collectively referred to as "the processors") and Deltafina;
  - on the other hand, the three agricultural unions (ASAJA, UPA and COAG) and the Confederation of Agricultural Cooperatives (CCAE), acting either directly or through their sectoral branches (collectively referred to as "the producers' representatives").
- (275) The present case concerns two infringements of Article 81(1) of the Treaty.
- (276) First, during the period 1996-2001 the processors and Deltafina concluded agreements between themselves and/or participated in a concerted practice designed essentially to fix each year the (maximum) average delivery price of each variety of raw tobacco (all qualities) and to share out the quantities of each variety of raw tobacco to be bought. For the last three years (1999-2001), they also agreed among themselves price brackets per quality grade of each variety of raw tobacco and additional conditions<sup>256</sup>. Taken together, these agreements and/or concerted practices constitute a single and continuous infringement.
- (277) Second, during the period 1996-2001 the producer representatives concluded agreements among themselves and/or participated in a concerted practice designed essentially to fix each year the price brackets per quality grade of each variety of raw tobacco and the additional conditions that would apply. Taken together, these agreements and/or concerted practices constitute a single and continuous infringement.

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<sup>255</sup> [1999] ECR I-4125, at par.81.

<sup>256</sup> See, for a definition of additional conditions, section 1.5.1.2.3

#### 2.1.4. *Conduct of processors restraining competition*

- (278) Between 1996 and 2001 the processors and Deltafina concluded among themselves each year agreements and/or participated in concerted practices relating primarily to the (maximum) average delivery price of each variety of raw tobacco (all qualities) and the share-out of the quantities of tobacco to be bought by each processor.
- (279) These agreements and/or concerted practices took place every year between at least 1996 and October 2001. A distinction should, however, be made between the period prior to 1998 and that after 1998: in 1996 and 1997 the processors and Deltafina concluded agreements<sup>257</sup> that were not, however, complied with when the final selling transactions involving the raw tobacco took place. By contrast, in 1998 they concluded a "framework" agreement that also included arrangements for ensuring the implementation of and compliance with the restrictive practice for prices and quantities, namely an exchange of information and a tobacco transfer and compensation mechanism. They abided by the framework agreement when the final selling transactions involving the raw tobacco took place and even extended it each year until October 2001.
- (280) Between 1999 and October 2001 the processors also agreed among themselves price brackets per quality grade of each variety of raw tobacco and, as an adjunct, additional conditions.

##### 2.1.4.1. Nature of the conduct in question

###### *(a) Between 1996 and 1997*

- (281) In the first few months of 1996 and 1997 the processors and Deltafina met together and had a number of contacts with one another that resulted in the conclusion of agreements concerning primarily the (maximum) average delivery price for each variety of tobacco (all qualities) and the quantities of raw tobacco to be bought in each of those harvests [see recitals (91) to (99) and recitals (116) to (122)]. The Commission considers that these agreements constitute agreements between undertakings within the meaning of Article 81(1) of the Treaty.
- (282) In 1996 the discussions between the processors and Deltafina on the share-out of the quantities to be bought simply gave rise to a concerted practice in so far as, without reaching an agreement, the processors did, however, disclose the conduct they planned to adopt on the market. Under the circumstances, in accordance with the case law of the Court of Justice, "[...] *subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the [processors] participating in concerting arrangements and remaining active on the market [as in the case of the four Spanish processors] take account of the information exchanged*

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<sup>257</sup> Or a concerted practice as regards the discussions on the share-out of the quantities of raw tobacco to be bought in 1996.

*with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period*<sup>258</sup>.

- (283) During the buying period for raw tobacco (mainly August-December) the processors and Deltafina continued their meetings or written contacts (involving the exchange of information on the average prices paid by each of them and on the quantities bought) in order to make it easier for them to implement and abide by the agreements concluded at the beginning of the year [see recitals (109) and (110) for 1996 and recitals (133) to (143) for 1997].
- (284) The agreements concluded at the beginning of each of those years were not, however, complied with when the raw tobacco was bought as it results from the buying conditions offered by the processors to the producers [see recitals (102) to (105) for 1996 and recitals (124) to (130) for 1997]. The average prices of each tobacco variety (all qualities) continued to rise [see the table in recital (38)] and the quantities bought by each of the processors varied. Those agreements nevertheless constitute agreements between undertakings within the meaning of Article 81(1) of the Treaty.

*(b) As from 1998*

- (285) As was stated in recital (279), in the first few months of 1998 the processors and Deltafina adopted the basic principles of a "framework" agreement that would lead to the cartelisation of raw tobacco purchases in Spain.
- (286) The experience of the previous two years had shown that without an agreement on quantities, the processors would continue to compete among themselves by buying more raw tobacco, and purchase prices would consequently rise. In addition, the lack of any arrangements for guaranteeing implementation of or compliance with the restrictive practice explains in part the failure of these initial agreements.
- (287) The processors rectified this by concluding at a series of meetings at the beginning of 1998 a "framework" agreement dealing specifically with the (maximum) average delivery price of each variety of raw tobacco (all qualities) and the volume of raw tobacco per variety that each processor could undertake to buy from the producers, initially under the cultivation contracts ("quantities contracted") and then when the actual buying of the raw tobacco took place ("quantities bought"). This agreement also provided for an exchange of information and a tobacco transfer and compensation mechanism. Together, they ensured that the agreement was implemented and complied with. The exchange of information on the quantities of raw tobacco bought by each of them made it possible to determine the quantities to be bought by each of them the following year [for the details of this agreement, see recitals (156) to (167)].

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<sup>258</sup> Cases C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at par. 121, and C-199/92 *Hüls v Commission* [1999] ECR I-4287, at par. 162; more recently, Case T-9/99 *HFB Holding and Others v Commission* [2002] ECR II-1487, at par. 216.

- (288) Each of the processors acknowledged the existence of this "framework" agreement in its statements to the Commission<sup>259</sup>. Each also acknowledged that the agreement, which had been concluded during the 1998 crop, had been extended each year until 3 October 2001 (date of the Commission inspections)<sup>260</sup>.
- (289) The Commission considers that the "framework" agreement concluded in 1998 and extended each year until 2001 constitutes an agreement between undertakings within the meaning of Article 81(1) of the Treaty.

*(c) As from 1999*

- (290) As from 1999 and until at least October 2001 the processors agreed on the price brackets per quality grade that they intended to propose to the producer representatives and other additional conditions. They prepared at ANETAB meetings proposals for price schedules that were subsequently sent to the producer representatives with a view to discussing them at a series of subsequent meetings.
- (291) The negotiations between the processors and the producers representatives took place each year, for the most part either at meetings of COSETA, the body bringing together the representatives of the two sectors<sup>261</sup>, or at the meetings convened by the Agriculture Ministry and held in its offices<sup>262</sup>. Occasionally, the representatives of the two sectors met outside any formal framework<sup>263</sup>. As part of these negotiations the two groups also exchanged, between meetings, proposals for price schedules.
- (292) In 1999 the processors reached an agreement with the producer representatives on the price brackets per quality grade for all the varieties of raw tobacco except Havana [see recital (198)]. An indicative average price per variety, based on a forecast on the application of the price brackets to estimated delivered quantities, was also agreed [see recitals (200) and (201)]. The agreement took the form of a schedule for each tobacco variety giving a price bracket for each quality grade (the price schedules per quality grade). These schedules were attached to the "standard" contract approved that year by the Agriculture Ministry. The "standard" contract and the annex containing the "completed" schedules were published in the Official Gazette [see recital (202)].
- (293) In 2000, by contrast, the processors and the producer representatives negotiated and exchanged proposals for price schedules and the corresponding minimum average price per producer group without reaching an agreement such as that in 1999 [see

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<sup>259</sup> See the statements by Cetarsa of 15 February 2002, pages 10 and 11 [doc. 38.238/4234-4235], by Agroexpansión, pages 24 to 28 [doc. 38.238/3961-3965], by WWTE, pages 9 and 10 [doc. 38.238/4335-4336] by Taes, pages 22 to 24 [doc. 38.238/4577-4579].

<sup>260</sup> See the statements by Cetarsa of 15 February 2002, page 10 [doc. 38.238/4234], by WWTE of 15 February 2002, page 9 [doc. 38.238/4335], by Agroexpansión of 15 February 2002, page 24 [doc. 38.238/3961] and by Taes of 18 February 2002, pages 26, 27 and 30 [doc. 38.238/4581, 4582 and 4585].

<sup>261</sup> For 1999, see recital (196).

<sup>262</sup> For 1999, see recital (197); for 2000, see recital (228); for 2001, see recital (252).

<sup>263</sup> For 2000, see par (230) and, for 2001, see recital (253).

recitals (225) to (232)]. Moreover, no "standard" contract was submitted to the Agriculture Ministry for approval. These negotiations also concerned the price brackets for surplus tobacco from the previous marketing year. However, the parties did not come to any agreement [see recital (232)].

- (294) In 2001 the representatives of the two sectors again negotiated and exchanged proposals for price schedules. The negotiations also related to the corresponding minimum average prices per producer group and the possibility of annexing a price schedule for the Burley E and Burley F varieties that would take account of their chlorine content. As in the previous year, the discussions did not result in an agreement and no "standard" contract was submitted to the Agriculture Ministry for approval [see recitals (252) to (257)].
- (295) The Commission takes the view that the failure of bilateral negotiations between processors and producer representatives does not change the nature of the processors' anticompetitive behaviour (see, to the same effect, recital (319)).

*(d) A single and continuous infringement*

- (296) The Commission considers that the agreements and/or concerted practices that were negotiated by the processors and Deltafina in the period 1996-2001 and that constitute one of the infringements at issue in this Decision constitute a single and continuous infringement.
- (297) The differing conduct of the processors and Deltafina pursued the same ultimate object throughout the period under consideration, namely, to fix a maximum level of prices for raw tobacco each year in order to restrict or eliminate competition in the raw tobacco sector in Spain. To that end, they agreed on several aspects relating to price or quantities such as the (maximum) average delivery price for each variety of raw tobacco (all qualities), the volumes of raw tobacco to be bought by each processor and, subsequently, the price brackets per quality grade and additional conditions. The concerted conduct throughout the year in respect of these different factors provided the means whereby the processors could manage, at the time the raw tobacco was actually bought, to set transaction prices within the agreed (maximum) average delivery price. Such conduct forms part of a cyclical restrictive practice that took place every year at the same time and had the same structure and the same implementing arrangements each year. In addition, throughout its existence, this restrictive practice extended to all the aspects of the purchase price of tobacco that arose for each harvest: the (maximum) average delivery prices and initial tonnages and then as from 1999 the price brackets and the additional conditions, in 2000 the price brackets for the surplus tobacco from the previous year and, lastly, in 2001 the price brackets reflecting the chlorine content of the Burley E and Burley F varieties. Nevertheless, already since 1996 the processors and Deltafina participated continuously in this common plan aimed at eliminating or restricting competition in the raw tobacco sector in Spain.
- (298) According to the case law of the Court of Justice, "*Patterns of conduct having the same anti-competitive object, each of which, taken in isolation, would fall within the meaning of 'agreement', 'concerted practice' or 'a decision by an association of*

*undertakings' may constitute "different manifestations of a single infringement of Article [81](1) of the Treaty."*<sup>264</sup>.

#### 2.1.4.2. Restriction of competition

(299) Article 81(1)(a) of the Treaty gives as an example of a restriction of competition a conduct which consists in directly or indirectly fixing purchase or selling prices. In addition, points (b) and (c) of the same paragraph refer to types of conduct that “limit or control production [and] markets” and that “share markets or sources of supply”.

(300) Such are the essential objectives of the continuous agreement and/or concerted practice consisting in the restrictive practice engaged in by Spanish processors of raw tobacco and Deltafina.

##### *(a) (Maximum) average delivery price*

(301) Firstly, the agreement and/or concerted practice between the processors and Deltafina concerned the (maximum) average delivery price of each of the raw tobacco varieties (all qualities). As explained in section 1.5.1.2.1, the average delivery price represents, in practice, the average of “the price that the producer must receive for the raw material”, that is to say, the average of the final sales transaction prices paid by the processor to the producer for all of its tobacco of the same variety. In other words, the processors and Deltafina agreed that processors would pay final transaction prices per kg minding that the average price actually paid did not exceed the (maximum) average delivery price agreed. This (maximum) average delivery price thus determines very directly the final price paid for each given variety of raw tobacco. The impact of this infringement on competition was significant in so far as the processors, by agreeing on the (maximum) average delivery price to be paid to the producers, managed to align as closely as possible the final prices they would pay to the producers and to reduce them for their own benefit to a level below that which would result from the free interplay of competition.

(302) Cetarsa, Agroexpansión and WWTE contended in their replies to the Statement of Objections and at the subsequent oral hearing that the processors’ cartel, on the one hand, and the agreements which both producers and processors entered into on an average minimum price per producers group, on the other, was identical and that the potentially anticompetitive effects of processors’ and producers’ behaviour would therefore neutralise each other<sup>265</sup>. This contention cannot be accepted. As illustrated above at recital (81), negotiations on average minimum prices per producers group would take place during the phase preceding the conclusion of cultivation contracts and were meant to result in a guarantee of minimum prices and revenue for producers. By their very nature, average minimum prices per producers group would still be open to increase following negotiation at delivery. The processors’ cartel, on the other hand, aimed precisely at avoiding a situation whereby negotiation at delivery could push prices beyond the level that processors had agreed between themselves.

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<sup>264</sup> Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at par. 113.

<sup>265</sup> Comments in Cetarsa’s reply to the Statement of Objections, pages 7-10, in WWTE’s reply to the Statement of Objections pages 13-18 and in Agroexpansión’s reply to the Statement of Objections pages 18-45.

*(b) Share-out of quantities*

- (303) Secondly, the restrictive practice engaged in between the processors and Deltafina was designed to share the quantities of raw tobacco that each processor was able to undertake to buy in the cultivation contracts signed with each producer group as well as the quantities that each processor could then buy in practice from the producers when the raw tobacco was actually bought<sup>266</sup>.
- (304) Clearly, the effect of this aspect of the restrictive practice involving the quantities of raw tobacco to be bought by each processor is to "limit or control production" and "share markets or sources of supply". Accordingly, this aspect constitutes a restriction of competition within the meaning of Article 81(1) of the Treaty.
- (305) Moreover, this aspect was closely linked to the aspect concerning (maximum) average delivery prices in that neither of them could be implemented and observed without the other (see the message from WWTE to Deltafina on 9 July 1997, referred to in recital(136), and the Agroexpansión activity report of April 1999, mentioned in recital (186)].

*(c) Arrangements for implementing and monitoring compliance with the restrictive practice*

- (306) The processors and Deltafina also introduced arrangements for guaranteeing the implementation of and compliance with the agreements concluded and/or concerted practices in which they participated.
- (307) In 1996 and 1997 they attended meetings and established other contacts (notably exchanges of information) during the buying period for raw tobacco with a view to implementing the price and quantity agreements concluded at the beginning of the year and attempting (without success) to guarantee observance of the above restrictions [see recitals (109) to (111) for 1996 and recitals (133) to (143) for 1997].
- (308) As from 1998, under the "framework" agreement, the processors and Deltafina devised in minute detail and set up a sophisticated information-exchange system and a raw tobacco transfer and compensation mechanism [see recitals (162) to (165)].
- (309) It will be recalled that the exchange of information concerned (i) when it took place after the cultivation contracts had been signed, the quantities of tobacco that each processor had undertaken to buy in those contracts and (ii) when it took place during the buying period, the average prices paid and the quantities bought by each of them. The processors acknowledged that this exchange of information enabled them to ascertain at each stage whether the "framework" agreement had been implemented and complied with and to prepare the share-out of quantities for the following year [see for each year recitals (171), (190), (191), (212) and (241)]. By strengthening in this way the agreements between the processors on the (maximum) average delivery price and the sharing-out of quantities, this exchange of information is contrary to Article 81 (1) of the Treaty.

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<sup>266</sup> For further details, see section 1.5.2.1, recitals (97) to (99) for 1996, recitals (120) for 1997, recital (158) for 1998, recitals (186) and (187) for 1999, recitals (208) and (213) for 2000 and (240) to (245) for 2001.

- (310) On the basis of this exchange of information, they were also able to set up the tobacco transfer or compensation mechanism. Processors that bought quantities of tobacco in excess of the tonnage agreed had to compensate the processors that had not bought the tonnage agreed either (i) by paying them a compensation (calculated per kg and for each tobacco variety separately) for the quantities of tobacco in excess of their quota or (ii) by selling them the quantities of tobacco in excess of their quota at the average buying price that the deficit processors had agreed with the producer groups in the cultivation contracts. These measures ensured that the quotas agreed were maintained, thereby strengthening the aspect of the restrictive practice involving the share-out of quantities. Accordingly, they too are in breach of Article 81(1) of the Treaty.
- (311) The implementation of these mechanisms also reflects the implementation of the "framework" agreement itself. In particular, the tables supplied by the processors in their statements and recording the quantity adjustments made in the course of the different marketing years and the quantities of tobacco to be transferred between the processors confirm that the aspect of the restrictive practice involving the share-out of quantities over the years was implemented and complied with [see recitals (213) and (243) respectively].

*(d) Price brackets per quality grade and additional conditions*

- (312) The restrictive effect of the negotiations and agreements on these clauses is discussed in detail under recitals (329) to (332) below.

*(e) Other (on restriction of competition)*

- (313) The fixing of prices and the share-out of quantities are such as to restrict competition within the meaning of Article 81(1) of the Treaty.
- (314) For Article 81(1) of the Treaty to be applicable, it is settled case law that there is no need to take account of the actual effects of an agreement once it appears that its aim is to prevent, restrict or distort competition within the common market, which is the case here<sup>267</sup>. The table in recital (38) indicates nonetheless that, as from 1998, when the agreement between the processors and Deltafina was fully implemented and complied with, prices stabilised and actually fell: in 1998 a fall of 4.8% - all varieties - was recorded. Agroexpansión also confirmed the existence of a link between the processors' cartel and prices' decrease (see recital (173)).

#### 2.1.4.3. Appreciable effect on trade between Member States

- (315) It is settled case law that, in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States<sup>268</sup>.

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<sup>267</sup> See, for example, Case T-305/94 etc. *LVM and Others v Commission* [1999] ECR II-931, at par. 741.

<sup>268</sup> Case 42/84 *Remia and others v Commission* [1985] ECR 2545, at 22.

- (316) The restrictive practice between the processors and Deltafina involving the fixing of (maximum) average delivery prices, the share-out of quantities to be bought and, as from 1999, the price brackets and the additional conditions is likely to have such an effect on the pattern of trade between Spain and the other Member States in that the object of the restrictive practice was to guarantee the exportation of Spanish processed tobacco.
- (317) It should also be pointed out that an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about<sup>269</sup>. This is particularly true here since the parties to the concerted practice were the only processors recognised in Spain, since they bought most of the raw tobacco produced in Spain every year, since the restrictive practice involved all the tobacco bought by the processors and, lastly, since this tobacco, once processed, was sold primarily for export.

#### 2.1.5. *Conduct of producer representatives restraining competition*

- (318) The conduct of the producer representatives in restraint of competition consists of agreements and/or concerted practices primarily concerning the fixing of price brackets per quality grade of each variety of raw tobacco and the additional conditions which they would then negotiate with processors.
- (319) The Commission takes the view that the failure of bilateral negotiations between processors and producer representatives does not change the nature of the producer representatives' anticompetitive behaviour.

##### 2.1.5.1. Nature of the conduct concerned

###### *(a) 1996-98*

- (320) The agreement and/or concerted practice between the producer representatives, designed essentially to fix the price brackets per quality grade and additional conditions for negotiation with individual processors, took shape, first, at the meetings between the producer representatives to decide on their negotiating strategy, and, second, at their joint meetings with the processors to negotiate the price brackets for raw tobacco and the additional conditions. In this way, the producer representatives joined forces and demanded the same selling conditions from all the processors.
- (321) In 1996 the concerted action by the producer representatives had some practical results in that the three agricultural unions and CCAE persuaded each of the processors to undertake to buy raw tobacco from all the producers represented by them on the basis of the same price brackets and the same additional conditions [see recital (100) to (105)]. This did not, however, happen in 1997 and 1998. None of the processors was

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<sup>269</sup> Case C-309/99 *Wouters* [2002] ECR I-1577, at par. 95. In a judgment delivered the same day (Case C-35/99 *Arduino* [2002] ECR I-1529), the Court of Justice ruled that a tariff fixing minimum and maximum fees for members of a profession since it "extends to the whole of the territory of a Member State, [it] may affect trade between Member States".

willing to accept the selling conditions proposed by the producers' representative and the negotiations failed [see recitals (126), (130) and (175)].

- (322) The Commission takes the view that the conduct of the producer representatives described above constituted agreements between associations of undertakings and/or associations of associations of undertakings within the meaning of Article 81(1) of the Treaty. During the negotiations between themselves and with processors, the producer representatives agreed on "a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action [...] in the market"<sup>270</sup>.

(b) *As from 1999*

- (323) As from 1999, the producer representatives not only continued to agree between themselves on the price brackets per quality grade and additional conditions that they intended to propose to the processors but also, as mentioned in recital (290) et seq., jointly negotiated those price brackets and additional conditions with all the processors through ANETAB with a view to reaching an agreement with them.<sup>271</sup>
- (324) The producer representatives met the four processors jointly each year and the representatives of the two groups exchanged proposals for price schedules per quality grade and additional conditions between the meetings [for the detail of the meetings and of the exchanges of price schedules, see recital (291)].
- (325) As was explained in recital (292), the negotiations between the producer representatives and the processors resulted in 1999 in an agreement on the price brackets per quality grade for each variety of raw tobacco and on the additional conditions (namely the average minimum price per producer and the average minimum price per group). The price brackets per quality grade thus agreed were annexed to the "standard" contract approved by the Agriculture Ministry that year and published in the Official Gazette.

(c) *A single and continuous infringement*

- (326) The Commission takes the view that, in any event, all the agreements and/or concerted practices in which the producer representatives participated between 1996 and 2001 constitute a single and continuous infringement of Article 81(1) of the Treaty.
- (327) As in the case of the processors and Deltafina, the differing conduct on the part of the producer representatives pursued the same ultimate objective throughout the period

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<sup>270</sup> Commission Decision of 5 December 2001 in Case COMP/E-1/36.604 - *Citric acid* (OJ L 239, 6.9.2002, p. 18, recital 137).

<sup>271</sup> In 2000 the restrictive practice involving the producer representatives also concerned the price brackets for surplus tobacco produced in 1999 and, for this aspect, the producers were represented by the producer groups and not by the agricultural unions [see recital (218)]. In the light of evidence at its disposal concerning the participation of the producer groups, the Commission does not intend to hold them responsible for their possible participation in a concerted practice consisting in fixing the price brackets for surplus tobacco produced in 1999. The only evidence in the Commission's possession comes from minutes drafted by the processors and simply indicates in general terms "*all the producer groups*" without identifying the individual groups that allegedly took part [see in particular recitals (218) to (220) and (224)].

under consideration, namely the fixing of the price for raw tobacco each year in order to restrict or eliminate competition between the Spanish producers of raw tobacco and/or the groups representing them. To this end, the producer representatives agreed each year on the price brackets per quality grade of each variety of raw tobacco and the additional conditions. This concerted action enabled the producer representatives to impose on the processors conditions governing the sale of raw tobacco that were as similar as possible for all the producers and as favourable as possible to their own interests. As with the processors, the conduct of the producer representatives formed part of a cyclical restrictive practice which took place each year at the same time (before or at the actual time of the negotiations with the processors) and took the same form (negotiations at meetings).

- (328) According to the case law of the Court of Justice, "*Patterns of conduct having the same anti-competitive effect, each of which, taken in isolation, would fall within the meaning of 'agreement', 'concerted practice' or 'a decision by an association of undertakings' can constitute 'different manifestations of a single infringement of Article [81](1) of the Treaty'*"<sup>272</sup>.

#### 2.1.5.2. Restriction of competition

- (329) Article 81(1)(a) of the Treaty gives as an example of a restriction of competition a conduct which consists in directly or indirectly fixing purchase or selling prices. Such is the object of the conduct by the producer representatives at issue in this Decision.

##### (a) *Price brackets*

- (330) By agreeing on these price brackets, the producer representatives determined the margins within which they would subsequently negotiate the final price of raw tobacco, thereby restricting the interplay of competition. They also aimed to impose on the processors conditions for selling raw tobacco that were as favourable as possible to their own interests. It is though true that, since the prices in each of the brackets specified in the price schedules differed significantly, the potential impact on competition of the concerted action regarding the price brackets could be limited in practice.

##### (b) *Additional conditions*

- (331) The agreement and/or concerted practice between the producer representatives also concerned additional conditions, mainly in the form of "average minimum price per producer" and the "average minimum price per group". As explained under section 1.5.1.2.3, as from 2000 producer representatives in their negotiations with processors' representatives make reference to "average price" *tout-court*. It is clear however that the object of this "average price" was the same as that of the "average minimum price per producer group" negotiated in the previous years. By agreeing on the minimum level of the average price, the producer representatives aimed to increase for their own benefit the final selling price of their raw tobacco above the level that would result from the free interplay of competition.

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<sup>272</sup> Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at par. 113.

(332) Lastly, in order to determine whether Article 81(1) of the Treaty is applicable, it is not necessary to examine the actual effects of an agreement on competition once it has been established that the object of the agreement was to restrict competition.

#### 2.1.5.3. Appreciable effect on trade between Member States

(333) The infringements that consisted primarily in fixing the price brackets and additional conditions were likely to restrict competition between Member States.

(334) The restrictive practice involving the producer representatives in the period 1996-2001 was likely to affect trade between Member States appreciably inasmuch as the participants represented 99.77% of Spanish raw tobacco producers in 2001 [see Table 1 in recital (34)] and the restrictive practice covered all the raw tobacco produced by the those producers, which, once processed, was sold mainly for export. As was already pointed out at recital (317) above, an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about<sup>273</sup>.

(335) In their reply to the Statement of Objections, the producers' representatives have claimed that their conduct could not have any effect on trade between Member States, as tobacco can only be exported upon processing<sup>274</sup>.

(336) This argument cannot be accepted. An influence of agreements and practices on patterns of trade between Member States can in fact occur also in cases where, for example, the agreement or practice relates to an intermediate product which is used in the supply of a final (or other intermediate) product which is traded<sup>275</sup>. This is certainly the case of Spanish raw tobacco which, once processed, can be and is exported (particularly to Italy).

## 2.2. Council Regulation No 26 and Council Regulation (EEC) No 2077/92

### 2.2.1. Council Regulation No 26

(337) Council Regulation No 26 of 4 April 1962 applying certain rules on competition to production of and trade in agricultural products ("Regulation No 26")<sup>276</sup> stipulates that Article 81 applies to all agreements, decisions of associations of undertakings and concerted practices which relate to trade in the products listed in Annex II to the Treaty (now Annex I), including raw tobacco.

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<sup>273</sup> See case-law referred to under recital (317).

<sup>274</sup> See producers' reply to Statement of Objections, page 58.

<sup>275</sup> See in this respect Case T-86/95, *Compagnie Générale Maritime and others*, [2002] ECR II-1011, at par.71-74, Joined Cases T-24/93, *Compagnie maritime belge*, [1996] ECR II-1201, at par. 202 and Case 123/83, *BNIC v Clair*, [1985] ECR 391, at par. 29. See also Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4. 2004, pages 81-96).

<sup>276</sup> OJ 30, 20.4.1962, p. 993/62, as amended by Regulation No 49 of 29 June 1962 .

- (338) As an exception, it stipulates that Article 81 does not apply in three situations<sup>277</sup> which are not though connected with the case in question:
- (a) restrictive practices which "form an integral part of a national market organisation";
  - (b) restrictive practices which "are necessary for the attainment of the objectives set out in Article [33] of the Treaty"<sup>278</sup>;
  - (c) restrictive practices between farmers, farmers' associations or associations of such associations "belonging to a single Member State which concern the production or sale of agricultural products [...], and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article [33] of the Treaty are jeopardised."
- (339) In the case in point, the exception mentioned above at (a) cannot apply where the raw tobacco is covered by a common market organisation.
- (340) The exception at (b) cannot apply either. It should be recalled first that, in accordance with the Commission's decision-making practice and the case law of the Court of Justice, Article 2 of Regulation No 26 must be interpreted strictly in the case of an exception<sup>279</sup>.
- (341) According to the case law, the exception at (b) is applicable only if the agreement in question promotes the attainment of all the objectives of Article 33(1) of the Treaty or, at the very least, if those objectives were to appear divergent, only if the Commission is in a position to reconcile them in such a way as to permit application of the exception.
- (342) The raw tobacco sector is subject to a common market organisation. Such an organisation was essentially introduced in order to attain the objectives of Article 33 of the Treaty and, in particular, the two of most significance for the raw tobacco sector, namely "the stabilisation of markets and a fair standard of living for the

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<sup>277</sup> Case C-319/93 *Dijkstra* [1995] ECR I-4471, at 17 to 21. The ruling confirms that Regulation No 26 provides for three exceptions to the application of Article 81 of the Treaty: "*to interpret the second sentence as having no independent meaning would run squarely counter to the wishes of the legislature, in as much as it would result in more stringent conditions being applied to agreements which are to be made more flexible, since they would have to fulfil the conditions laid down in both the first and second sentences*".

<sup>278</sup> Article 33 of the Treaty states that: "*1. The objectives of the common agricultural policy shall be:(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;(c) to stabilise markets;(d) to assure the availability of supplies;(e) to ensure that supplies reach consumers at reasonable prices.*"

<sup>279</sup> Cases C-399/93 *Oude Luttikhuis* [1995] ECR I-4515, at 23 et seq., and T-70/92 and T-71/92 *Florimex and VGB v Commission* [1997] ECR II-693, at 152. See also, for example, Commission Decision 1999/6/EC of 14 December 1998 relating to a proceeding under Article 85 of the Treaty (IV/35.280 - Sicasov) (OJ L 4, 8.1.1999, p. 27, recital 68).

agricultural population concerned"<sup>280</sup>. It may be seen that the restrictive practices in question are in no way included among the means indicated by the Regulation<sup>281</sup>.

- (343) Also, the contention made by the producer representatives in their reply to the Statement of Objections<sup>282</sup> and at the oral hearing, that the conclusion of collective agreements was in any event capable of enhancing some or all of the objectives of Article 33(1) of the Treaty (as further implemented in the tobacco CMO) cannot be accepted. The 1992 reform of the CMO (in particular, as reformed after 1998) was clearly designed to stimulate the production of better quality tobacco which could receive higher prices, making the cultivation of tobacco less dependent on Community premia in the medium-long term. Price competition was therefore essential in order to achieve the goals of the reform. In 1998, by linking the variable part of the premium to the commercial prices obtained, the CMO further strengthened the role of price competition in the sector.
- (344) In this context, the common fixing of common prices (in the form of price brackets, minimum prices or minimum average prices) must therefore be considered to be completely at odds with the objectives pursued by the reform as it had the effect of reducing the scope of one of its essential instrument, namely price competition.
- (345) In addition, Article 2 of Regulation No 26 must be interpreted as to requiring that any restriction of competition through measures which were to be justified under its terms be proportionate to the objective sought, that is to say that no other less restrictive measures would allow the objectives pursued to be attained. In the present case, the producers' representatives have failed to give any reason as to why price fixing arrangements should be considered proportionate. Moreover, by their very nature, restrictions on competition in the form of price fixing arrangements could be found to be necessary and proportionate to the objectives sought by Article 33 of the EC Treaty only in very exceptional circumstances. As the Court of Justice recently recalled that "*the maintenance of effective competition on the market for agricultural products is one of the objectives of the common agricultural policy*" and that "*the common organisations of the markets in agricultural products are not [...] a competition-free zone*"<sup>283</sup>.
- (346) The exception at (c) is also ruled out where the two infringements at issue are concerned. First, the restrictive practice engaged in by the processors involves parties other than farmers and is designed, among other things, to fix prices (the average

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<sup>280</sup> Second recital to Regulation (EEC) No 2075/92

<sup>281</sup> Joined Cases T-70/92 and T-71/92 *Florimex and VGB v Commission* [1997] ECR II-693, at 148 and 149, and the conclusions of Advocate-General Tesauro of 12 September 1995 in *Oude Luttikhuis* [1995] ECR I-4471, at 14. For recent examples of the Commission's decision-making practice, see also recital 68 of the *Sicasov* decision, referred to above, Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (British Sugar plc, Tate & Lyle plc, Napier Brown & Company Ltd and James Budgett Sugars Ltd) (OJ L 76, 22.3.1999, p. 1, recital 187) and Commission Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty (French Beef) (OJ L 209, 19.8.2003, p. 12, recital 147).

<sup>282</sup> Comments in producers' reply to the Statement of Objections, pages 58-62.

<sup>283</sup> Case C-137/00 *Milk Marque Ltd.*, [2003] ECR I-7975, at paragraphs 57 and 61.

prices, the price brackets and other minor price aspects). Second, the restrictive practice engaged in by the producer representatives is also designed to fix prices (the price brackets but also the average minimum price per producer and the average minimum price per group). Accordingly, the exception at (c) cannot apply to any of the infringements at issue.

- (347) It follows from all of these factors that neither the processors' (including Deltafina) nor the producers' restrictive practices at issue can be regarded as being necessary within the meaning of the first sentence of Article 2(1) of Regulation No 26. Accordingly, they are caught by Article 81(1) of the Treaty.

#### 2.2.2. Council Regulation (EEC) No 2077/92

- (348) Lastly, mention should be made of Regulation (EEC) No 2077/92 concerning inter-branch organisations and agreements in the tobacco sector ("Regulation (EEC) No 2077/92") [recital (51)]. This Regulation, which includes a derogation from Regulation No 26 in so far as it declares Article 81(1) to be inapplicable to inter-branch agreements, explicitly excludes the benefit of this derogation where the inter-branch agreement consists in fixing prices or sharing out quantities. Although concluded between organisations representing the raw tobacco processing and production sectors, the agreement and/or concerted practice concluded between the processors - through ANETAB - and the producer representatives for the period 1999-2001 cannot benefit from that derogation where those organisations were not recognised by Spain or by the Commission as being "inter-branch organisations" within the meaning of Regulation (EEC) No 2077/92. In any event, the agreements between, on one hand, processors and, on the other, producer representatives, in so far as they are designed primarily to fix the price brackets and additional conditions for raw tobacco by quality grade, cannot benefit from the derogation provided for in that Regulation.

### 2.3. Intervention of the Spanish State: national regulatory framework

- (349) According to settled case law, if anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 81 of the Treaty does not apply since, at that time, the restriction of competition is not attributable, as that provision implicitly requires, to the autonomous conduct of the undertakings. By contrast, Article 81 of the Treaty does apply "*if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition*"<sup>284</sup>.
- (350) In the present case neither the national rules nor ministerial practice were such as to preclude application of Article 81(1) of the Treaty to the conduct at issue.
- (351) First, neither the law nor ministerial practice required the processors to agree on the (maximum) delivery average price for raw tobacco or to share out the quantities of

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<sup>284</sup> Joined Cases C-359/95P and C-379/95P *Commission and France v Ladbroke Racing* [1997] ECR I-6265, at 33 and 34, Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, at 130, and Case T-513/93 *Consiglio nazionale degli spedizionieri doganali v Commission* [2000] ECR II-1807, at 58 and 59.

tobacco to be bought by each processor. Accordingly, their agreement and/or concerted practice is caught by the prohibition in Article 81(1) of the Treaty. In addition, both the law and ministerial practice remain completely silent as regards (maximum) delivery average prices and the quantities to be bought; they have not, therefore, been able in any way to diminish the independence of the processors' conduct.

- (352) Second, the infringements concerning the price brackets per quality grade specified in the price schedules and the additional conditions call for the following comments.
- (353) On the one hand, the national rules did not require the producer representatives and the processors to agree jointly on the price brackets and the additional conditions. At most, between 1982 and 2000 the rules stipulated that the "standard" contracts were to include a clause concerning the "guaranteed minimum price" and the "price that the producer must receive for the raw material" [see recitals (57) and (58)] but did not require the parties to agree on the actual figures to be inserted in the price clauses of the "standard" contract before submitting that contract to the Agriculture Ministry for approval. In addition, during that period<sup>285</sup> the Ministry approved the contract with those clauses left "blank". The 2000 Law repealing the previous rules explicitly states that the price of tobacco is to be freely fixed by the parties signatory to the cultivation contract and makes the validity of these contracts subject to national and Community competition rules [see recitals (63) and (64)].
- (354) As for ministerial practice on the other hand, the facts indicate that between 1995 and 1998 the Agriculture Ministry approved "standard" contracts comprising a price clause (still "blank") that did mention that all the producer representatives would negotiate jointly with each individual processor the price schedules and the additional conditions relating to the sale of tobacco (that is to say, the average minimum price per producer and the average minimum price per group). In 1999 the Agriculture Ministry even approved the price schedules that had already been negotiated jointly by all the producer representatives and the four processors. These schedules were annexed to the "standard" contract published in the Official Gazette that year. Lastly, in 2000 and 2001 the Agriculture Ministry invited the representatives of the two sectors to a number of meetings — some of which were held at the Ministry itself — with a view to agreeing on the price schedules<sup>286</sup>. In so doing, the Ministry did at least encourage the parties to press ahead with their joint negotiations on those schedules.
- (355) Ministerial practice neither required the parties to agree on the price brackets nor created a framework that removed all possibility of competitive behaviour on their part. According to the recent case law of the Court of Justice, "*if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles 81 EC and 82 EC and may incur penalties (...)*"<sup>287</sup>. Consequently, the agreements and/or

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<sup>285</sup> And in particular from 1996 to 1998.

<sup>286</sup> Whereas, according to the Agriculture Ministry itself, the new 2000 Law put an end to the legality of joint negotiations between producers and processors on the selling prices of agricultural products.

<sup>287</sup> Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) and Autorità Garante della Concorrenza e del Mercato*, [2003] ECR I-8055, at par. 56.

concerted practices between the producer representatives on the one hand and the processors on the other hand concerning the price brackets and the additional conditions are caught by Article 81(1) of the Treaty.

- (356) Under the circumstances, it has to be concluded that the anti-competitive conduct of the parties in question that constitutes the two infringements at issue in the present case are caught by the prohibition laid down in Article 81(1) of the Treaty. This is without prejudice to any action taken against the Spanish State.

#### **2.4. Addressees of the Decision**

- (357) The facts described in the first part of this Decision show that:

(i) Cetarsa, Agroexpansión, WWTE, Taes and Deltafina participated directly in the continuous agreement and/or concerted practice concerning maximum (delivery) average prices and quantities in the period 1996-2001 as well as price brackets and additional conditions from 1999 onwards;

(ii) the three agricultural unions (ASAJA, UPA and COAG) and the Confederation of Agricultural Cooperatives (CCA) participated directly in the continuous agreement and/or concerted practice concerning price brackets and additional conditions during the period 1996-2001<sup>288</sup>.

- (358) Consequently, each of those undertakings, associations of undertakings or associations of associations of undertakings is required to assume responsibility for the infringement, and this Decision is, therefore, addressed to each of them.

- (359) On account of the role it played in the restrictive practice engaged in by the Spanish processors concerning (maximum) average delivery prices and quantities, Deltafina has to be regarded as having joint responsibility for their conduct.

- (360) Deltafina is the subsidiary of Universal Corporation in Italy (and hence the sister company of Taes) that is responsible for the group's activities in Europe. Its purchasing and sales directors are the chairman of Taes and a board member respectively. Deltafina buys 95% of the tobacco processed by Taes, is [another processor] main customer and also buys tobacco processed by [another processor] .

- (361) Deltafina played a particularly active role in the restrictive practice engaged in by the Spanish raw tobacco processors. It is also significant that the fax sent by Universal Leaf to the Commission mentions that Deltafina was cooperating with Taes in drawing up the memorandum that would also allow them to benefit from preferential treatment under the Commission's 1996 leniency notice [see recital (6)].

- (362) Deltafina's participation in the restrictive practice took two forms.

- (363) First, it took the form of participation of its chairman and occasionally of other Deltafina representatives at the meetings between the four Spanish processors at which they discussed and organised their restrictive practice regarding prices and quantities

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<sup>288</sup> As from May 1999, UPA acted through its sectoral branches ACOTAB and TABARES. As from April 2001, ASAJA acted through its sectoral branch FNCT [see recital (251)].

[see in particular the meeting of 13 March 1996 referred to in recital (92), the meetings of 17 December 1996 and 30 January 1997 mentioned in recitals (117) and (118), and an ANETAB meeting in March 1999 referred to in recital (186), at which Deltafina's chairman announced that he would be attending the forthcoming meetings of that association].

- (364) Second, when it did not participate in the meetings, Deltafina was regularly informed by each of the Spanish processors of the situation on the Spanish raw tobacco market and of the practices employed by them. In 1997 a memo which the Spanish processors had drafted and signed at one of their meetings, and which gave the details of the different agreements reached between them that year, was even entrusted to Deltafina's chairman [see recital (122)] [; for the rest, see in particular recitals (95), (133) to (135), (140) to (143) and (149)].
- (365) This flow of information enabled it to play a key role in the organisation of the Spanish restrictive practice, notably by way of letters it sent to the processors, with a view to securing an agreement between all of them<sup>289</sup>. It thus acted as the mediator for disputes between the processors<sup>290</sup> [see, for example, recital (133)] and footnote 120<sup>291</sup>]. Particular note should be taken of Deltafina's leading role in the discussions on the price schedules for excess tobacco in 1999 [see recitals (221) to (224)]. Taes acknowledged in its statement that Deltafina was particularly involved since it wished to buy some of the surplus tobacco from [another processor] and, in fact, did so [see recital (222)].
- (366) Under the circumstances, Deltafina has to be regarded as having actively participated in designing and implementing the agreement on (maximum) delivery average prices and quantities concluded between the processors after 1996 and the negotiations on the price schedules for surplus tobacco in 2000; as a result, it must be held jointly responsible for the conduct of the Spanish processors. It must, therefore, be one of the addressees of this Decision.
- (367) None of the arguments which Deltafina has deployed in its reply to the Statement of Objections could warrant a different conclusion. Deltafina has essentially argued that the conduct ascribed to Deltafina should be attributed to Deltafina's chairman, acting in a personal capacity and not as an undertaking<sup>292</sup>. Further, it contends that the lack in

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<sup>289</sup> In a fax dated 10 April 1996, WWTE indicated the following to Deltafina: "*Firstly, I would like to thank you for your efforts for trying to obtain an agreement in Spain*" (underlining added) (see Annex 12 to the statement by Agroexpansión of 15 February 2002 [doc. 38.238/4070]).

<sup>290</sup> Taes acknowledged in its statement that Deltafina had performed this role (see the statement by Taes of 18 February 2003, page 14 [doc. 38.238/4569]).

<sup>291</sup> In particular, doc. 38.238/4653, which reproduces a letter from Deltafina to WWTE in the following terms: "Following your phone call yesterday, I had the assurance that a better period was beginning for Spanish tobacco, however I received a fax from [Agroexpansión] today (...) that you are paying some of the Cotabaco growers you have a price exceeding ESP 100 per kg. (...) this situation poses a problem (...) your conduct would have to be interpreted as a violent attack on Agroexpansión. I would like to hope that this is the result of poor information, and this is why I would ask you to settle the dispute immediately with [Agroexpansión] otherwise I would be obliged to take the view that all your offers of peace have only been strategies to carry on your business".

<sup>292</sup> Comments in Deltafina's reply to the Statement of Objections, pages 19-25.

the statement of objections of a clear definition of the relevant market in which the conduct occurred has impeded the full exercise by Deltafina of its rights of defence. Moreover, Deltafina does not operate in the Spanish market for the purchase of raw tobacco, assuming this is the relevant market<sup>293</sup>. Making Deltafina liable in the present case would go against basic Community law principles of personal liability, legal certainty, rights of defence and proportionality<sup>294</sup>.

- (368) Contrary to what has been contended, it was precisely Deltafina's very significant economic interest in the Spanish tobacco market, albeit as a purchaser rather than a first processor, which allowed it to play a pivotal role (which Deltafina does not deny) in the establishment and implementation of the processors' cartel<sup>295</sup>. In this respect the lack of a (more) precise market definition in this Decision and the fact that Deltafina does not operate at the same production level of the Spanish processors involved is ultimately irrelevant in establishing Deltafina's liability, as long as the contribution of Deltafina's behaviour to the processors cartel is clearly established, together with the cartel's restrictive nature and its effects on intra-Community trade. This also consistent with the case-law of the Court of First Instance, according to which the analysis of the relevant market is not necessary in order to make a finding of breach of Article 81(1) of the Treaty in cases where the infringement at issue is a restriction of competition by object.<sup>296</sup>
- (369) Having said that, the role of Deltafina in the instant case must be considered as having been direct and primary and not limited to the role of an external co-ordinator and/or facilitator.
- (370) In the present proceedings, the question as to who should be an addressee arises notably in two cases where the question of ascribing the subsidiary's conduct to its parent company should be examined. These cases involve Agroexpansión and WWTE.

#### 2.4.1. Principles applicable

- (371) In order to determine whether a parent company is to be regarded as being responsible for the unlawful conduct of its subsidiary, it needs to be established that the subsidiary "*does not decide independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by the parent company*"<sup>297</sup>.
- (372) According to settled case law, where the subsidiary is wholly owned by the parent company, it can legitimately be assumed that the parent company in fact exercises

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<sup>293</sup> Comments in Deltafina's reply to the Statement of Objections, pages 25-36.

<sup>294</sup> Comments in Deltafina's reply to the Statement of Objections, pages 31-36.

<sup>295</sup> This is further confirmed by WWTE's reply to the Statement of Objections, pages 30-32 and by Agroexpansión's reply to the Statement of Objections, pages 97-105. Both WWTE and Agroexpansión consider that Deltafina played the role of leader of the processors' cartel.

<sup>296</sup> Joined cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services Ltd (ENS) and Others v Commission* [ECR] 1998 II, 3141 at par.136.

<sup>297</sup> Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619, at paragraphs 132 and 133.

decisive influence over its subsidiary's conduct<sup>298</sup>. Such an assumption can be further strengthened by specific factors arising in individual cases.

- (373) In the case of subsidiaries that are not wholly owned, the Court of Justice ruled that a parent company can influence its subsidiary's policy if it holds all the capital of that subsidiary at the time the infringement is committed<sup>299</sup> or where it is "constantly" informed about the subsidiary's practices and directly determines its conduct<sup>300</sup>.
- (374) According to settled case law, the term "undertaking" must be understood in competition law as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal<sup>301</sup>.

#### 2.4.2. Case at issue

- (375) In the present case, three of the four<sup>302</sup> Spanish processors of raw tobacco are controlled (to the extent of 100% or 90%) by US multinationals. There are other factual elements that confirm the presumption that the conduct of Agroexpansión and WWTE has to be ascribed to their respective parent companies. In these cases, the two companies - the parent company and the subsidiary - must be regarded as being jointly responsible for the infringements established in this Decision.
- (376) On the other hand, following the issuing of the Statement of Objections and the hearing of the parties, it has become apparent that the evidence in the file could not warrant a similar conclusion in respect of Universal Corporation's and Universal Leaf's shareholdings in Taes and Deltafina. In fact, apart from the corporate link between the parents and their subsidiaries, there is no indication in the file of any material involvement of Universal Corporation and Universal Leaf in the facts which are being considered in this Decision. It would therefore not be appropriate to address them a decision in this case. The same conclusion would apply, *a fortiori*, to Intabex insofar as its 100% shareholding in Agroexpansión was purely financial.

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<sup>298</sup> Case C-286/98P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, at par. 29. See also Case 107/82 *AEG-Telefunken AG v Commission* [1983] ECR 3151, at par. 50, in which the Court of Justice ruled that "a wholly-owned subsidiary (...) necessarily follows a policy laid down by the same bodies as, under its statutes, determine [the parent company's] policy". See also Case T-305/94 *LVM and Others v Commission* [1999] ECR 931, at 961 and 984.

<sup>299</sup> Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619, at 136.

<sup>300</sup> The Court of Justice ruled as follows in *AEG Telefunken*, par. 52: "[the subsidiary] constantly informed [the parent company] about its negotiations with [a third party] (...) [the parent company] made direct contact with [that third party] to consider the possibility of regularising his activities, although they did not involve the German market (...), that it raised within its organisation problems raised by [that third party's] application for admission (...) and that it finally stated that: 'at present there is no reason to pursue the discussions initiated with [that third party]'".

<sup>301</sup> Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission* [2002] ECR II-1487, at par. 66, with reference to Case 170/83 *Hydrotherm Gerätebau GmbH v Firma Compact del Dott. Ing. Mario Andreoli & C. Sas* [1984] ECR 2999, at par. 11.

<sup>302</sup> The fourth processor Cetarsa is not a subsidiary of any foreign multinational.

#### 2.4.2.1. Agroexpansión/Dimon Group

- (377) As was stated in recital (21), between 1994 and 1997 Agroexpansión was jointly controlled by the Spanish company Marpetrol S.A. and a natural person. Since the second half of 1997, however, it has been fully controlled by the US multinational Dimon through its wholly owned subsidiary Intabex.
- (378) It can, therefore, be legitimately assumed in accordance with the case law of the Court of Justice that, at least from the second half of 1997 onwards, Dimon exerted a determining influence over the conduct of Agroexpansión, the wholly owned subsidiary. Other facts in the Commission's file confirm this presumption in respect of the fact that Dimon was in a position to exert decisive influence.
- (379) First, Agroexpansión draws up "activity reports" and "field reports" that it systematically translates from Spanish into English<sup>303</sup>. These reports often refer to the practices highlighted in this Decision. Second, there are in fact numerous examples of letters from Agroexpansión to Dimon informing it of the practices that are the subject-matter of this Decision [see, for example, recitals (179) and (168) and footnotes]. Agroexpansión and Dimon also exchanged letters on the contracts for processing raw tobacco or selling processed tobacco that Dimon concluded with other processors<sup>304</sup>. Some of these letters, along with others, often refer in more general terms to the buying conditions for raw tobacco in Spain and to the regulatory framework<sup>305</sup>.
- (380) It will be seen from the above that Dimon was informed of its subsidiary's practices that are the subject-matter of this Decision and of the circumstances in which they were carried out and that, since Dimon held all of its subsidiary's capital after 1997, it was in a position to exert influence over its subsidiary's conduct.
- (381) The arguments which Dimon has deployed in its reply to the Statement of Objections do not warrant any different conclusion in this respect. In particular, the existence of a

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<sup>303</sup> The Commission file contains copies of some of these reports in English covering the period from December 1998 to May 2001, and in particular the activity reports dated December 1998 [doc. 38.238/1559], January 1999 [doc. 38.238/1557], February 1999 [doc. 38.238/1556], March 1999 [doc. 38.238/1555], April 1999 [doc. 38.238/1552], September 1999 [doc. 38.238/1546-1548], October 1999 [doc. 38.238/1543], December 1999 [doc. 38.238/1541-1542], January 2000 [doc. 38.238/1540], May 2000 [doc. 38.238/1537-1538], June 2000 [doc. 38.238/1535], September 2000 [doc. 38.238/1762-1764] and November 2000 [doc. 38.238/1728]. There is also a field report dated May 2001 [doc. 38.238/1729-1732].

<sup>304</sup> See, in particular, several letters concerning the contract concluded between Dimon and [another processor]: docs. Agroexpansión RMR 108 [doc. 38.238/1752-1754], Agroexpansión RMR 107 [doc. 38.238/1751], Agroexpansión RMR 105 [doc. 38.238/1749], Agroexpansión RMR 109 [doc. 38.238/1755-1757], Agroexpansión BNL 29 and BNL 30 [doc. 38.238/1497-1498] and Agroexpansión SP 6 [doc. 38.238/1586]. See other letters for the contract concluded between Dimon and [another processor]: docs. Agroexpansión RMR 104 [doc. 38.238/1748], Agroexpansión RMR 106 [doc. 38.238/1750], Agroexpansión RMR 110 [doc. 38.238/1758] and Agroexpansión SP 5 [doc. 38.238/1585].

<sup>305</sup> See the letters from the Agroexpansión chairman to the Dimon Vice-President responsible for the group's activities in Europe: doc. Agroexpansión BNL 30 [doc. 38.238/1498]; doc. Agroexpansión SP 6 [doc. 38.238/1586]; doc. Agroexpansión BNL 27 [doc. 38.238/1495]; and doc. Agroexpansión BNL 28 [doc. 38.238/1496].

dedicated local management running its Spanish subsidiary does not rule out the possibility for Dimon to exercise decisive influence over the same subsidiary.

- (382) The specific facts which Agroexpansión brought to the attention of Dimon in their correspondence should have caused the immediate reaction of Dimon, either in the form of taking the due distance from any possible infringement of competition rules or by requesting Agroexpansión's management to put an end to any potentially anticompetitive behaviour. No such course of action was eventually pursued by Dimon.
- (383) On the other hand, in its response to the Statement of Objections, Intabex has adequately proved that, owing to the purely financial nature of its interest in Agroexpansión, it was not in a position to exercise any decisive influence over the subsidiary.
- (384) Dimon has also argued that making it liable in the present case would bring about a breach of the principle of non-discrimination vis-à-vis the treatment of WWTE's parent companies (which are also addressees of this Decision) and Taes' and Cetarsa's parent companies (which are not addressees of this Decision). On this point, it should be observed that the fact that the specific circumstances which may lead the Commission to hold a parent company liable for the behaviour of its subsidiary may vary from one instance to the other cannot constitute as such a breach of the principle of non-discrimination, as long as the principles of liability are consistently applied. As to the fact that SEPI (Cetarsa's mother company) is not made liable in this case, this is due to the fact that, contrary to what Dimon has contended, the Commission's file does not contain any direct communication between Cetarsa and SEPI in relation to the subject matter of this case. Also, the interest of SEPI in Cetarsa appears to be eminently financial, not unlike the link between Intabex and Agroexpansión. In fact, Cetarsa (unlike Agroexpansión) concentrates within itself all the tobacco processing business of the SEPI group and, for the same reason, appears to be operated as a separate business. Finally, Cetarsa is not fully owned by SEPI.
- (385) By way of analogy, reference can also be made to Recital 22 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, where it states that in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them.
- (386) It can therefore be concluded that Dimon must be held jointly responsible together with Agroexpansión for the latter's conduct as established by this Decision for the period from the second half of 1997 until 10 August 2001.

#### 2.4.2.2.(b) WWTE/Standard Group

- (387) A distinction has to be made between two stages in SCC's acquisition of control over WWTE: a first stage from 1995 to May 1998 and a second stage from May 1998 onwards (SCC heads the Standard Group).

*(a) Between 1995 and May 1998*

- (388) As indicated in recital (24), between 1995 and May 1998 two-thirds of WWTE's capital was held by the US multinational SCC through its [confidential] subsidiary TCLT (which, in turn, became a [confidential] subsidiary of SCTC in 1998<sup>306</sup>). The remaining third was held by three natural persons including the chairman, who held [20%-30%] of the capital<sup>307</sup>.
- (389) At that time, decisions at the general meeting of shareholders were adopted if shareholders holding 75% of the capital voted in favour. This rule thus protected minority shareholders, who together held [20%-30%] of the capital<sup>308</sup>.
- (390) The board of directors was made up of four members appointed by the general meeting. During the period under consideration, two of the members of the board, including the WWTE chairman, who had a preferential vote, represented the minority shareholders. Of the two remaining members one was the Vice-President of SCC responsible for the group's activities in Europe. The decisions at the time were approved by simple majority.
- (391) Under the circumstances, it transpires that during this period WWTE was jointly controlled by SCC (through its subsidiaries TCLT and SCTC) and by the WWTE chairman and his family. Certain particulars in the Commission's file also show that, during this period, SCC (and/or its subsidiaries) exercised effective influence on the conduct of their subsidiary in Spain. In particular:
- The SCC's manager for the group's activities in Europe had been a member of the board since at least 1996. The same person is indicated as being SCC's vice-president in the SCC's Annual Reports for 1999, 2000 and 2001. In its reply to the Statement of Objections, SCC has claimed that this information in their Annual Reports was factually incorrect, that it was reproduced in order to raise the profile of the person concerned but that the position of SCC's vice-president in fact did not exist. As evidence of this, SCC has submitted a certificate of the Secretary of the Board, listing its Corporate Directors and Corporate Officers for the years 1996 to 2001. SCC also claimed that the manager for the group's activities in Europe did not work for SCC, TCLT or SCTC and was not authorised to represent any of these companies. Regardless of the exact meaning of the expression "Vice-President" in SCC's Annual Reports, the fact that part of the correspondence sent to the manager for the group's activities in Europe was actually addressed to him at SCTC, the content of that correspondence and the fact that his general responsibility for the groups' activity in Europe was never contradicted provide sufficient evidence to state that he was acting as the SCC's representative and was responsible for relaying between the WWTE and its parent companies. Hence, contrary to what is claimed by SCC, a direct relationship between SCC and the manager for the group's activities in Europe cannot be denied.

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<sup>306</sup> Even before that date SCTC enjoyed control over TCLT as borne out in Doc. 38.238/2555-2573, discussed below under recital (391)

<sup>307</sup> The two other persons were members of the family of the WWTE chairman.

<sup>308</sup> See the reply by WWTE of 9 May 2003, Question 5 [doc. 38.238/9650-9655].

- The minutes of the WWTE board meeting on 25 and 26 March 1996 [see recital (94)], which were drafted both in Spanish and in English<sup>309</sup>, read as follows: “[confidential]”. In this connection, the minutes mentioned, for example, certain investment costs for which “[confidential]”. They also state that WWTE's code of conduct was the same as SCTC's, was drawn up by the parent company in English and applied to all WWTE employees, who were required to sign it. In addition, the board analysed the 1995 crop and the economic and commercial situation of the parent company. Lastly, it drew up the buying strategy for the 1996 crop in Spain and, in this connection, the minutes mentioned the verbal price agreements concluded between the Spanish processors at the meeting on 13 March 1996 [see recital (92)].
- A fax was sent on 28 October 1996 by WWTE to SCC (for the attention of the manager for the group's activities in Europe) informing the parent company in detail about the purchases of tobacco during the 1996 crop, to which is annexed a table giving the average prices paid by each processor<sup>310</sup>.
- The fax of 6 October 1997 [see recital (139)] sent by WWTE to SCC's manager responsible for the group's activities in Europe informed him in detail of a meeting between the processors at which they agreed to exchange information on the prices paid and quantities of tobacco bought, and analysed the result of those exchanges of information.
- On 8 October 1997 WWTE sent to SCC's manager responsible for the group's activities in Europe a copy of a letter it sent to Cetarsa complaining that it had not abided by the price agreements concluded between the processors<sup>311</sup>.
- A fax of 10 October 1997 sent by WWTE to SCC's manager responsible for the group's activities in Europe informed him about the buying period and, in particular, about the quantities of tobacco bought and the prices paid by the other processors to the producer groups<sup>312</sup>.

(392) Accordingly, it has to be concluded that between 1996 and May 1998, when SCC controlled (through its subsidiaries TCLT and SCTC) only two-thirds of WWTE's capital, it had nonetheless set in place certain mechanisms which, considered together, enabled it to keep track of the activities of its subsidiary in Spain and thus to exert effective control over the latter's commercial policy.

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<sup>309</sup> Doc. 38.238/2555-2573.

<sup>310</sup> The following are extracts: *"I am sending you copies of press releases in which Cetarsa and the agricultural unions welcome the price agreement concluded by us during the 'contratación' (...) If we had not done so, we would be dead this year (...) For us, the problem is not the cost of tobacco but the number of kg that we are able to 'contract'. I am attaching a table giving our purchases (...) the private [processing companies] (...) have less capacity [than Cetarsa] to readjust prices (...)"* (doc. WWTE MFS 2 [doc. 38.238/2161-2163]).

<sup>311</sup> Doc. 38.238/2320-2323.

<sup>312</sup> Doc. 38.238/2324-2327.

*(b) From 1998 onwards*

- (393) In May 1998 TCLT increased its holding in WWTE to [80%-90%]. The remainder of the capital was held in part by WWTE in the form of own shares (around [confidential] %) and by a natural person ([confidential] %). Some months later, in October 1998, WWTE acquired that person's shares and SCC acquired a direct holding of [confidential] % in WWTE. In May 1999, SCC acquired in total some 90% of WWTE's capital ([confidential]).
- (394) At the general meeting the voting rules did not change and the decisions were approved by shareholders representing 75% of the capital. Since SCC had at least [80%-90%] of WWTE 's capital after May 1998, it controlled the adoption of decisions at the general meeting. Moreover, the own shares did not carry voting rights.
- (395) As regards the board of directors, the two members representing the minority shareholders resigned in May 1998 and were replaced by two new members appointed by the general meeting. The voting system for decisions was changed, with it then becoming necessary to secure the support of three of the four members.
- (396) Lastly, after 1998 SCC's manager responsible for the group's activities in Europe is indicated to have a role in the conclusion of cultivation contracts concluded by WWTE with the producer groups<sup>313</sup>. The fact that the negotiation process was the main responsibility of WWTE's Chairman and Purchasing Director would not detract from the possibility of a SCC's representative's playing a role as well in the same process, as the evidence clearly indicates.
- (397) All these factors demonstrate that SCC, either directly or through its subsidiaries SCTC and TCLT, had exclusive control of WWTE after May 1998 and exercised decisive influence on its commercial policy.
- (398) A number of particulars in the Commission's file illustrate this situation. With particular reference to the practices established by this Decision, WWTE's "Manual of internal control procedures and systems" dated 2000 mentions the following<sup>314</sup>: "The chairman, together with the purchasing director, is directly responsible for the contracting ("*contratación*") process, subject to prior authorisation from the parent company, which approves the budget for each marketing year in March".

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<sup>313</sup> See doc. 38.238/2358-2360. This is a memo from the Executive Committee of SCTC to the manager responsible for the group's activities in Europe on "*Long term Spanish supply contracts*", which begins as follows: "*This will serve to authorize Regional Manager Europe to enter into supply contracts with growers to deliver tobacco to World Wide Tobacco España, S.A. within the following parameters and conditions (...)*".

<sup>314</sup> Doc. 38.238/2211. It should also be mentioned that, at a meeting of WWTE's board of directors on 20 January 2000 WWTE's business plan for the tax year 2001 was approved subject to the amendments suggested by the parent company. The board of directors also advocated training courses for staff within the framework imposed by the parent company (doc. 38.238/2270-2271).

- (399) The arguments which SCC has deployed in its reply to the Statement of Objections do not warrant any different conclusion in this respect. In particular, the existence of a dedicated local management running its Spanish subsidiary does not disprove that SCC was exercising decisive influence over the same subsidiary.
- (400) In the light of the foregoing, it has to be concluded that, after at least 1996 SCC and/or its subsidiaries SCTC and TCLT exercised effective influence on the commercial policy of their subsidiary WWTE. SCC, SCTC and TCLT must, therefore, be held jointly responsible for their subsidiary's practices that are the subject-matter of this case, at least after 1996. They must therefore be addressees of this Decision.

## **2.5. Application of Article 7 of Regulation (EC) No 1/2003**

- (401) Pursuant to Article 7(1) of Regulation No 1/2003, the Commission, where it finds that there is an infringement of Article 81 of the Treaty, may by decision require the participating undertakings to bring such infringement to an end. According to the statements provided to the Commission by the processors, the conduct deemed to be in restraint of competition on the part of the processors had, in principle, ceased on 3 October 2001, when the Commission carried out its inspections. On the other hand, the Commission has not been informed of the cessation of the conduct deemed to be in restraint of competition on the part of the producer representatives.
- (402) While it is therefore likely, in the light of the parties' statements, that the processors' infringement has ceased to produce effects, it is impossible to assert this with absolute certainty.
- (403) Accordingly, it is for the Commission to require the undertakings, associations of undertakings and associations of associations of undertakings to which this Decision is addressed to bring the infringements to an end (if they have not already done so) and to desist henceforth from any agreement, concerted practice or decision that might have a similar object or effect.

## **2.6. Application of Article 23(2) and (3) of Regulation (EC) No 1/2003 (Article 15(2) of Regulation 17)**

### *2.6.1. General considerations*

- (404) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 81 of the Treaty. Pursuant to Article 15(2) of Regulation No 17, which was applicable at the time of the infringement, the Commission could impose on undertakings or associations of undertakings fines not exceeding 10% of their total turnover in the preceding business year.
- (405) In the case at issue, the Commission intends, in the light of all the facts described and analysed above, to impose fines on the addressees of this Decision in respect of the infringements specified above. In determining the amount of the fine, the Commission must take account of the gravity and duration of the infringement.

### 2.6.2. Gravity of the infringement

- (406) In fixing the amount of the fine, the Commission is to have regard to all relevant circumstances, and in particular to the gravity and duration of the infringement, in accordance with Article 23(3) of Regulation (EC) No 1/2003.
- (407) In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.
- (408) The production of raw tobacco in Spain accounts for 12% of the Community production. The area under cultivation in Spain is 14.571 hectares located primarily in the Autonomous Communities of Extremadura (84%), Andalucia (11.5%) and Castille-Leon (3%). The size of the market is rather small, and quite concentrated in one region of Spain.
- (409) However, the nature of the infringement is considered very serious, since it concerns the fixing of the prices of the varieties of raw tobacco in Spain and the sharing of quantities.
- (410) More particularly, the conduct of the producer representatives restraining competition consisted of agreements and/or concerted practices primarily concerning the fixing of price brackets per quality grade of each variety of raw tobacco (within which producers would subsequently negotiate the final price of raw tobacco at delivery) and the average minimum price per producer and the per producer group. If, on the one hand, margins within price brackets were very broad and could vary from 100% to 380% difference between the minimum and maximum value for each quality grade within a variety of raw tobacco, on the other hand, by agreeing on the minimum level of the average price (per producer and per producer group), the producer representatives aimed to increase the final selling price of their raw tobacco above the level that would result from the free interplay of competition.
- (411) As far as the processors and Deltafina are concerned, they also agreed on price brackets per quality grade and additional conditions to be negotiated with producers' representatives in the context of public negotiations. In addition, and more significantly, they secretly agreed on several other aspects relating to price and quantities to be transacted, in particular (maximum) average delivery price for each variety of raw tobacco (all qualities) and the volumes of raw tobacco to be bought by each processor. As from 1998 they also adopted sophisticated compensation and transfer mechanisms with a view to securing compliance with their secret cartel on prices and quantities.
- (412) The Commission does not possess conclusive evidence of the actual effects of the producers' and processors' infringements on the market; indeed, it would be impossible to determine *ex post facto* the level of prices which would have applied in the market for raw tobacco in Spain in the absence of the conducts at issue.
- (413) Nevertheless, it can be said that at least from 1998, as a result of their secret coordination among themselves on prices and quantities before and after the conclusion of cultivation contracts and up to the conclusion of final transactions, the

processors' cartel was fully implemented and enforced (see (285) to (289)) and was liable to have a real impact on the market.

- (414) On the basis of the considerations above, the Commission concludes that both infringements must be described as very serious. However, the Commission will take into account the relatively limited size of the product market.

### 2.6.3. *Individual weight and deterrence*

- (415) In the circumstances of cases which involve several undertakings, the specific weight of each of the undertakings involved and the real effect of its unlawful behaviour should be considered in determining the starting amount of the fine so that the deterrent effect of the fine imposed on each undertaking can be proportionate to its contribution to the illegal conduct to be sanctioned.
- (416) As far as the processors' cartel (to include Deltafina) is concerned, the Commission considers that fines should be scaled down in consideration of their contribution to the illegal conduct and the market position enjoyed by each party involved.
- (417) Bearing this in mind, the Commission concludes that Deltafina should receive the highest starting amount for its prominent market position as main purchaser of Spanish processed tobacco. Its commercial relationships with [another processor], [another processor] and Taes are referred to under recitals (...), (...) and (27). As a result of its buying power, Deltafina had more capacity than anybody else to influence the behaviour of the Spanish processors.
- (418) The contribution to the illegal conduct by the Spanish processors can be broadly taken as having been similar. Starting fines should however take into account the different size and the market shares of each processor involved.
- (419) With a market share of around 67% of the market for the purchase of Spanish raw tobacco, Cetarsa is by far the leading Spanish first processor and should be placed in category of its own and receive the highest starting amount of fine.
- (420) Agroexpansión and WWTE have both market shares of approximately 15% each (see recitals (23) and (25)) and should receive the same starting amount of fine.
- (421) Finally Taes, by far the smallest processor involved, with a market share of only 1.6%, should receive the lowest starting amount of fine.
- (422) A starting amount merely reflecting the market position would however fail to be sufficiently deterrent in respect of WWTE and Agroexpansión. In fact, despite their relatively small market shares in the Spanish market, these two companies belong to multinational groups of considerable economic and financial strength. Moreover, WWTE and Agroexpansión operated under the decisive influence of their respective parent companies.
- (423) It is therefore necessary to increase the starting amount for WWTE and Agroexpansión by the application of a multiplying factor based on, on one hand, the size of the groups to which they belong and, on the other, their comparative size vis-à-

vis the other Spanish processors. It is observed that the consolidated turnover of Dimon Inc. (ultimate mother company of Agroexpansión) amounted, in 2003, to USD1,271.7 million, while the consolidated turnover of Standard Commercial Corporation (ultimate parent of WWTE) amounted for the same year to USD 993.716 million for the same year. These figures equal to more than 20 and 16 as much as Cetarsa's turnover<sup>315</sup> (namely the biggest Spanish processor). On this basis, the application of a multiplying factor of 1.5, in respect of the starting amount for WWTE, and of 2, in respect of the starting amount for Agroexpansión appears appropriate.

(424) For these reasons, the starting amount of the fines in this case should be set as follows:

- Deltafina            EUR 8,000,000
- Cetarsa             EUR 8,000,000
- WWTE                EUR 1,800,000 x 1.5 = 2,700,000
- Agroexpansión    EUR 1,800,000 x 2    = 3,600,000
- Taes                  EUR 200,000

(425) Concerning the producer representatives' behaviour, the Commission considers that only a symbolic fine should be applied for the following reasons.

(426) As was explained under recitals (350) and following, the applicable national rules<sup>316</sup> did not require the producer representatives and the processors to agree jointly on the price brackets and the additional conditions. At most, between 1982 and 2000 the rules stipulated that the "standard" contracts were to include a clause concerning the "guaranteed minimum price" and the "price that the producer must receive for the raw material" [see recitals (57) and (58)] but did not require the parties to agree on the actual figures to be inserted in the price clauses of the "standard" contract before submitting that contract to the Agriculture Ministry for approval. Furthermore, facts indicate that between 1995 and 1998 the Agriculture Ministry approved "standard" contracts comprising a price clause still "blank".

(427) It is true, however, that "standard contracts" negotiated between 1995 and 1998 mentioned that all the producer representatives would negotiate jointly with each individual processor the price schedules and the additional conditions relating to the sale of tobacco (namely the average minimum price per producer and the average minimum price per group). In 1999 the Agriculture Ministry even approved the price schedules that had already been negotiated jointly by all the producer representatives and the four processors. These schedules were annexed to the "standard" contract published in the Official Gazette that year. Lastly, in 2000 and 2001 the Agriculture Ministry invited the representatives of the two sectors to a number of meetings — some of which were held at the Ministry itself — with a view to agreeing on the price schedules<sup>317</sup>. In so doing, the Ministry did at least encourage the parties to press ahead with their joint negotiations on those schedules.

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<sup>315</sup> Based on a 1€ = 1.25USD rate.

<sup>316</sup> Law 19/1982 of 26 May 1982 on the *contratación* of agricultural products (the "1982 Law"), (ii) the Royal Decree of 1983 approving the regulation developing that Law further (the "1983 Decree"), (iii) Royal Decree 2556/85 (the "1985 Decree").

<sup>317</sup> Whereas, according to the Agriculture Ministry itself, the new 2000 Law put an end to the legality of joint negotiations between producers and processors on the selling prices of agricultural products.

- (428) On this basis, the Commission accepts that the legal framework surrounding the collective negotiation of standard agreements could engender a considerable degree of uncertainty as to the legality of the producer representatives and processors' conduct in the specific context of their collective negotiation of standard agreements.
- (429) Furthermore it should be taken into account that the existence and the results of the negotiations on standard contracts were generally well in the public domain and that no authority ever questioned their compatibility with either Community or Spanish law before these proceedings started.
- (430) The imposition of a symbolic fine of EUR 1,000 on each producer representative therefore appears to be appropriate in the present case.
- (431) In view of the application of a symbolic fine to producer representatives, the application to them of other criteria for setting fines becomes irrelevant.

#### *2.6.4. Duration of the infringement*

- (432) The restrictive practice involving the processors and Deltafina began on 13 March 1996 [see recital (92)] and ceased to exist, according to the statements made by the processors, on 3 October 2001. However, the latest evidence in the Commission's possession concerns a meeting held on 10 August 2001 [see recital (260)]. Consequently, for the purpose of determining the duration of the infringements in these proceedings, the Commission considers that the restrictive practice lasted more than five years and four months.
- (433) The Commission concludes that the infringement was of long duration (more than five years) for the processors and Deltafina. Accordingly increases of 50% should be applied to the starting amounts of the fines imposed on the processors and Deltafina.

#### *2.6.5. Basic amount*

- (434) For these reasons, the basic amount of the fines in this case based should be set as follows:

- Deltafina	EUR	12,000,000
- Cetarsa	EUR	12,000,000
- WWTE	EUR	4,050,000
- Agroexpansión	EUR	5,400,000
- Taes	EUR	300,000
- ASAJA	EUR	1,000
- UPA	EUR	1,000
- COAG	EUR	1,000
- CCAE	EUR	1,000

## 2.6.6. *Aggravating and mitigating circumstances*

### 2.6.6.1. Aggravating circumstances

- (435) From the facts referred to under recitals (361) , it appears that Deltafina played a key role in designing and implementing the agreements on (maximum) average delivery prices and quantities concluded between the processors after 1996. Deltafina (represented by its Chairman) persuaded the Spanish processors to co-ordinate the purchasing strategies and acted as the repository and arbiter of the processors' anticompetitive agreements, especially when their anti-competitive practices began.
- (436) The leading role of Deltafina in the processors' cartel was further confirmed by Agroexpansión and WWTE in their replies to the Statement of Objections and the subsequent oral hearing<sup>318</sup>. For these reasons the basic amount of the fine imposed on Deltafina should be increased by 50%.

### 2.6.6.2. Mitigating circumstances

- (437) The same factors considered under recitals (427) to (429) would apply to the processors' conduct only in respect of their public negotiation and conclusion of standard contracts (including negotiations on price brackets and additional conditions) with producers' representatives.
- (438) In respect of their secret agreements on (maximum) average delivery prices and share-out of quantities of each variety of raw tobacco, it should be observed that their conduct went significantly beyond the scope of the relevant legal framework and the scope of public negotiations and agreements with producer representatives. However, the Commission acknowledges that the public negotiations between producer representatives and processors determined, at least to some extent, the material framework (especially in terms of opportunities to negotiate between themselves and adopt a common position) within which processors could develop, aside from the common position they would take in the context of public negotiations, their secret strategy on (maximum) average delivery prices and quantities. For these reasons, the overall mitigating effect of the circumstances discussed above is to be taken, as far as processors' conduct is concerned, as leading to a reduction of 40% of the basic amount of the fines which would be otherwise applicable to the processors (to include Deltafina).

## 2.6.7. *Fines excluding the upper limit to the fine*

- (439) Having taken into account the aggravating and attenuating circumstances, the amount of fines prior to the application of the criterion Article 23(2) of Regulation (EC) No 1/2003 (which is equivalent to what already provided for under Article 15(2) of Regulation 17/1962) (namely fines not having to exceed 10% of the total turnover in the preceding business year) should be set as follows:

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<sup>318</sup> Comments in WWTE's reply to the Statement of Objections, pages 30-32, , and in Agroexpansion's reply to the Statement of Objections, pages 97-105.

- Deltafina	EUR	13,200,000
- Cetarsa	EUR	7,200,000
- WWTE	EUR	2,430,000
- Agroexpansión	EUR	3,240,000
- Taes	EUR	180,000
- ASAJA	EUR	1,000
- UPA	EUR	1,000
- COAG	EUR	1,000
- CCAE	EUR	1,000

#### 2.6.8. *Fines including the upper limit to the fine*

- (440) Article 23(2) of Regulation (EC) No 1/2003 (which is equivalent in this respect to what is already provided for under Article 15(2) of Regulation No 17) provides that for each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.
- (441) In cases where the companies involved belong to a group and it is established that the parent companies exercised decisive influence on them and that, as a consequence, they are jointly and severally liable for the fines imposed on the subsidiary, the worldwide turnover of the group must be taken into account in order to determine the limit imposed under Article 23(2) of Regulation (EC) No 1/2003.
- (442) In the present case SCC, SCTC, TCLT and Dimon, in their capacity as parent companies of WWTE and Agroexpansión, are jointly and severally liable for the fines imposed on their subsidiaries and their world-wide turnover must be taken into account in order to determine the limit imposed under Article 23(2) of Regulation (EC) No 1/2003.
- (443) As Deltafina's 2003 annual turnover amounted to EUR 133,228,000, the fine imposed on it should not be reduced.
- (444) As Cetarsa's 2003 annual turnover amounted to EUR 48.42 million, the fine imposed on it should be reduced to EUR 4.842 million.
- (445) As Taes' 2003 annual turnover amounted to EUR 1,870,183 the fine imposed on it should not be reduced.
- (446) The fines imposed on Agroexpansión and WWTE do not need any adjustment in this respect, their mother companies' consolidated annual turnover [expressed in sales and operating revenues] for the year 2003 being USD1,271.7 million for Dimon Inc. (ultimate mother company of Agroexpansión) and USD 993.716 million for Standard Commercial Corporation (WWTE's ultimate mother company).
- (447) Having taken account of the aggravating and attenuating circumstances and the limit imposed under the terms of Article 23(2) of Regulation (EC) No 1/2003, prior to the application of 1996 Leniency Notice, the amount of the fine should be as follows

- Deltafina	EUR	13,200,000
- Cetarsa	EUR	4,842,000
- WWTE	EUR	2,430,000
- Agroexpansión	EUR	3,240,000
- Taes	EUR	180,000
- ASAJA	EUR	1,000
- UPA	EUR	1,000
- COAG	EUR	1,000
- CCAE	EUR	1,000

#### 2.6.9. *Application of the 1996 Leniency Notice*

- (448) Both processors and producer representatives have applied for leniency under the terms of the Commission notice on the non-imposition of fines in cartel cases of 1996 at different stages of the investigation.
- (449) Cetarsa, WWTE, Taes, Agroexpansión and Deltafina have claimed the benefits of the 1996 Leniency Notice before the issue of the Statement of Objections (see recitals (4) and (6)). Unión de Pequeños Agricultores (UPA), Asociación Agraria de Jóvenes Agricultores (ASAJA), Coordinadora de Organizaciones de Agricultores y Ganaderos (COAG) and Confederación de Cooperativas Agrarias de España (CCAЕ), have applied on 19 March 2004 in accordance with the first and second indent of Section D(2) of that Notice, as part of their reply to the Statement of Objections.
- (450) Section D of the Leniency Notice is applicable to Cetarsa, WWTE, Agroexpansión and Taes: *“1. Where an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated. 2. Such cases may include the following: - before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement; - after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.”*
- (451) Cetarsa, World Wide Tobacco España, Taes and Agroexpansión applied for leniency following the inspections the Commission launched in October 2001. The information provided by them mainly regards the market functioning, the applicants’ respective activities and specific conducts and the context of the facts at issue. Although most of the essential elements proving the existence of the infringement were already in the possession of the Commission, the information supplied by the processors improved the ability of the Commission to clarify and establish it.
- (452) In consideration of its particularly valuable co-operation during the procedure (especially insofar as the involvement of Deltafina is concerned)<sup>319</sup> and of the fact that it never contested the facts as set out in the Statement of Objections, Taes should be granted a 40 % reduction of the fine that would have been imposed if it had not co-

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<sup>319</sup> Statement by Taes of 18 February 2002 provided the Commission with probably the most accurate description of the events [doc. 38.238/4555-4862].

operated with the Commission in accordance with the first and second indent of Section D(2) of the 1996 Leniency Notice.

- (453) However significant (for the reasons explained above), the information supplied by Cetarsa and WWTE did not prove as useful as the information supplied by Taes for the purposes of the Commission's investigation. In their replies to the Statement of Objections they generally declared that they did not contest the facts on which the Commission based its allegations. Nevertheless, Cetarsa and WWTE contended that the processors' cartel on (maximum) average delivery prices, on the one hand, and the various agreements which both producers and processors entered into on an average price per producers group, on the other, was identical and that the potentially anticompetitive effects of processors' and producers' behaviour would therefore neutralise each other<sup>320</sup>. For the reasons expressed in recital (302) above, this contention apparently does not correspond to the reality of the facts and cannot be accepted. In consideration of these circumstances, and in accordance with the first indent of Section D(2) of the 1996 Leniency Notice, Cetarsa and WWTE should be granted a 25% reduction of the fine that would have been imposed if they had not co-operated with the Commission.
- (454) Agroexpansión has also provided useful information to the Commission. However, in its reply to the Statement of Objections, it contested the facts on the same lines as Cetarsa and WWTE (see above). Moreover, Agroexpansión denied the secret nature of the processors' agreements on (maximum) average delivery prices. In view of this, Agroexpansión should be granted a 20% reduction of the fine that would have been imposed if they had not co-operated with the Commission.
- (455) As regards Deltafina, it has been explained under recital [(6)] that, by fax of 15 February 2002, Universal Leaf announced that Deltafina was cooperating with Taes in drafting the memorandum that the latter would send to the Commission on 18 February 2002 and that it hoped that Deltafina could thus also benefit from the advantages flowing from the 1996 leniency notice. A request to the same effect was reiterated by Universal Corporation and Deltafina in their written and oral replies to the Statement of Objections<sup>321</sup>.
- (456) Although neither Universal Corporation nor Deltafina gave specific indications of the contribution made by Deltafina to Taes' cooperation with the Commission, it cannot be ignored that part of the documents annexed to Taes' memorandum of 18 February 2002 appear to have originated from Deltafina and provided by it to Taes for the purposes of Taes' cooperation with the Commission<sup>322</sup>. As was explained under recital (452), the information supplied by Taes was particularly valuable for the purposes of the Commission's investigation and essential, in particular, to establish Deltafina's liability. At the same time however, it should also be borne in mind that Deltafina

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<sup>320</sup> Comments in Cetarsa's reply to the Statement of Objections, pages 7-10, in WWTE's reply to the Statement of Objections pages 13-18 and in Agroexpansión's reply to the Statement of Objections pages 18-45.

<sup>321</sup> Comments in Universal Corporation's reply to the Statement of Objections, pages 30-31 and Deltafina's reply to the Statement of Objections pages 6 and 42

<sup>322</sup> See documents 38.238/4609, 46011, 4613-4614, 4615-4637, 4641-4642, 4643-4644, etc

failed during the entire procedure to clarify directly with the Commission how and to what extent it intended to co-operate. Furthermore, in its reply to the Statement of Objections, it substantially contested the findings of the Statement of Objections in respect of its liability. In assessing the benefit which Deltafina may be granted under Section D of the leniency notice, consideration should also be given to the fact that Deltafina does not meet the requirement provided for under Point B (e) of the Leniency Notice. For all these reasons the reduction to be granted to Deltafina should be 10%.

(457) In view of the application of a symbolic fine to producer representatives, the application to them of the 1996 Leniency Notice becomes irrelevant.

(458) By way of conclusion the amounts of the fines to be imposed with Article 23 of Regulation (EC) No 1/2003 should be set as follows:

- Deltafina EUR 11,880,000
- Cetarsa EUR 3,631,500
- WWTE EUR 1,822,500  
(SCC, SCTC and TCLT to be jointly and severally liable)
- Agroexpansión EUR 2,592,000  
(Dimon to be jointly and severally liable)
- Taes EUR 108,000
- ASAJA EUR 1,000
- UPA EUR 1,000
- COAG EUR 1,000
- CCAE EUR 1,000

### 3. CONCLUSIONS

HAS ADOPTED THIS DECISION:

#### *Article 1*

Compañía Española de Tabaco en Rama, S.A. (Cetarsa), World Wide Tobacco España, S.A. (WWTE), Tabacos Españoles, s.l. (Taes), Agroexpansión, S.A. (Agroexpansión), Deltafina SpA (Deltafina), Dimon Incorporated (Dimon), Standard Commercial Corporation (SCC), Standard Commercial Tobacco Co. Inc. (SCTC) and Trans-Continental Leaf Tobacco Corporation Ltd. (TCLT) have infringed Article 81(1) of the Treaty by concluding agreements and/or concerted practices, during the period 1996-2001, designed to fix each year the (maximum) average delivery price of each variety of raw tobacco (all qualities) and to share out the quantities of each variety of raw tobacco to be bought.

For the last three years (1999-2001), they have also agreed among themselves price brackets per quality grade of each variety of raw tobacco and additional conditions.

Asociación Agraria de Jóvenes Agricultores (ASAJA), Unión de Pequeños Agricultores (UPA), Coordinadora de Organizaciones de Agricultores y Ganaderos (COAG) and the Confederación de Cooperativas de Organizaciones Agrarias de España (CCAÉ) have infringed Article 81(1) of the Treaty by concluding agreements and/or concerted practices between them, during the period 1996-2001, designed to fix each year the price brackets per quality grade of each variety of raw tobacco and the additional conditions that would apply.

The infringement of the processors began on 13 March 1996 and continued to have effect at least until 10 August 2001. The infringement of the producer representatives began in February 1996 and the latest evidence in the Commission's possession concerns a meeting held on 10 August 2001.

#### *Article 2*

The undertakings, associations of undertakings and associations of associations of undertakings named in Article 1 shall immediately bring the infringement to an end, in so far as they have not already done so, and shall henceforward refrain from any restrictive practice that has the same or an equivalent object or effect.

#### *Article 3*

The following fines are hereby imposed:

- Deltafina                    EUR 11,880,000
- Cetarsa                      EUR 3,631,500

- WWTE EUR 1,822,500 (SCC, SCTC and TCLT to be jointly and severally liable)
- Agroexpansión EUR 2,592,000 (Dimon to be jointly and severally liable)
- Taes EUR 108,000
- ASAJA EUR 1,000
- UPA EUR 1,000
- COAG EUR 1,000
- CCAE EUR 1,000

#### *Article 4*

The fines shall be payable within three months of the date of notification of this Decision to the following account:

**Account N° 001-3953713-69 of the European Commission with FORTIS Bank, Rue Montagne du Parc 3, 1000 Brussels  
(Code SWIFT GEBABEBB - IBAN BE71 0013 9537 1369)**

After that time, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision was adopted, plus 3,5 percentage points.

#### *Article 5*

This Decision is addressed to:

1. Compañía Española de Tabaco en Rama, S.A. (Cetarsa), avenida de las Angustias 20, E-10300 Navalmoral de la Mata, Cáceres, Spain
2. World Wide Tobacco España, S.A. (WWTE), ., Paseo de la Castellana 110, Piso 12, E-28046 Madrid, Spain
3. Tabacos Españoles, s.l. (Taes), carretera Madrid-Lisboa, km. 179, E-10300 Navalmoral de la Mata, Cáceres, Spain
4. Agroexpansión, S.A. (Agroexpansión), calle Suero de Quiñones, 42, E-28002 Madrid, Spain
5. Deltafina SpA (Deltafina), Via Gaetano Donizetti 10, I-00198 Roma, Italy
6. Dimon Incorporated (Dimon), 512 Bridge Street, PO Box 681, Danville VA 24543-0681, United States

7. Standard Commercial Corporation (SCC), 2201 Miller Road, Wilson, North Carolina 27893, United States
8. Standard Commercial Tobacco Co. Inc. (SCTC), 2201 Miller Road, PO Box 450, Wilson, North Carolina. 27894, United States
9. Trans-Continental Leaf Tobacco Corporation Ltd (TCLT), Aeulestrasse 38, 9490 Vaduz, Liechtenstein
10. Asociación Agraria de Jóvenes Agricultores (ASAJA), Calle Agustín Betancourt, 17, 2º, E-28003 Madrid, Spain
11. Unión de Pequeños Agricultores (UPA), calle Agustín de Betancourt, 17, 3ºA, 28003 Madrid, Spain
12. Coordinadora de Organizaciones de Agricultores y Ganaderos (COAG) Calle Agustín de Betancourt, 17, 5º, E-28003 Madrid, Spain
13. Confederación de Cooperativas de Organizaciones Agrarias de España (CCAЕ), Calle Agustín de Betancourt, 17, 4º, E-28003 Madrid, Spain

This Decision shall be enforceable under Article 256 of the Treaty.

Done at Brussels,

*For the Commission*

Mario MONTI

*Member of the Commission*